

**IN THE SUPREME COURT OF OHIO**

**STATE *ex rel.* FOCKLER, et al.,**

**Relators,**

**V.**

**CASE NO. 2016-1863**

**ORIGINAL ACTION  
IN MANDAMUS**

**HUSTED,**

**Respondent.**

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**RELATORS' MERIT REPLY BRIEF**

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## ARGUMENT

### **I. S.B. 193's New Party-Formation-By-Petition Procedure is Not Relevant.**

Respondent desperately wants this case to be about S.B. 193's new party-formation-by-petition procedure. He wants LPO, whose challenge to S.B. 193's new procedure has yet to prove successful,<sup>1</sup> to be the Relator here. He insists that LPO has already conceded the issue presented here and somehow confessed Relators' case. Judged by the number of times (three) Respondent has now fully quoted LPO's alleged confession, it is certainly Respondent's premier argument. Most importantly, "what I tell you three times is true."<sup>2</sup>

With an apology to Lewis Carroll, it is not. The truth is that the present case has nothing to do with S.B. 193's party-formation-by-petition procedure. It has nothing to do with LPO's (or anyone else's)<sup>3</sup> challenges to that procedure. It has nothing to do with LPO's Application for Emergency Relief addressed to Justice Kagan. Whether an independent group of voters may use Ohio's vote test in R.C. § 3517.01(A)(1)(a) to create a political party for future elections was never an issue in *LPO v. Husted* (2016) or any other case.<sup>4</sup>

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<sup>1</sup> The Supreme Court denied certiorari in *Libertarian Party of Ohio v. Husted*, 831 F.3d 832 (6th Cir. 2016), on January 9, 2017. LPO's challenge to S.B. 193 under Ohio's Constitution, meanwhile, remains pending in the Ohio Court of Appeals.

<sup>2</sup> Just the place for a Snark! I have said it twice:  
That alone should encourage the crew.  
Just the place for a Snark! I have said it thrice:  
What I tell you three times is true.

LEWIS CARROLL, *THE HUNTING OF THE SNARK (AN AGONY IN 8 FITS)* (MacMillan & Co. 1876).

<sup>3</sup> The ACLU on behalf of the Green and Constitution Parties intervened in *LPO v. Husted* (2016) to separately challenge S.B. 193's new party-formation procedure. The ACLU's distinct challenge, which unlike LPO's challenge claimed that S.B. 193's signature-collection requirement violated the First Amendment all by itself, also failed. The ACLU did not appeal.

<sup>4</sup> And even if LPO's footnote were meant to address R.C. § 3517.01(A)(1)(a)'s application to independent candidates, so what. It would merely be an accurate statement of what Respondent

It is for this reason that the Sixth Circuit's description of Ohio's ballot access laws in *Libertarian Party of Ohio v. Husted*, 831 F.3d 832 (6th Cir. 2016), and *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), are irrelevant. Neither mentions whether an independent group of voters may use Ohio's vote test because, as Respondent admits, *see* Respondent's Merit Brief at 12, the matter was never raised. It has until now never been an issue. Both *LPO v. Husted* (2016) and *Blackwell* involved constitutional challenges to Ohio's party-formation-by-petition alternatives. Neither had anything to do with Ohio's vote test, let alone whether its vote test in R.C. § 3517.01(A)(1)(a) could be used by a "group of voters." Nor would they. Ohio's vote test only allows groups of voters to qualify as political parties for future elections. It does not allow them to qualify as political parties for the election at hand, which is what the Constitution demands.

Though allowing non-parties to use vote tests to qualify as parties for future elections is not uncommon,<sup>5</sup> it is neither constitutionally sufficient nor constitutionally compelled.<sup>6</sup> One

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then claimed in his press release was Ohio's law. Unlike Respondent (who has enforcement power), what LPO or any other private litigant thinks about Ohio law is unimportant -- at least until a court of law agrees.

<sup>5</sup> At least six other states, Alaska, Georgia, New Hampshire, North Dakota, Rhode Island, and Wisconsin, have statutory provisions like Ohio's recognizing that political groups, associations and supporters of independent candidates can use vote-tests to create "political parties" capable of running candidates in subsequent elections. *See* ALASKA STAT. ANN. § 15.80.010(27) ("political party" means an organized group of voters that represents a political program and (A) that nominated a candidate for governor who received at least three percent of the total votes cast for governor at the preceding general election"); GA. CODE ANN. § 21-2-180(2) ("Any political body ... is qualified to nominate candidates for state-wide public office by convention if ... At the preceding general election, the political body nominated a candidate for state-wide office and such candidate received a number of votes equal to 1 percent of the total number of registered voters who were registered and eligible to vote in such general election."); N.H. REV. STAT. § 652:11 ("Party" shall mean any political organization which at the preceding state general election received at least 4 percent of the total number of votes cast for any one of the following: the office of governor or the offices of United States senators."); N.D. STAT. ANN. § 16.1-11-30 ("A political organization that had printed on the ballot at the last preceding presidential election

might say that it is constitutionally irrelevant in the context of ballot access litigation in federal courts.

Of course, Relators fully understand Respondent's litigation logic in this case. The statute at issue, R.C. § 3517.01(A)(1)(a), plainly states that "any group of voters" may use Ohio's vote test. Given this plain language, Respondent has no choice but to build a straw man in order to knock it down. He cannot succeed by knocking down the language of R.C. § 3517.01(A)(1)(a).

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the names of a set of presidential electors pledged to the election of the party's candidates for president and vice president or a candidate for governor and those candidates for presidential electors or governor received at least five percent of the total vote cast for presidential electors or the office of governor within this state at that election, and any political organization that has printed on the ballot at the last preceding nonpresidential election a candidate for attorney general or secretary of state, and the candidate received at least five percent of the total vote cast for the office the candidate was seeking at the election are entitled to organize according to the requirements of chapter 16.1-03."); R.I. GEN. LAWS § 17-1-2(9) ("Political party' or 'party' means: (i) any political organization which, at the next preceding general election for the election of general officers, nominated a candidate for governor, and whose candidate for governor at the election polled at least five percent (5%) of the entire vote cast in the state for governor, or (ii) any political organization which at the next preceding general election for the election of a president of the United States nominated a candidate for president and whose candidate for president at the election polled at least five percent (5%) of the entire vote cast in the state for president, or (iii) any political organization which, on petition forms provided to the chairperson of the organization by the state board of elections, obtains the signatures and addresses of that number of registered qualified voters equal to five percent (5%) of the entire vote cast in the state for governor or president in the immediately preceding general election."); WIS. STAT. ANN. § 5.62(b)1 ("every recognized political party listed on the official ballot at the last gubernatorial election whose candidate for any statewide office received at least 1% of the total votes cast for that office and, if the last general election was also a presidential election, every recognized political party listed on the ballot at that election whose candidate for president received at least 1% of the total vote cast for that office shall have a separate primary ballot or one or more separate columns or rows on the primary ballot as prescribed in par. (a) and a separate column on the general election ballot in every ward and election district. An organization which was listed as "independent" at the last general election and whose candidate meets the same qualification shall receive the same ballot status upon petition of the chairperson and secretary of the organization to the commission requesting such status and specifying their party name, which may not duplicate the name of an existing party.").

<sup>6</sup> That several states recognize this mechanism disproves Respondent's claim that it makes no sense and "undermines the purpose of ballot access laws." See Respondent's Merit Brief at 15.

Respondent's straw man fails for a number of reasons. First, LPO never conceded that a group of voters cannot use R.C. § 3517.01(A)(1)(a). LPO's Application for Emergency Relief to Justice Kagan speaks for itself; it says nothing about whether a group of voters may nominate an independent ticket, satisfy Ohio's vote test, and create a new political party.<sup>7</sup>

Second, LPO is not a party in this case. Relators are a "group of voters" who, together with the 5,000+ Ohio voters who signed Relators' nominating petition, successfully nominated Gary Johnson and William Weld as an independent presidential ticket.<sup>8</sup> LPO's letter attached to Relators' request stated that it supported Relators' right to become a party under R.C. § 3517.01(A)(1)(a) and consented to Relators' use of "Libertarian." LPO has never claimed that it used R.C. § 3517.01(A)(1)(a) to nominate an independent presidential ticket and satisfy Ohio's vote test. LPO claimed in a different case that it, as a political party, sought to nominate Johnson and Weld as its presidential ticket in order to take advantage of Ohio's vote test. Respondent refused to let it do so, however, and neither the Sixth Circuit nor the Supreme Court entered emergency relief on LPO's behalf.

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<sup>7</sup> Mr. Winger's blog post, which is also claimed by Respondent to be an admission of some sort, *see* Respondent's Merit Brief at 18, accurately summarizes LPO's alleged admission. Both statements are true and correct -- LPO could not remain a party under Ohio's vote test without nominating a presidential ticket -- and neither has any relevance to whether a group of voters may separately nominate an independent presidential ticket, use Ohio's vote test, and establish a new political party.

<sup>8</sup> Respondent complains that Relators are simply the "committee" that nominated Johnson and Weld. He cites no authority, however, for his assertion that Relators are not "any group of voters." If he is correct, moreover, Relators could not qualify as "any group of voters" for purposes of using R.C. § 3517.01(A)(1)(b)'s party-formation-by-petition alternative either. Suffice it to say that Relators are the committee Ohio law requires for independent candidates who seek to run for President and Vice-President, respectively. This committee is "any group of voters" and also officially represents the entire "group of voters," 5000+ Ohio voters, who signed the nomination petition. Either way, Relators are "any group of voters."

Third, Relators' case is not about S.B. 193's party-formation-by-petition procedure. It is about the meaning of R.C. § 3517.01(A)(1)(a), which has existed for 100 years. Relators' case is about whether Ohio's vote test may be used by a "group of voters." S.B. 193 was not designed to deal with any constitutional problem with Ohio's vote test in R.C. § 3517.01(A)(1)(a). Ballot access litigation in Ohio over the course of the last decade has focused on Ohio's party-formation-by-petition procedure. Ohio's procedure was invalidated in 2006 in *Blackwell*, 462 F.3d 579, again in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), and once again in *Libertarian Party of Ohio v. Husted*, 2011 WL 3957259 (S.D. Ohio 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012). LPO has had success<sup>9</sup> because the federal Constitution requires that States provide a reasonable and timely mechanism for political parties to gain access to electoral ballots in the same election cycle. Put another way, the Constitution requires that States have a reasonable mechanism to qualify political parties before an election. That is why Ohio was forced to pass S.B. 193. It was designed to be the new party-formation-by-petition procedure that allowed groups to become political parties before the general election.

Ohio's vote-test, in contrast, requires participation in a prior election in order to qualify a group as a political party in future elections. Because it only allows access to future elections, Ohio's vote test for "any group of voters" cannot satisfy the Constitution's command that access be made timely available before an election. In terms of the constitutionality of Ohio's ballot access laws, it is irrelevant. That, together with the difficulty involved in meeting the test --

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<sup>9</sup> Respondent repeatedly complains about LPO's "extensive litigation" and LPO's "various litigation strategies." *See, e.g.*, Respondent's Merit Brief at 13 n.6. Even assuming that LPO wholly lost its challenge to S.B. 193 -- which is not true because LPO won an injunction preventing S.B. 193's application to the 2014 election -- LPO has still been successful in 3 of 4 challenges these past ten years. LPO has "extensively litigated," as Respondent puts it, because LPO has been forced to do so. The result has been more free, open and competitive elections in Ohio, with the Constitution, Green, Libertarian and Socialist Parties all enjoying ballot access.

especially past tests which ranged from 5% to 10% -- is perhaps why it has never been discussed in ballot access cases.<sup>10</sup>

## **II. Respondent's Construction of R.C. § 3517.01(A)(1)(a) Is Not Entitled to Deference.**

Respondent alternatively asserts that he is under no obligation to liberally construe R.C. § 3517.01(A)(1)(a) because its terms are "clear and unequivocal," Respondent's Merit Brief at 14, and that his construction is entitled to deference because R.C. § 3517.01(A)(1)(a) is "subject to two different, but equally reasonable, interpretations." Respondent's Merit Brief at 7.

Respondent cannot have it both ways. Either R.C. § 3517.01(A)(1)(a) is clear or it is ambiguous. If the latter, it must be liberally construed to foster free and competitive elections. If the former, Respondent is not entitled to deference.

The reality, of course, is that R.C. § 3517.01(A)(1)(a)'s terms are "clear and unequivocal." Section 3517.01(A)(1)(a) plainly states that "any group of voters" that "meets" Ohio's vote test becomes and remains a political party. Respondent has no authority to construe it in any other way. But even if R.C. § 3517.01(A)(1)(a) were ambiguous, Respondent's contrived interpretation restricting free and competitive elections would not be entitled to deference. This Court in *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 333, 2008-Ohio-5097, 899 N.E.2d 120, 124, established that the "duty to construe election laws in favor of the right to vote" comes first and overrides administrative deference:

we need not defer to the secretary of state's interpretation because it is unreasonable and fails to apply the plain language of [the statute]. Adopting the secretary of state's interpretation of [the statute] would result 'not [in] a construction of [the] statute, but, in

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<sup>10</sup> Respondent concedes that no federal court has ever addressed the issue raised here yet speculates that Relators' interpretation of R.C. § 3517.01(A)(1)(a) "would have been relevant" in *Blackwell*. Respondent's Merit Brief at 12. He fails to explain, however, why or how it would have been relevant. Truth be told, it was not and would not have been relevant in *Blackwell* or any other federal ballot access case because it could have had no impact on whether Ohio's party-formation-by-petition procedure violated the federal Constitution.

effect, an enlargement of it by the court, so that what was omitted \* \* \* may be included within its scope.” *This result is also consistent with “our duty to liberally construe election laws in favor of the right to vote.”*

(Citations omitted and emphasis added).

Where the Secretary either disregards the plain language of the statute or ignores his "duty to construe election laws in favor of the right to vote," deference is not required. *See also State ex rel. Stewart v. Clinton County Board of Elections*, 124 Ohio St.3d 584, 591,2010- Ohio-1176, 925 N.E.2d 601, 608 (Court interprets election law liberally to "comport[] with our duty to ‘avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.’") (citation omitted). Far from favoring free and competitive elections, Respondent's misstatements about R.C. § 3517.01(A)(1)(a)'s language, *see infra* at 10, and contrived construction of its grammar needlessly restrict healthy political competition. Such a construction is entitled to no deference. As this Court stated in *Funk v. Rent-All Mart, Inc.*, 91 Ohio St. 3d 78, 80, 2001-Ohio-270, 742 N.E.2d 127, 129, its mission is to interpret the words supplied by the legislature: "we have no choice but to rely on the words of the statute as it is written."

### **III. S.B. 193 Reinforced R.C. § 3517.01(A)(1)(a)'s Application of Ohio's Vote Test to "Any Groups of Voters."**

While making minor changes to R.C. § 3501.01(F)'s definitions of "major" and "minor" political parties (to reflect Ohio's vote-test's drop from 5% to 3%), and major changes to 3517.01(A)(1)(b) in order to incorporate a new party-formation-by-petition procedure, S.B. 193 left unchanged the "any group of voters" language in R.C. § 3517.01(A)(1)(a). S.B. 193 even inserted "the group" and "a group" into R.C. § 3517.01(A)(1)(a) to make clear that Ohio's vote test applies to "any group of voters" as opposed to only an existing "political party."

Although S.B. 193's new party-formation-by-petition procedure is not relevant here, S.B. 193's changes to R.C. § 3517.01(A)(1)'s vote-test language are. While lowering Ohio's vote test from 5% to 3%, S.B. 193 left the "any group of voters" language in what became R.C. § 3517.01(A)(1)(a) untouched. Just as important, S.B. 193 inserted "a group" and "the group" into the statute to reiterate that it was not limiting Ohio's vote test to political parties.

The significance of these changes is perhaps best illustrated by comparing the various versions of Ohio's vote test in R.C. § 3517.01. In 1968, R.C. § 3517.01 stated:

A political party within the meaning of Title XXXV of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state at least ten per cent of the entire vote cast for governor or which filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding election. Such petition shall be circulated, signed, verified, and the signatures thereon examined and certified to in the same manner as is required of referendum petitions. No such group of electors shall assume a name or designation which is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast ten per cent of the total vote cast at an election for the office of governor it shall cease to be a political party.

*Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 986 n.1 (S.D. Ohio 1968) (quoting R.C. § 3501.17) (emphasis added). Immediately before S.B. 193 was enacted in 2013, R.C. 3517.01(A)(1) stated:

A political party within the meaning of Title XXXV of the Revised Code is any group of voters that at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five percent of that vote a petition signed by qualified voters equal in number to one percent of the total vote for governor or nominees for presidential electors at the most recent election declaring their intention of organizing a political party .... If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.

(Emphasis added). After S.B. 193's enactment in 2013, R.C. § 3517.01(A)(1) now states:

A political party within the meaning of Title XXXV of the Revised Code is any group of voters that meets either of the following requirements:

(a) Except as otherwise provided in this division, at the most recent regular state election, the group polled for its candidate for governor in the state or nominees for presidential electors at least three per cent of the entire vote cast for that office. A group that meets the requirements of this division remains a political party for a period of four years after meeting those requirements.

(b) The group filed with the secretary of state, subsequent to its failure to meet the requirements of division (A)(1)(a) of this section, a party formation petition that meets all of the following requirements ....

(Emphasis added).

The emphasized language in all three variants of R.C. § 3517.01 shows that use of "any group of voters" has remained constant. Further, the use of "any group of voters," juxtaposed against the use of "political party" in all three versions, demonstrates that the framers of this language knew the difference between a group's becoming a political party and its remaining a political party. The 1968 version, for example, states that "[w]hen any political party fails to cast ten per cent of the total vote cast at an election for the office of governor it shall cease to be a political party." This distinction is carried forward in all the versions of the statute. The framers of R.C. § 3517.01 intended to make clear that a group's becoming a political party by satisfying the vote test is not perpetual. The group becomes a political party by satisfying the vote test, but only remains a political party so long as it meets the test in the next election (according to the 1968 version).

Today's legislators embraced this when they passed S.B. 193. They left untouched "any group of voters," added "a group" and "the group" to reinforce R.C. § 3517.01(A)(1)'s application beyond existing political parties, and then once again included language making clear that the vote test is not perpetual. "A group that meets the requirements of this division remains

a political party for a period of four years after meeting those requirements." *Id.* S.B. 193 embraced what has been Ohio law for 100 years.

#### **IV. Respondent Misstates R.C. § 3517.01(A)(1)(a)'s Language.**

Respondent argues that R.C. § 3517.01(A)(1)(a) "requires that a *party's* candidate satisfy the applicable vote test in order for that party to *retain* recognized party status." Respondent's Merit Brief at 10 (emphasis original); *see also id.* at 13 ("The statute provides that a party that satisfies the vote test '*remains* a political party for a period of four years ....") (emphasis original). As made plain above, the language of R.C. § 3517.01(A)(1)(a) says no such thing. Nor has it ever said such a thing. Its only current mention of "political party" is found in the sentence stating that "[a] group that meets the requirements of this division remains a political party for a period of four years after meeting those requirements." Respondent has not only inserted "political party" for "group," he has also transformed "remains" into "retains."

Respondent attempts to justify his re-creation of R.C. § 3517.01(A)(1)(a)'s language by claiming that "[a] group cannot *remain* something it was not to begin with." Respondent's Merit Brief at 13 (emphasis original). "For parties who do not *retain* party status by passing the applicable vote test, the option is to form by petition." *Id.* (emphasis original).

Even with Respondent's substituted language, the argument cannot hold water. R.C. § 3517.01(A)(1)(a) plainly states that "any group of voters" that "meets the requirements of this division" "remains" a political party for four years. It does not say a "political party" that "meets" the requirements of the division "remains" a political party. According to R.C. § 3517.01(A)(1)(a), "any group of voters" becomes a "political party," and because the status is not perpetual, only "remains" a political party for four years. Using Respondent's dictionary, the "group" becomes a political party and "continues" to be a political party for four years. This

language is plain and unequivocal. Far from being a liberal construction that furthers free and competitive elections -- which is Respondent's duty under Ohio law -- Respondent's interpretation is contrived to keep Relators from competing in Ohio's future elections.

**V. Respondent's Legislative History is Not Relevant.**

Respondent includes as evidence a snippet of legislative history surrounding S.B. 193. He only briefly, however, mentions this history, and then only to claim that it "similarly explains" his position. *See* Respondent's Merit Brief at 12. Respondent wisely does not attempt to elaborate how this legislative history "explains" his position, for it does not.

Further, even if it did it would be irrelevant. As Justice Scalia explained for a unanimous Supreme Court in *United States v. Wood*, 134 S. Ct. 557, 568 (2013), "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." (quoting *Bruesewitz v. Wyeth, LLC*, 562 U.S. 223, 242 (2011) ("Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition 'could have had no effect on the congressional vote'") (citation omitted)).

**VI. Relators Have No Adequate Alternative Remedy.**

Respondent argues that mandamus is improper because Relators have an adequate alternative remedy; they can spend hundreds of thousands of dollars, gather tens of thousands of signatures and file a party-formation petition under S.B. 193's party-formation-by-petition alternative. Respondent's Merit Brief at 8. The argument, with all due respect, is specious. First, Relators could not do this before February 1, 2017. Second, it would cost hundreds of thousands of dollars. Third, the validity of S.B. 193's party-formation-by-petition procedure is

still being litigated. Relators are not financially capable of needlessly risking hundreds of thousands of dollars and thousands of hours of time needlessly. Nor is any other group of voters or minor party in Ohio. Fourth, the relief sought here is to have Respondent fulfill his duty to recognize Relators as a political party under R.C. § 3517.01(A)(1)(a) based on Johnson and Weld's meeting Ohio's vote test. That Relators could become a political party in some other way cannot adequately replace this relief.

**VII. Recognizing Relators' Success Does Not Undermine the Purpose Behind Ohio's Ballot Access Law.**

Respondent unpersuasively argues that "[a]llowing party recognition for Relators under the circumstances presented here undermines the purpose of ballot access regulations." Respondent's Merit Brief at 15. The "circumstances presented here" include the Johnson/Weld ticket winning a greater percentage of the presidential vote nationally and in Ohio than any minor-party or independent candidate since Ross Perot in 1996. This proved true in Ohio notwithstanding that the ticket had no political party designation. Relators' candidates had more than a modicum of support; they had the most support for any non-major-party presidential ticket in the last twenty years.

Further, at least six states have procedures like Ohio's allowing groups and political associations to run candidates for high office, meet a vote test, and then proceed as qualified political parties in subsequent elections. *See* footnote 3, *supra*. Obviously, this procedure has not undermined their ballot access laws. Why would it undermine Ohio's? Unless Respondent's position is that ballot access regulations are designed to keep the third-most-popular candidates off the ballot, recognizing Relators' success cannot undermine Ohio's ballot access laws.

### **VIII. Winger is a Nationally Recognized Expert on Past and Present Ballot Access Laws.**

Respondent makes a 'kitchen sink' challenge to Richard Winger's expertise,<sup>11</sup> *see* Respondent's Merit Brief at 19, even though Respondent does not deny that he and his co-defendant (the State of Ohio) used Winger as an expert in *LPO v. Husted* (2016).<sup>12</sup> Respondent also ignores the fact that Winger's expertise was extensively relied upon by the Sixth Circuit in *Blackwell* in 2006.

Respondent's challenge to Winger's testimony should be rejected for the same reason it was rejected in *Libertarian Party of Tennessee v. Goins*, 793 F. Supp.2d 1064, 1068 (N.D. Tenn. 2010):

As a threshold issue, the Court concludes that Defendants' contention to exclude the affidavit and report of Plaintiffs' expert, Richard Winger, lacks merit. Much of Winger's expert report and affidavit contain historical facts that are reliable and subject to verification. Defendants do not challenge the accuracy of Winger's historical data. Winger's testimony as an expert has been accepted in numerous ballot access actions, as reflected on his curriculum vitae. Significantly, the Sixth Circuit cited similar data presented by Winger in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006). Thus, the Court considers Winger's affidavit.

Even if Winger were not to be considered an expert, the history behind R.C. § 3517.01(A)(1)(a) and its relevance to the dispute in the present case is clear. Section 4949 of the Primary Act of 1914 stated that as "all voluntary political parties or associations in this state which at the next preceding general election polled for its candidate for governor in the state or

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<sup>11</sup> If Respondent is correct that an historian must be personally present to witness the events that he or she later describes, *see* Respondent's Merit Brief at 19, no historian would ever be competent to testify as an expert witness. That Winger has repeatedly testified to past and present ballot access activities across the country proves that this cannot be the case.

<sup>12</sup> Respondent fails to explain why he in *LPO v. Husted* (2016) represented to the Sixth Circuit that any "political group" may use Ohio's vote test if that were not in fact true. The reason is simple: it is true. Any "group of voters" or political "group" may use Ohio's vote test.

in any district, county or subdivision thereof, or municipality, at least ten percent of the entire vote cast therein for governor" were deemed political parties and required to hold primaries. *See* Acts of the State of Ohio, vol. 103 at 476, § 4949 (emphasis added).<sup>13</sup>

Ohio's Attorney General summarized § 4949 on October 2, 1917:

Under section 4949 G. C. the voluntary political parties and associations recognized by the primary act are such as poll for their candidates for governor, in the state or any district, county or subdivision thereof, or municipality, at least ten per cent of the entire vote cast therein for governor, and the officers of such political party must nominate their candidates for public office in the manner provided by our primary act found in section 4948 et seq. G. C.

1917 O.A.G. 675 at 1835 (Oct. 2, 1917) (emphasis added).<sup>14</sup>

By 1932, the Primary Act of 1914 had been replaced by § 4785-61 of the General Code (the immediate predecessor to O.R.C. § 3517.01), which stated:

A political party within the meaning of this act shall be any group of voters which, at the last preceding general state election, polled for its candidate for governor in the state at least ten per cent of the entire vote cast therein for governor; or which shall have filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding election. Such petition shall be circulated, signed, verified, and the signature thereon examined and certified to in the same manner as is required of referendum petitions. No such group of electors shall assume a name or designation which shall be so similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast ten per cent of the total vote cast at an election for the office of governor it shall cease to be a political party within the meaning of this act.

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[https://books.google.com/books?id=rEwZAAAAAYAAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com/books?id=rEwZAAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (last visited Jan. 8, 2017).

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<http://www.ohioattorneygeneral.gov/getattachment/ba584741-84c3-4982-9730-9d6cbe36758b/1917.aspx> (last visited Jan. 8, 2017).

See 1932 O.A.G. 4587 at 1003 (Sep. 1, 1932) (quoting § 4785-61, General Code) (emphasis added).<sup>15</sup> As the language makes clear, § 4786-61 is remarkably similar to the version of § 3517.01 that existed in 1968. Section 4785-61 also incorporated a party-formation-by-petition alternative while maintaining its vote test for "any group of voters."

In 1968, R.C. § 3517.01 stated:

A political party within the meaning of Title XXXV of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state at least ten per cent of the entire vote cast for governor or which filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding election. Such petition shall be circulated, signed, verified, and the signatures thereon examined and certified to in the same manner as is required of referendum petitions. No such group of electors shall assume a name or designation which is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast ten per cent of the total vote cast at an election for the office of governor it shall cease to be a political party.

*Socialist Labor Party*, 290 F. Supp. 983 at 986 n.1 (quoting R.C. § 3501.17) (emphasis added).

This historical comparison demonstrates that Winger is correct. Ohio has since 1914 had a vote-test option for groups and associations that were not recognized as political parties. And it has since the adoption of § 4785-61 included separate language stating that once a political party fails to meet the vote test it is no longer a political party (thus demonstrating that its framers understood the difference between "any group of voters" and "political parties"). Section 3517.01's language has not changed. Its original intent controls.

Respondent specifically challenges Winger's description of both the Progressive Party's becoming a political party in 1914 and the Reform Party's efforts to become a political party in

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<http://www.ohioattorneygeneral.gov/getattachment/f1f48102-39b7-48d6-9814-db0a97b8d972/1932-4587.aspx> (last visited Jan. 7, 2017).

1996. *See* Respondent's Merit Brief at 21. Respondent, however, fails to produce any evidence tending to show Winger is wrong. In regard to the Reform Party, Respondent erroneously conflates Ross Perot's candidacy in 1992, which was wholly independent, with the Reform Party's efforts in 1995 and 1996. Winger's affidavit states that it was the 1996 effort that resulted in party recognition for the Reform Party. The Reform Party did not exist in 1992, and no one attempted after Perot's failed run tried to form it.

Further, Respondent asserts that the Reform Party was "allowed ... to cure the signature deficiency in its [party formation] submission" and therefore was a recognized political party when Perot ran again in 1996. *See* Respondent's Merit Brief at 21. This is simply not true. This is not what Winger's affidavit stated. Winger explained that Secretary Taft allowed the Reform Party to "cure" its submission only to run candidates for President and Vice-President, respectively. The Reform Party was not recognized to hold primaries or run candidates for any other office. It was not a recognized political party in Ohio in 1996, and did not even exist in 1992. Perot's presidential campaign in 1996 was not on behalf of a recognized political party in Ohio. Yet the Reform Party was recognized in 1998 as a political party because Perot met the vote test. Consequently, according to Winger Ohio has experienced two instances where candidates for unrecognized political groups met Ohio's vote test and thereby created recognized "political parties."

In the end, of course, Respondent is in possession of the records and evidence needed to prove one way or the other whether any group of voters has ever been denied political party status after meeting Ohio's vote test. Respondent possesses the proof needed to show that Winger is wrong. Respondent has failed to identify a single instance over the course of the last 100 years when his Office has rejected a request made by a group of voters to be recognized as a political

party following their independent candidate's having met Ohio's vote test. As Winger explained, Respondent's rejection of Relators' request is unprecedented.

### **CONCLUSION**

For the foregoing reasons, Mandamus should be **GRANTED**.

Respectfully submitted,

*/s Mark R. Brown*

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### **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing was served by electronic mail and United States Mail on the date of filing to Halli Watson, Associate Attorney General, Counsel for Respondent, at halli.watson@ohioattorneygeneral.gov, 30 E. Broad Street, 16th Floor, Columbus, OH 43215.

*s/ Mark R. Brown*  
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Mark R. Brown