

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

STATE, ex rel., C. Ralph Wilcoxson, II
Relator

CASE # CA 024095

v.

Steven P. Harshman, Director
Montgomery County Board Of Elections et al.
Respondents

**RESPONSE TO RESPONDENTS
MOTION FOR PARTIAL
DISMISSAL**

NOW COMES the Relator, C. Ralph Wilcoxson, II, with its response to respondents Motion for Partial Dismissal and urge this Honorable Court to deny these motions in their entirety, and submits the following argument.

Respectfully submitted,

C. Ralph Wilcoxson, II
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RESPONSE TO DEFENDANTS' PARTIAL MOTION TO DISMISS

On June 14, 2010, Relator, C. Ralph Wilcoxson, II filed a Writ of Mandamus with this court. On June 21, 2010, the respondent, Board of Elections filed a Motion for Partial Dismissal of Relator's Claims pursuant to Civ R. 12(b)(1) & Civ R. 12(b)(6).

Relator respectfully opposes the defendants' motion to dismiss. Defendants seek to dismiss Relator's Complaint against them, claiming lack of subject matter jurisdiction pursuant to Civ. R 12(b)(1) & 12(b)(6). The Board of Elections correctly states the status of the law...in most instances. Case law has established that to be entitled to a writ of mandamus, Relator must establish a clear legal right to certification of his candidacy and placement of his name on the election ballot, a corresponding clear legal duty on the part of the board of elections and its members, and the lack of an 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, 881 N.E.2d 1252, 10. The Ohio Supreme Court has ruled in a case similar to this and held that when a Writ of Mandamus is sought and the effect of the requested relief would be to enjoin respondent from enforcing mandates and to obtain a declaratory judgment on the constitutionality of the statute as it is applied to his situation. Further the court reasoned that "Normally, if the allegations in a complaint indicate that the real object sought is injunction, the complaint does not state a cause of action for mandamus and must be dismissed for want of jurisdiction." *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections* (1995), 72 Ohio St.3d 289, 290, 649 N.E.2d 1205, 1207; *State ex rel. Governor v. Taft* (1994), 71 Ohio St.3d 1, 2-3, 640 N.E.2d 1136, 1137-1138 (emphasis added). Relators could seek a declaratory judgment regarding the constitutionality of R.C. 3513.04, provided that they comply with R.C. Chapter 2721. See, specifically, R.C. 2721.03; see, also, R.C. 2721.12; and *Sebastiani v. Youngstown* (1979), 60 Ohio St.2d 166, 14 O.O.3d 405, 398 N.E.2d 558 (Where the constitutionality of an ordinance [or statute] is challenged by declaratory judgment, service of a copy of the proceeding upon the Attorney General is a jurisdictional requirement.)." Nevertheless, the court concludes that the constitutionality of a statute may, in certain instances, be challenged by mandamus. *State ex rel. Zupancic v. Limbach* (1991), 58 Ohio St.3d 130, 133, 568 N.E.2d 1206, 1209; see, also, *State ex rel. Brown v. Summit Cty. Bd. of Elections* (1989), 46 Ohio St.3d 166, 545 N.E.2d 1256; and, generally, 1 Antieau, *The Practice of Extraordinary Remedies* (1987) 313-315, Section 2.20.

The Supreme Court of Ohio has, by way of instruction, held that, election cases are unique in that “certain election matters may present extraordinary circumstances. In this regard, declaratory judgment might not provide an adequate remedy in the ordinary course of law. *Brown*, 46 Ohio St.3d at 9 167-168, 545 N.E.2d at 1258; and *Thurn*, 72 Ohio St.3d at 291-292, 649 N.E.2d at 1207-1208, citing *State ex rel. Smart v. McKinley* (1980), 64 Ohio St.2d 5, 6, 18 O.O.3d 128, 129, 412 N.E.2d 393, 394. “Given the proximity of the election, an injunction would arguably not constitute an adequate remedy because any ‘appellate process would last well past the election.’”

As a result of the aforementioned case law it is clear that this court has the requisite subject matter jurisdictional authority to consider and address the questions posed by this action. Clear authority for an exercise of jurisdiction has been established and the Relator urges this court to adopt the reasoning put forth above. The Relator believes that the instant case qualifies as a special circumstance as indicated by the court in *Zupancic & Brown* and thus the exercise of jurisdiction is overwhelmingly reasonable. As a result, the Relator urges this Honorable Court to deny the motion in its entirety.

Alternatively, if the court deems necessary, the Relator respectfully requests leave of court to serve a copy of the original complaint on The Ohio Attorney General Richard Cordray.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via regular U.S. mail on the 30th day of June 2010, upon the following:

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