

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LIBERTARIAN PARTY OF OHIO, et al.,

Appellants-Plaintiffs,

V.

CASE NO. 15-4270

**JON HUSTED,
in his Official Capacity as Ohio
Secretary of State,**

Appellee-Defendant,

and

THE STATE OF OHIO,

Appellee-Intervenor-Defendant.

**APPELLANTS' REPLY TO RESPONSE OF APPELLEES-DEFENDANTS'
JON HUSTED AND STATE OF OHIO TO APPELLANTS' MOTION FOR
EMERGENCY INJUNCTION AND EXPEDITED APPEAL**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 15-4270

Case Name: Libertarian Party of Ohio v. Husted

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Ohio, et al.,

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 20, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark R. Brown

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

**6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

(a) **Parties Required to Make Disclosure.** With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed.**

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) **Form and Time of Disclosure.** The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

I. Ohio Erroneously Describes the Proceedings Below.

Appellees, the State of Ohio and its Secretary of State, make several factual errors in describing the proceedings below. First, in referring to Appellants' case as a "bootstrapped emergency," Response of Appellees-Defendants Jon Husted and State of Ohio to Appellants' Motion for Emergency Injunction and Expedited Appeal, Sixth Circuit Doc. No. 14 (hereinafter "Ohio's Response") at 2, Ohio argues that Appellants knew "months" before that their "substantive requests for injunctive relief were doomed in district court." *Id.*

Ohio fails to explain how this was so and why this would even be relevant. The reality is that Appellants could not have known "months" before the District Court's October 14, 2015 Opinion and Order that their claims under Counts Four and Five were "doomed." The District Court, after all, had not ruled on them.

As explained in Appellants' Motion for Emergency Relief filed with this Court last week, Appellants amended their Complaint on November 8, 2013 to challenge S.B. 193 under Count Three (the federal Due Process challenge), Count Four (the federal Equal Protection challenge) and Count Five (the Ohio constitutional challenge). Two days later, on November 10, 2013, Plaintiffs' moved for preliminary relief under all of these counts.

Intervening-Plaintiff-Hart, represented by the ACLU (hereinafter "the ACLU Plaintiffs"), joined this action on November 27, 2013, to challenge S.B.

193. *See* Doc. No. 19 (Motion to Intervene). The ACLU Plaintiffs argued: (1) that S.B. 193 violated Due Process, as had Appellants under their Count Three; (2) that S.B. 193 violated Equal Protection, in a way that was similar to Appellants' claim under their Count Four; and (3) that S.B. 193 facially violated the First Amendment.

Contrary to Ohio's factual assertion, *see* Ohio's Response, Sixth Circuit Doc. No. 14 at 5, Appellants never joined the ACLU Plaintiffs' facial First Amendment challenge. Nor did Appellants ever join in any motion for relief under any argument that was filed by the ACLU Plaintiffs.

The District Court on January 7, 2014 concluded under Count Three (the Due Process challenge) of Appellants' Complaint that S.B. 193 could not be applied to the 2014 election. Acting judiciously, it went no further. It did not address the merits of Appellants' Counts Four and Five under the Equal Protection Clause and Ohio's Constitution, respectively.

In large part because of intervening discovery difficulties with Ohio's Secretary of State and Intervenor-Defendant-Felsoci,¹ the summer of 2014 slipped away while Appellants amended their Complaint and proceeded to phase three. Although the District Court ultimately rejected Appellants' claim to preliminary

¹ *See Libertarian Party of Ohio v. Husted*, 33 F. Supp.2d 914 (S.D. Ohio 2014); *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472 (S.D. Ohio 2014); *Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio 2014).

injunctive relief in this third phase, it notably reported that Defendants had purposely engaged in "harassing and obstructive conduct" throughout discovery. Doc. No. 260 at PAGEID # 7104. Defendants, including the Secretary, did everything they possibly could to prevent the LPO from expeditiously challenging the LPO's removal from Ohio's ballot.

Once Appellants failed to win preliminary injunctive relief under phase three on October 17, 2014, they immediately filed for summary judgment on October 23, 2014 under all Counts, including Counts Four and Five. Before Appellants did so, the ACLU Plaintiffs had on August 15, 2014 filed their own motion for summary judgment under their First Amendment and Equal Protection challenges to S.B. 193. *See* Doc. No. 165 (Motion for Summary Judgment). Appellants had nothing to do with this filing and did not join it, contrary to Ohio's assertion.

On March 16, 2015, following Appellants' February 27, 2015 motion to maintain the status quo,² *see* Doc. No. 284 (Motion to Maintain Status Quo), the District Court rejected the ACLU Plaintiffs' First Amendment and Equal Protection challenges to S.B. 193. *See* Doc. No. 285 (Opinion and Order). Appellants, however, were not parcel to or parties to the ACLU's challenges. Appellants, for example, never made a First Amendment challenge to S.B. 193.

² This motion was not ruled on until October 14, 2015.

Because Appellants were not parties to those challenges and did not join the ACLU Plaintiffs' motion for summary judgment, they could not appeal the District Court's rejection of those claims on March 16, 2015. The ACLU, moreover, did not make an Ohio constitutional challenge. The ACLU's loss on March 16, 2015 had absolutely no effect on Appellants' motions for preliminary relief and summary judgment, let alone their appellate rights. Appellants could not have known, as Ohio argues, that their claims were "doomed" on March 16, 2015. Appellants filed their own motion for summary judgment challenging S.B. 193 several months before on October 23, 2014 under Ohio's Constitution and the Equal Protection Clause.³

Second, Ohio asserts that Appellants waited a "full month" to challenge the District Court's October 14, 2015 decision. This is not true either. The District Court's October 14, 2015 decision stated that it denied without prejudice the Plaintiffs' and Defendants' cross-motions for summary judgment under Count Seven. It instructed the parties to re-file those motions in light of the newly discovered evidence.

³ Ohio argues that Appellants "merely parroted the arguments presented in the failed facial challenge" made by the ACLU Plaintiffs. *See* Ohio's Response, Sixth Circuit Doc. No. 14 at 6. While Appellants' facial Equal Protection challenge was similar to that made by the ACLU Plaintiffs, Appellants made the argument first. It was not parroted.

Appellants immediately contacted chambers and asked for expedited renewed briefing under Count Seven. Appellants informed the Court that they were prepared to file a renewed motion for summary judgment as early as October 16, 2015. Per the Appellants' request, the District Court on October 16, 2015 directed Appellants to file their renewed motion for summary judgment under Count Seven on that day. It directed the parties to complete briefing by November 9, 2015. *See* Doc. No. 336 (Opinion and Order).

Five business days after having filed their renewed motion for summary judgment under Count Seven⁴ -- the Count that prevented the October 14, 2015 decision from being rendered final and appealable -- and after having researched the problem of how to obtain immediate appellate review of not only Count Four but also Count Five, Appellants filed their motion to modify the judgment to certify that their challenge to S.B. 193 could be immediately appealed. In sum, Appellants' time following the October 14, 2015 partial summary judgment was fully engaged.

⁴ This renewed motion for summary judgment filed on October 16, 2015 involved several new depositions (conducted just days prior) and hundreds of pages of newly produced documents (delivered just days prior). *See* Doc. No. 335 (Plaintiffs' Omnibus Motion to Supplement Record). In a nutshell, this new evidence proved that the Ohio Republican Party paid the protestor's lawyers and that the Kasich Campaign for Governor was intricately involved in all aspects of the protest of Plaintiff-Earl. Presenting this evidence to the District Court and renewing Appellants' motion for summary judgment under Count Seven took an extraordinary amount of time.

The District Court ordered expedited briefing to be completed by October 30, 2015,⁵ *see* Doc. No. 240 (Order), but because of the Secretary's motion for an extension, the Court allowed the response to be filed on November 6, 2015. Appellants replied that same day. *See* Doc. No. 348 (Order).

On November 18, 2015, less than two weeks after the motion to modify was ripe for disposition, Appellants filed their notice of appeal. Appellants had hoped that the motion to modify could be decided beforehand, but they recognize that federal courts are extremely busy and the issue is complex. They therefore filed a premature appeal in order to provide this Court with as much time as possible to consider the matter before the March 15, 2016 primary.⁶ Appellants expect that the District Court will resolve their motion to modify as soon as possible. But in the interim, the Federal Rule of Appellate Procedure countenance premature appeals.

⁵ The Secretary and Ohio opposed the motion to certify, refused to agree to an expedited briefing schedule of any sort, and then objected to the schedule the District Court directed. This was common practice.

⁶ Ohio now apparently concedes that December 16, 2015 is not a drop-dead date. It argues that an emergency injunction is not necessary because once "that day passes, any further relief need[ed] for a fast-track appeal can be reassessed." Ohio's Response, Sixth Circuit Doc. No. 14 at 3. Ohio concedes that this Court might order corrective relief after the primary: "A court could later conclude that the Statutes must be enjoined and still grant relief giving the party access to the 2016 general election." *Id.* at 20.

II. Ohio Erroneously Describes S.B. 193.

Ohio claims that S.B. 193 creates "two methods" for parties to access ballots. One is to petition, the other is to win votes. *See* Ohio's Response, Sixth Circuit Doc. No. 14 at 3-4. This is not completely correct. Senate Bill created one initial mechanism for the minor parties, including LPO, to access the 2014 general election ballot. This is what LPO challenged. LPO had to petition under the revised terms of O.R.C. § 3501.01(F)(2)(b) to gain access. There was no vote test from prior elections to satisfy. If there were, LPO would have satisfied the vote-test. LPO had to gather tens of thousands of signatures within five months. It was stripped by S.B. 193 of its previously recognized ballot-qualified status. *See* Am. Sub. No. 193, § 3. But for the District Court's January 7, 2014 preliminary injunction, *see* Doc. No. 47 (Opinion and Order), LPO would not have been on the 2014 general election ballot.

III. Appellants' Equal Protection Challenge Is Not Contested.

The District Court below stated that Appellants "fail[ed] to cogently explain how their as-applied challenge to S.B. 193 differs from Intervening Plaintiffs' facial challenge. It is not the task of the Court to supply an argument or an evidentiary basis for Plaintiffs' bare allegations." Doc. No. 336 at PAGEID # 8698. Ohio argues that this supports denying emergency relief. Ohio's Response, Sixth Circuit Doc. No. 14 at 8.

The District Court's perplexing frustration with Appellants' Equal Protection argument is likely connected to Ohio's arguments. Ohio feels that because it beat the ACLU it defeated Appellants. It has trumpeted this argument throughout its pleadings.

Appellants filed their motion for summary judgment under Count Four (the federal Equal Protection challenge) on October 23, 2014, several months before the District Court on March 16, 2015 rejected the ACLU Plaintiffs' challenge under the Equal Protection Clause. *See* Doc. No. 285 (Opinion and Order). LPO could not have known that it should "cogently explain" how its claim differed. Indeed, Appellants were the first to make an Equal Protection challenge to S.B. 193.

Further, Ohio's premise that LPO's claim was "as-applied," in need of additional evidentiary support, is incorrect. Plaintiffs never identified or argued their claim under Count Four was an "as-applied" claim. *See* Doc. No. 188 at PAGEID # 3842-43; 3849 (Plaintiffs' Third Amended Complaint). Appellants' claim is and has always been that as a matter of law, Ohio's granting membership benefits to the established parties -- but not other parties (like LPO) -- during an election cycle violates Equal Protection. No additional facts are needed.⁷

⁷ Most of Ohio's argument under the federal Constitution is devoted to the First Amendment. Appellants have never claimed that S.B. 193's denial of primaries violates the First Amendment.

IV. Ohio Voluntarily Invoked Federal Jurisdiction and Waived Immunity.

Ohio argues that "[f]or one thing, the State never *invoked* federal *jurisdiction*." Ohio's Response, Sixth Circuit Doc. No. 14 at 16 (emphasis original). This is patently incorrect, as the Supreme Court has concluded that intervention invokes federal jurisdiction. Next, Ohio argues that its intervention "as to one claim does not waive its immunity as to another." *Id.* This, too, is wrong, as made clear by *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002).

Third, Ohio's argument that it intervened before S.B. 193 was challenged is factually correct, but legally irrelevant. It was rendered legally irrelevant by Ohio's active defense of S.B. 193. Ohio itself moved for, and was granted, summary judgment under Counts challenging S.B. 193. *See* Opinion and Order, Doc. No. 336 at PAGEID # 8700, 8705.

Fourth, Ohio argues that its own waiver does not waive the Eleventh Amendment immunity of its agent, the Secretary. This, too, is incorrect. In *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 308-09 (1990), the Supreme Court ruled that New York had waived its Eleventh Amendment immunity and that its waiver authorized suit in federal court against its agent.

V. Ohio's Constitution is Enforceable.

Ohio argues that its constitutional right to primaries is not enforceable because it is not "self-executing." It cites only *State v. Jackson*, 811 N.E.2d 68, 73 (Ohio 2004), where the Court refused to create an exclusionary rule under Article V, § 2's secret ballot requirement. There, a criminal defendant who had tampered with election ballots claimed that the introduction of those ballots as evidence violated Ohio's secret ballot requirement. The court understandably disagreed. As explained in Appellants' initial motion, Ohio courts have jurisdiction over and enforce Ohio's Constitution.

CONCLUSION

Appellants' motion for emergency relief should be **GRANTED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Reply was filed using the Court's electronic filing system and that copies of this First Amended Complaint will be automatically served on all parties of record through the Court's electronic filing system.

s/Mark R. Brown
Mark R. Brown

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(5) & (6)

I hereby certify that this Reply complies with the typeface limitations found in Federal Rule of Appellate Procedure 32(a)(5) & (6) in that the type-face is proportionally spaced 14-point Times New Roman type.

s/Mark R. Brown