

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

**LIBERTARIAN PARTY OF OHIO;  
KEVIN KNEDLER; AARON HARRIS;  
CHARLIE EARL,**

**Plaintiffs-Appellants,**

**V.**

**CASE NO. 16-3537**

**JON HUSTED,  
Secretary of State,**

**Defendant-Appellee,**

**and**

**STATE OF OHIO;  
GREGORY FELSOCI,**

**Intervenors-Appellees.**

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On Appeal from the United States District Court  
For the Southern District of Ohio

**APPELLANTS' MOTION FOR EMERGENCY  
RELIEF PENDING APPEAL AND/OR TO  
EXPEDITE BRIEFING**

Mark Kafantaris  
625 City Park Avenue  
Columbus, Ohio 43206  
(614) 223-1444  
(614) 221-3713 (fax)  
mark@kafantaris.com

Mark R. Brown  
303 E. Broad Street  
Columbus, Ohio 43215  
(614) 236-6590  
(614) 236-6956  
mbrown@law.capital.edu

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 16-3537

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

*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 May 23, 2016 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.

Plaintiffs/Appellants (hereinafter collectively "the Libertarian Party of Ohio" or "LPO") respectfully move under Federal Rule of Appellate Procedure 8(a) to stay the judgment of the District Court below, grant an emergency injunction pending appeal, and/or expedite final decision in this appeal. Specifically, the Libertarian Party of Ohio in this Motion challenges (1) the District Court's conclusion that Ohio's new ballot access law for minor parties, Senate Bill 193, does not violate the federal Equal Protection Clause, *see* Doc. No. 336 at PAGEID # 8696-8700 (Opinion and Order, dated Oct. 14, 2015),<sup>1</sup> and (2) that no state actor was involved in the politically-motivated conspiracy to remove the Libertarian Party of Ohio and its candidates from Ohio's primary and general election ballots.<sup>2</sup> *See* Doc. No. 369 at PAGEID # 8940-46 (Opinion and Order, May 20, 2016). The Libertarian Party of Ohio accordingly requests that S.B. 193 be enjoined pending appeal and that the Libertarian Party of Ohio be immediately restored as a qualified political party to Ohio's election ballot.

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<sup>1</sup> References in the form of "Doc. No. \_\_, [description of document]" are to documents listed on the District Court's CM/ECF docket sheet unless otherwise noted.

<sup>2</sup> LPO's appeal from final judgment also includes additional issues and reasons supporting reversal that are not included in this Emergency Motion. LPO reserves the right to argue those issues and reasons in proceedings in this Court.

The Libertarian Party of Ohio on May 20, 2016 requested this same emergency relief under Federal Rule of Civil Procedure from the District Court. *See* Doc. No. 371. The District Court has yet to rule on that motion.

Alternatively, the Libertarian Party of Ohio requests that the Court expedite this appeal so that it may be fully resolved before August 10, 2016, when presidential nominations are due in Ohio. Should S.B. 193 be enjoined by that date, or should the Libertarian Party of Ohio otherwise be restored to the ballot based on selective enforcement by a state actor, the Libertarian Party of Ohio will be able to qualify its presidential ticket for the November 2016 presidential election.

### **PROCEEDINGS BELOW**

The present matter originated on November 6, 2013, when Ohio Governor John Kasich signed Senate Bill 193. This law dissolved all minor parties in Ohio, including LPO, and required that in order to re-qualify as political parties they would have to gather over 30,000 signatures after the primary and four months before the general election. Of critical importance here, S.B. 193 denied these minor parties their previously recognized rights to participate in Ohio's primary. Under S.B. 193, these newly re-qualified political parties, including LPO, would have to nominate their candidates (who themselves would have to collect additional signatures) for the general election.

Senate Bill 193 changed several provisions in Ohio's election code to achieve this result. Sections 1 and 2 of S.B. 193 amended O.R.C. § 3517.01 to require that all new political parties, which includes LPO because § 3 of S.B. 193 dissolved LPO as a recognized political party, file with Ohio's Secretary of State "a party formation petition that meets all of the following requirements:"

(i) The petition is 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 for such office.

(ii) The petition is signed by not fewer than five hundred qualified electors from each of at least a minimum of one-half of the congressional districts in this state. ...

(iii) The petition declares the petitioners' intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding general election, held in even-numbered years that occurs more than one hundred twenty-five days after the date of filing.

(iv) The petition designates a committee of not less than three or more than five individuals of the petitioners, who shall represent the petitioners in all matters relating to the petition. ...

Sections 1 and 2 of S.B. 193 also amended O.R.C. § 3517.012 to require that all aspiring candidates of these new political parties (which would include LPO) file "[n]ot later than one hundred ten days before the of that general election and not earlier than the day the applicable party formation is filed" "a nominating petition ... that includes the name of the political party that submitted the party formation petition." Consequently, rather than be nominated in a primary, these

candidates are now required to nominate themselves after the new political party has itself qualified for the general election.

Sections 1 and 2 of S.B. 193 further amended O.R.C. § 3517.012 to require that these candidates support their nominating petitions with signatures collected from qualified electors who are not members of any political party; for state-wide office the nominating petition "shall be signed by at least fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years." For local offices "the nominating petition shall be signed by not less than five qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years."

By denying minor parties like the LPO primaries, S.B. 193 denies them their previously recognized right to official party membership. Ohio only registers party membership through its primaries. Senate Bill 193 therefore creates two classes of political parties: those (like the Democrats and Republicans) who have members, and those (like the LPO) who do not.

Senate Bill 193 was enacted as a partisan measure<sup>3</sup> designed to benefit the Republican Party and assist Governor Kasich's re-election campaign. No Democrats joined the six Republicans who co-sponsored the bill, and only one Democrat in either House voted for it. In contrast, Republican support was enormous in both Houses. In the Ohio Senate, 20 of 23 Republicans supported it.<sup>4</sup> In the Ohio House, 50 of 59 Republicans voted for it.<sup>5</sup>

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<sup>3</sup> Recent Republican efforts to dislodge Libertarian candidates are not confined to Ohio. For instance, the Republican National Committee (RNC) the week of March 28, 2016 filed an amicus brief in a New Hampshire case in support of keeping the Libertarian Party of New Hampshire off the 2016 ballot. *See Republican National Committee Files a Brief in Defense of New Hampshire Ballot Access Law*, BALLOT ACCESS NEWS, <http://ballot-access.org/2016/03/31/republican-national-committee-files-amicus-curiae-brief-in-defense-of-new-hampshire-ballot-access-restriction/> (last visited April 1, 2016). Republicans in Illinois attempted to remove the Libertarian Party's gubernatorial candidate in 2014. *See Ray Long, Libertarian Grimm could play spoiler in governor race*, CHICAGO TRIBUNE, Oct. 27, 2014, <http://www.chicagotribune.com/news/local/politics/ct-illinois-libertarian-governor-candidate-met-20141027-story.html> (last visited April 1, 2016).

<sup>4</sup> *See* Ohio Senate Journal, Nov. 6, 2013, at 1289 (<http://archives.legislature.state.oh.us/JournalText130/SJ-11-06-13.pdf>) (last visited Dec. 11, 2015) (officially reporting votes); <https://legiscan.com/OH/rollcall/SB193/id/304024> (identifying votes by parties) (last visited Dec. 11, 2015).

<sup>5</sup> *See* Ohio House of Representatives Journal, Nov. 6, 2013, at 1326 (<http://archives.legislature.state.oh.us/JournalText130/HJ-11-06-13.pdf>) (last visited Dec. 11, 2015) (officially reporting votes); <https://legiscan.com/OH/rollcall/SB193/id/372340> (identifying votes by parties) (last visited Dec. 11, 2015).

**A. LPO's Challenge to S.B. 193.**

LPO challenged S.B. 193 on November 8, 2013, two days after it was signed by the Governor. It pressed three challenges; first, that S.B. 193's late adoption and dissolution of the minor parties violated the federal Due Process Clause; second, that S.B. 193's creation of two classes of political parties -- those with official members and those without official members -- violated the Equal Protection Clause; and third, that S.B. 193's denial of primaries to minor parties violated Ohio's Constitution.<sup>6</sup>

On January 7, 2014, the District Court enjoined the application of S.B. 193 to Ohio's 2014 election. *See* Doc. No. 47 at PAGEID # 837-38 (Opinion and Order). The District Court agreed with the LPO that application of S.B. 193 to Ohio's upcoming election on such short notice violated the federal Due Process Clause. *Id.* The District Court, meanwhile, reserved ruling on the ultimate validity of S.B. 193 under LPO's federal Equal Protection challenge and its challenge under

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<sup>6</sup> The District Court on October 14, 2015 dismissed LPO's claim under the Ohio Constitution for lack of subject matter jurisdiction. *See* Doc. No. 336 at PAGEID # 8700-05. The Libertarian Party of Ohio moved for a Rule 54 order that this dismissal was final and appealable, but the District Court failed to rule on that motion. Following the Libertarian Party's unsuccessful attempt to take a premature appeal anticipating the District Court's ruling on its Rule 54 motion, and once it became clear the District Court would not act in time for the March 2016 primary, LPO filed an original action in the Franklin County Court of Common Pleas challenging S.B. 193 under Ohio's Constitution and seeking preliminary relief. That action remains pending and fully briefed.

Ohio's Constitution. *Id.* at PAGEID # 834-36. It stated that because Plaintiffs were to be included in the 2014 election, it need not resolve the LPO's challenge under Counts Four and Five "at this juncture." *Id.* at PAGEID # 836.

On January 10, 2014, the State of Ohio and Defendant-Secretary appealed the District Court's preliminary injunction prohibiting application of S.B. 193 to the 2014 election. *See* Doc. No. 50. On January 15, 2014, this Court refused to expedite. *See* Sixth Circuit Doc. No. 006111937423. On February 18, 2014, the State of Ohio and Defendant-Secretary dismissed their interlocutory appeal. This Court granted this stipulation on February 21, 2014. *See* Sixth Circuit Doc. No. 006111971695.

On October 23, 2014, LPO filed an omnibus motion for summary judgment, which included their challenge to S.B. 193 under the federal Equal Protection Clause. *See* Doc. No. 261. The District Court did not resolve this motion for one year, when on October 14, 2015, *see* Doc. No. 369 (Attachment 2), it granted partial summary judgment in Defendants' favor. Because of upcoming primary elections in 2015 and 2016, LPO had previously urged the District Court to resolve this challenge to S.B. 193 both before the 2015 primary and before the 2016 primary. *See* Doc. No. 284 (Motion to Maintain Status Quo) (filed Feb. 27, 2015); Doc. No. 319 (Request for Status Conference) (filed Aug. 21, 2015). The District Court declined; LPO was excluded from both primaries.

Following the District Court's partial summary judgment sustaining S.B. 193 on October 14, 2015, in an effort to have the matter resolved before the 2016 primary, LPO moved the District Court under Rule 54 to certify its decision to allow it to take an immediate appeal. *See* Doc. No. 339. Because Defendants objected, the District Court expedited briefing on LPO's Rule 54 motion. *See* Docs. No. 340 & 343. Judge Watson, however, failed to rule on LPO's Rule 54 motion. LPO was not allowed to participate in the 2016 primary, and LPO's premature appeal (which hinged on that Rule 54 motion) was dismissed by this Court. *See Libertarian Party of Ohio v. Husted*, 808 F.3d 279 (6th Cir. 2015).

**B. ORP's Removal of Charlie Earl.**

Having won injunctive relief restoring it to the 2014 primary ballot on January 7, 2014, LPO was allowed to field candidates for its 2014 primary. Nominations were due on February 5, 2014, and several candidates qualified. Having failed to remove LPO from Ohio's ballot through S.B. 193, Ohio Republicans (including Terry Casey, the Kasich Campaign for Governor, and the Ohio Republican Party among others) targeted LPO's two state-wide candidates for removal. Included was Charlie Earl, LPO's gubernatorial candidate. Without a gubernatorial candidate, Republicans knew, LPO could not re-qualify as a political party for future elections under Ohio law. Ohio law requires that political parties run candidates for Governor and receive 3% of the vote in order to retain qualified

political party status. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014). By removing Earl, Republicans knew that LPO could no longer be a qualified political party. It would miss not only the 2014 gubernatorial election, but also the 2016 presidential election.

The Libertarian Party of Ohio immediately on March 7, 2014 (the day Earl was removed) amended its Complaint to challenge Earl's removal. *See* Doc. No. 56 (Amended Complaint). Although its immediate effort failed, *see Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014), and Earl was not included in the 2014 primary, LPO ultimately in the following months uncovered the truth behind Earl's removal. As explained in more detail below, the truth is that Earl was not simply protested by a Libertarian; he was sabotaged by Terry Casey (Ohio's Chair of its Personnel Board of Review), the Kasich Campaign for Governor, and the Ohio Republican Party.

Earl's mysterious protestor was a gentleman by the name of Gregory Felsoci. Unknown at the time (and for several months thereafter), Felsoci was (unknown even to him) an agent of Terry Casey, the Kasich Campaign for Governor, and the Ohio Republican Party.<sup>7</sup> Felsoci, a member of LPO, did not know why he was

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<sup>7</sup> Although Casey repeatedly argued that his reason for protesting Earl was 'improper' support lent by Democrats, the Secretary's hearing officer (Professor Bradley Smith) concluded that neither the Democratic Party, the LPO nor Earl did anything wrong. Earl was removed from the ballot by Smith because one of his

protesting and did not know who was behind his protest. He simply signed the papers. As Judge Watson concluded, he was "duped."

Judge Watson suspected early-on that the Ohio Republican Party was behind Earl's removal. Matt Borges (Chair of Ohio's Republican Party), after all, had admitted to a news reporter in early March of 2014 (at the time Earl was being protested) that "We're the ones who filed that complaint." *See* Doc. No. 68 at PAGEID #1979-80. In his March 19, 2014 decision denying preliminary injunctive relief, Judge Watson described Felsoci as a "guileless dupe," Doc. No. 80 at PAGEID # 2148, and observed: "To state the obvious, Felsoci's testimony, as well as the other evidence in the record, supports an inference that operatives or supporters of the Ohio Republican Party orchestrated the protest that Felsoci signed." *Id.* at 2148-49.

Later, following what might charitably be described as contentious discovery, LPO uncovered dozens of e-mails between Casey, the Kasich Campaign, and agents of the Ohio Republican Party (ORP) establishing that the three worked together to protest Earl. If that were not enough, LPO in April of 2015 uncovered \$300,000 in payments from ORP to Felsoci's and Casey's lawyers on Felsoci's and Casey's behalf. *See* Doc. No. 296-1 & 296-2. This left little doubt

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circulators, Oscar Hatchett, Jr., had failed to disclose that he was paid by LPO -- a fact that LPO never denied and itself had reported.

as to ORP's involvement; it was (as Borges had stated) involved from the beginning and fully ratified Felsoci's and Casey's actions with hundreds of thousands of dollars in payments.

Felsoci, remarkably, remained ignorant of all of this. He was not told that Casey, the Ohio Republican Party, and the Kasich Campaign were involved and that they were paying his lawyers. He had no idea why he was challenging Earl. It took six months and two federal court orders, *see Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 at \*4 (S.D. Ohio 2014) (concluding that Ohio's Rules of Professional Responsibility required that Zeiger inform Felsoci who was paying his bill and directing Felsoci to produce documents identifying who paid his lawyers); *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 475 (S.D. Ohio 2014) (directing Felsoci to sit for his deposition so that Earl could inquire who paid his lawyers), but by August 15, 2014 LPO finally discovered part of truth -- Terry Casey was involved and had ostensibly hired Felsoci's lawyers.

Discovering the rest of the story took quite a bit more effort. Casey testified that he alone was responsible for protesting Earl and paying Felsoci's lawyers. Casey initially denied that the Kasich Campaign and the Ohio Republican Party were involved. Only later, after LPO uncovered e-mails proving that the Kasich Campaign had assisted Casey, did Casey admit he had even sought the Kasich Campaign's assistance.

Casey further testified that while he did not intend to pay Felsoci's legal bill, he did not know who would. His standard response was that he had not thought about it. This story unraveled when LPO uncovered in April of 2015 the \$300,000 in payments made by ORP to Casey's lawyers. Because of this belated revelation, and notwithstanding that omnibus cross-motions for summary judgment remained pending, on July 6, 2015 Judge Watson ruled that he would delay final judgment until LPO completed more discovery. *See* Doc. No. 305. That very day Casey produced e-mails further establishing his connection with the Kasich Campaign. Casey also produced invoices establishing that his bill in reality approached \$600,000.

The Libertarian Party of Ohio's discovery efforts continued during the summer of 2015. They met fierce resistance. Still, by early October of 2015, as result of yet additional court orders, *see, e.g.*, Doc. No. 322 (filed Sept. 2, 2015); *Libertarian Party of Ohio v. Husted*, 2015 WL 5766518 at \*3 (S.D. Ohio, Oct. 2, 2015), Casey and Felsoci were forced to release more incriminating documents. These e-mails proved not only that the Kasich Campaign had intimate and active involvement with Casey's protest of Earl, they added further proof of ORP's involvement.

Ultimately, Magistrate Judge Kemp chose not to sanction Felsoci and Casey for their recalcitrance. Still, it severely chastised them for not being forthcoming about ORP's involvement:

The overall conduct of discovery in this case, especially on the part of Mr. Felsoci's and Mr. Casey's counsel, demonstrates a pattern of technical and begrudging responses and objections to discovery requests, which pattern **was clearly designed to delay or obstruct the Plaintiffs' ability to learn that the Ohio Republican Party was involved in the effort to keep Libertarian Party candidates off the ballot.** ... Should these particular attorneys or parties come before the Court in future cases, the history of their conduct here will strongly influence the Court's approach to discovery, including sanctions ....

*Libertarian Party of Ohio v. Husted*, 2016 WL 447566 at \*4 (S.D. Ohio, Feb. 5, 2016) (emphasis added).

This was not the first time, moreover, the District Court was forced to address Felsoci's and Casey's obstructive discovery techniques. In a prior opinion Magistrate Judge Kemp observed that Felsoci's and Casey's responses to discovery requests "seem[ed] particularly designed to cause delay and increase costs." *Libertarian Party of Ohio v. Husted*, 2015 WL 5766518 at \*3 (S.D. Ohio, Oct. 2, 2015). On October 17, 2014, Judge Watson chastised Felsoci for employing "tactics that resulted in delay," Doc. No. 260 at PAGEID # 7102 (Oct. 17, 2014), and well as engaging in "harassing and obstructing" behavior during depositions. *Id.* at PAGEID # 7106. In sum, Felsoci and Casey went to great and questionable lengths to keep Casey's, the Kasich Campaign's and ORP's involvement in Earl's

removal a secret. They spared no cost and no discovery rule. They did so for a simple reason; they understood that ORP's nefarious involvement was certainly improper and quite likely illegal.

On October 14, 2015, the District Court granted the State of Ohio, Defendant-Secretary and Felsoci partial summary judgment. *See* Doc. No. 336 at PAGEID # 8700. It concluded that S.B. 193 did not violate the federal Equal Protection Clause and dismissed LPO's claim under the Ohio Constitution for lack of subject matter jurisdiction. *Id.* at PAGEID # 8705. On October 16, 2015, the District Court directed the parties to renew their cross-motions for summary judgment on LPO's selective enforcement claim against Felsoci in light of the newly discovered evidence. *See* Doc. No. 337 (Order). Plaintiffs did so that very day. *See* Doc. No. 338. Briefing on this remaining claim was completed on November 9, 2015.

On May 20, 2016, the District Court awarded summary judgment to Felsoci and the Secretary on the remaining selective enforcement claim. *See* Doc. No. 369 (Attachment 2). The Court concluded that even if Casey, the Kasich Campaign and the ORP had otherwise conspired to selectively remove Earl from Ohio's ballot for political purposes, none of them was a state actor within the meaning of 42 U.S.C. § 1983. Consequently, LPO's claim of selective enforcement failed.

## **JURISDICTION**

The District Court granted partial summary judgment to Defendants on October 14, 2015, holding that S.B. 193 did not violate the federal Equal Protection Clause. *See* Doc. No. 336 at PAGEID # 8696-8700 (Opinion and Order, dated Oct. 14, 2015). The District Court granted final summary judgment to Defendants on May 20, 2016, holding that no state actor was involved in the politically-motivated conspiracy to remove the Libertarian Party of Ohio and its candidates from Ohio's primary and general election ballots. *See* Doc. No. 369 at PAGEID # 8940-46 (Opinion and Order, May 20, 2016). The District Court entered final judgment that same day. *See* Doc. No. 370 (Final Judgment). This timely appeal is from that final judgment.

## **REASONS FOR GRANTING EMERGENCY RELIEF**

Ohio has historically had the most restrictive ballot access laws for minor parties in the United States. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006) ("LPO has put forth evidence showing that Ohio is among the most restrictive, if not the most restrictive, state in granting minor parties access to the ballot"). Indeed, two seminal ballot access cases originated in Ohio. *See Williams v. Rhodes*, 393 U.S. 23 (1968); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Correcting Ohio's many constitutional violations has taken a good deal of effort, with the Libertarian Party of Ohio in the lead. The Libertarian Party of Ohio has won no less than four successful suits (including the preliminary relief in the present case) over the last ten years opening up Ohio's ballots. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sep. 7, 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012); *Libertarian Party of Ohio v. Husted*, Doc. No. 47 (Opinion and Order and Preliminary Injunction, dated Jan. 7, 2014).

### **LEGAL ARGUMENT**

"When a district court is asked to issue a preliminary injunction, it ... balances four factors ... : (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995). These same four factors are balanced by this Court when deciding whether to issue an emergency injunction. *See Blankenship v. Blackwell*, 2004 WL 2390113, at \*1 (6th Cir. 2004).

## **I. LPO's Likelihood of Success on the Merits.**

### **A. S.B. 193 Dissolved LPO, Stole its Primary, Prevents it From Registering Members, and Places it at a Political Disadvantage in Violation of the Equal Protection Clause.**

Senate Bill 193 violates the Equal Protection Clause. It accomplishes this by placing new parties, including LPO, at a political disadvantage. It leaves parties that are not recognized by Ohio, including LPO after the November 2014 election, with no mechanism by which they can register party members on an equal basis with the established parties. With the passage of S.B. 193, political parties that are allowed to hold primaries will thereby register party members. Parties like the LPO will not. Party membership, recognized as such by the State, is a huge benefit in any election cycle. It cannot constitutionally be awarded to some parties but not others.

Ohio officially registers voters' affiliations with political parties through party primaries. *See, e.g.*, O.R.C. § 3513.05 ("an elector is considered to be a member of a political party if the elector voted in that party's primary election within the preceding two calendar years"); Jon Husted, Ohio Secretary of State, Frequently Asked Questions: General Voting & Voter Registration<sup>8</sup> ("Under Ohio election law, you declare your political party affiliation by requesting the ballot of

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<sup>8</sup> <http://www.sos.state.oh.us/sos/elections/Voters/FAQ/genFAQs.aspx#declare> (last visited Nov. 17, 2015).

a political party in a partisan primary election. If you do not desire to affiliate with a political party in Ohio, you are considered to be an unaffiliated voter.").

Party membership carries many practical benefits. *See, e.g., Baer v. Meyer*, 577 F. Supp.2d 838, 843 (D. Colo. 1984) (stating that party registration "lists are invaluable in organizing campaigns, enlisting party workers and raising funds."); O.R.C. § 3517.19 (allowing political parties in Ohio to sell their membership lists created by the State). And in Ohio, party membership has many legal benefits, too. For example, S.B. 193, § 1 (amending O.R.C. § 3517.012), imposes party-membership requirements on the signers and circulators of minor parties' candidates' nominating petitions. *See also* O.R.C. § 3513.05; Doc. No. 165-1 at PAGEID # 3276-77 (ACLU Memorandum Supporting Motion for Summary Judgment).

Without members, minor parties like LPO have a more difficult time circulating petitions and collecting signatures than their major-party counterparts. This Court in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 587, recognized that the ability to “organiz[e] and develop[], recruit[] supporters, choos[e] a candidate, and vot[e] for that candidate in a general election” are core political functions. Senate Bill 193 places minor parties at a distinct disadvantage in this regard.

In *Williams v. Rhodes*, 393 U.S. 23, 25 (1968), the Supreme Court observed:

It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that “invidious” distinctions cannot be enacted without a violation of the Equal Protection Clause.

*Id.* at 30. Applying the logic of *Rhodes*, courts have often invalidated “perks” and disparate benefits awarded to the established parties. In *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (en banc), for example, the Third Circuit recognized that although an across-the-board anti-fusion law (preventing parties from cross-endorsing other parties’ candidates) does not violate the First Amendment, one that allows major parties, but denies to minor parties, the right to do so violates Equal Protection. *See also Green Party of Pennsylvania v. Aichele*, 89 F. Supp.3d 723, 749 (E.D. Pa. 2015) (striking law that allowed only major political party members to cross-support candidates).

*Council of Alternative Political Parties v. State of New Jersey Division of Elections*, 781 A.2d 1041 (N.J. App. 2001), offers an illustration in the context of officially recognized party membership. There, the Court invalidated a statute that “preclude[d] a registered voter from declaring a party affiliation other than Republican, Democrat or Independent ....” *Id.* at 1043. The court concluded that “the statutory scheme imposes a significant handicap on the alternative parties’

ability to organize while reinforcing the position of the established statutory parties." *Id.* at 1051.

Few cases report the kind of discriminatory treatment now practiced by Ohio. Indeed, it does not appear that any other state allows only some political parties the privilege of official party membership. For this reason, case law specifically addressing this point is sparse. *Green Party of Michigan v. Land*, 541 F. Supp. 2d 912 (E.D. Mich. 2008), perhaps comes the closest. At the time, Michigan, like Ohio now, used primaries to register party members. As now made the law in Ohio by S.B., minor parties in Michigan were not entitled to primaries. In *Land*, the question was whether providing official membership lists only to the two major parties violated the Equal Protection Clause.

The Court concluded it did; Michigan's formula for registering and reporting party members (and the many benefits it entailed) unconstitutionally discriminated against the minor parties. The Court in *Land* stated that "[o]ne of the most valuable kinds of information for use in campaigns is the party affiliation of individual voters." *Id.* It rejected Michigan's claim that minor parties were provided an equal opportunity to earn primaries (and register members) by winning more votes in the preceding general election:

This argument fails to appreciate that when the Statute was passed in 2007, only the Democratic and Republican parties had met the 20% threshold in the previous presidential election. ... Accordingly, while at first blush the Statute may appear neutral on its face, further inquiry reveals that the

Statute, by its own terms, benefits the major political parties to the detriment of all others.

*Id.* at 917-18.

Judge Watson attempted to distinguish *Land*: “*Land* concerns a law premised on a single past election and relates to the reporting of information, whereas Plaintiffs now ask the Court to make a determination on the prospective application of S.B. 193 ....” Doc. No. 336 at PAGEID # 8699. Such a distinction, however, is not particularly relevant. The constitutional point of the case was that minor parties cannot be treated differently in terms of party membership lists. Whether challenging a past election or seeking future relief, the point is the same.

The plaintiffs' argument in *Land*, after all, was that “it is a denial of equal protection for the two major political parties to receive a state-generated resource of great value for general election campaigns, while all other parties are denied access to and use of that resource.” *Id.* at 916. The Court agreed:

The State’s asserted interests do not justify the burdens imposed by the Statute on Plaintiffs’ First Amendment right to association and on their right to an equal opportunity to win the votes of the electorate. The State is not required to provide the party preference information to any party. When it chooses to do so, however, it may not provide the information only to the major political parties.

*Id.* at 924. The Court did not condition its conclusion on its application to past versus future elections.

Judge Watson further attempted to distinguish *Land* on the ground that it “specifically found the issue of a minor party’s access to the ballot was not implicated ....” Doc. No. 336 at PAGEID # 8699-8700. This is true, but again it is beside the point. Ballot access was not implicated in *Land* because the plaintiffs did not seek it. The state's ballot access machinery was raised by the state to defend its disparate treatment; the state argued that because minor parties could be treated (as a federal constitutional matter) differently in terms of the procedures for ballot access, their memberships could also be treated differently.

The Court responded that while access procedures may differ, this does not allow the state to prefer the major parties in terms of party membership:

in each of the cases cited by Defendant, independent candidates had a route to the ballot. Here, in contrast, Plaintiff Third Parties have no other way to obtain the party preference information. Accordingly, the precedents cited by Defendant that involve access to the ballot are not relevant to this case.

*Id.* at 923.

The *Land* Court’s reasoning applies equally here. Even though states may as a federal constitutional matter use different procedures for nominating candidates (a point LPO has never challenged), they cannot legislate membership advantages for the major parties. Because of S.B. 193, LPO is now prevented from officially registering members. It has no official membership list. In contrast, the major parties (which were not dissolved by S.B. 193) continue to hold primaries, register

members, and access lists.<sup>9</sup> This cannot be squared with the Equal Protection Clause. The ability to “organiz[e] and develop[], recruit[] supporters, choos[e] a candidate, and vot[e] for that candidate in a general election,” after all, is core political activity. See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 587.

**B. The Ohio Republican Party is a State Actor Guilty of Selectively Enforcing Ohio Law in Violation of the Equal Protection Clause.**

Had Defendant-Secretary selectively used Ohio's election laws to target Earl for political reasons, he clearly would have violated the First and Fourteenth Amendments. He is by all accounts a state actor. Similarly, if some other person or entity engaged in state action selectively enforced Ohio's election law for political reasons, that person or entity would also violate the Equal Protection Clause. Here that other entity is the Ohio Republican Party (ORP).

The District Court properly recognized that LPO presented a credible case in granting LPO leave to file its Third Amended Complaint charging unconstitutional

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<sup>9</sup> Judge Watson criticized LPO in rejecting its Equal Protection Clause challenge for not distinguishing its argument from that of the ACLU. See Doc. No. 336 at PAGEID # 8698. This criticism is perplexing. LPO filed its challenge under the Equal Protection Clause before the ACLU intervened as a Plaintiff and filed its motion for summary judgment (October 23, 2014) several months before the District Court (on March 16, 2015) rejected the ACLU's challenge. See Doc. No. 285 (Opinion and Order). LPO could not have known that it should distinguish its challenge from that made by the ACLU. Further, the District Court's premise that LPO's claim was an “as-applied” challenge is incorrect. LPO's claim was not an “as-applied” claim. See Doc. No. 188 at PAGEID # 3842-43; 3849 (Plaintiffs' Third Amended Complaint). It needed no additional facts to succeed.

selective enforcement. *See* Doc. No.187 at PAGEID # 3794 (observing that LPO's "proffered evidence may support a plausible assertion that state actors participated in selective enforcement of Ohio Revised Code § 3501.38(E)(1) to disqualify Plaintiffs' petitions on the basis of political affiliation and speech"). Cases have long established that the selective enforcement of otherwise valid laws violates the Equal Protection Clause when premised on impermissible motives like race, religion, gender and speech. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977) (holding that adverse personnel decision based on content of speech violates the First Amendment).

Whether selective enforcement involves a criminal law, *see, e.g., Wayte v. United States*, 470 U.S. 594, 614 (1985) (holding that government cannot apply otherwise valid criminal law because of speech); *Wood v. Kesler*, 323 F.3d 872, 883 (11th Cir. 2003) (recognizing claim for "retaliatory prosecution in violation of the First Amendment"); *Poole v. County of Otero*, 271 F.3d 955, 960-61 (10th Cir. 2001) (same)<sup>10</sup> or a civil measure, it is well-established that state actors -- whomever they are -- cannot selectively enforce laws based on a person's or party's protected First Amendment activity. *See Police Department of City of Chicago v.*

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<sup>10</sup> The Supreme Court in *Hartman v. Moore*, 547 U.S. 250, 254 (2006), ruled that to recover money damages for improper retaliation in violation of the First Amendment a plaintiff must demonstrate that the criminal prosecution lacked probable cause. Plaintiffs do not seek money damages in the present case.

*Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."). *See also Vergara v. City of Waukegan*, 590 F. Supp.2d 1024 (N.D. Ill. 2008) (recognizing that a "selective application" claim is part of as an "as-applied" First Amendment challenge); *Richter v. Maryland*, 590 F. Supp. 2d 730 (D. Md. 2008) (recognizing "selective application" claim under First Amendment).

This principle has been applied to elections as well as political events. *See Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682-83 (1998) (holding that a state cannot exclude candidate from debate based on his viewpoint). It is understood that state actors cannot selectively apply laws in an effort to "dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 525-26 (2001). The market-place of ideas cannot constitutionally be skewed by state actors -- period. *See generally* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 63-64 (2011).

The Libertarian Party of Ohio does not claim (and has never claimed) that Defendant-Secretary himself selectively enforced Ohio law. Rather, LPO's claim throughout these proceedings has been (and remains) that Terry Casey, the Kasich Campaign, ORP and others joined together to selectively enforce Ohio's law and

remove Earl. They did so through an innocent agent, Gregory Felsoci,<sup>11</sup> for purely political reasons. They wanted to assist Governor Kasich and the Republican Party. They spent a great deal of money on the effort. The question here is whether any of these persons or entities engaged in state action.

The District Court concluded that neither Casey, the Kasich Campaign, Governor Kasich, nor the Ohio Republican Party were engaged in state action. *See* Doc. No. 260 at PAGEID # 7095 (Opinion and Order); Doc. No. 369 at PAGEID # 8940-41 (Opinion and Order). "[E]ven if it was on behalf of the ORP," Judge Watson ruled, the ORP was not a state actor. *Id.* Even assuming for purposes of this Motion that Judge Watson was correct about Casey,<sup>12</sup> Governor Kasich, the

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<sup>11</sup> Felsoci is obviously not himself a state actor. He is a "guileless dupe," an innocent agent unwittingly employed by others to remove Earl from Ohio's ballot. His innocence, however, does not absolve his manipulators of responsibility. If they, or any one of them is a state actor, *see Wilkerson v. Warner*, 545 Fed. Appx. 413, 421 (6th Cir. 2013) ("private persons jointly engaged with state officials in a deprivation of civil rights are acting under color of law for purposes of § 1983."), the entire enterprise is considered state action. The Supreme Court recognized in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), moreover, that the innocence of agents does not insulate principals with discriminatory animus from responsibility.

<sup>12</sup> Casey not only chaired Ohio's Personnel Board of Review but also exercised authority over "classified state service" employees in the Secretary's Office at all relevant times in this case. Casey's position, LPO argued below, provided him an "aura of official authority and power," *United States v. Lanier*, 33 F.3d 639, 653 (6th Cir. 1994), *vacated on other grounds*, 73 F.3d 1380 (1996), *rev'd*, 520 U.S. 259 (1997), especially over those in the Secretary's Office subject to his jurisdiction. *See also Memphis, Tennessee Area Local American Postal Workers Union v. Memphis*, 361 F.3d 898, 903 (6th Cir. 2004). He therefore engaged in state action. There was also evidence tending to show that officials in the

Kasich Campaign and others, he erred in concluding that the Ohio Republican Party was not engaged in state action.

Courts across the country, including the Supreme Court, have long ruled that the two major parties' state affiliates (and agents) are governmental actors when they regulate the electoral process. *See, e.g., Lynch v. Torquato*, 343 F.2d 370, 372 (3d Cir. 1965) (“The people, when engaged in primary and general elections for the selection of their representatives in government, may rationally be viewed as the ‘state’ in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal protection of the laws.”). This is particularly true with manipulations of party primaries.

*Smith v. Allwright*, 321 U.S. 649 (1944), offers the textbook example. In *Allwright*, the Democratic Party of Texas forbade African-Americans from voting in its primaries. The Court ruled that this constituted impermissible state action: “[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state.” *Id.* at 660. Nine years later, the Court in *Terry v. Adams*, 345 U.S. 461 (1953), ruled that an agent of the Texas Democratic Party -- the Jaybird Democratic Association -- was also a state actor when it excluded African-

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Secretary's office, including Matthew Damschroeder, assisted Casey in his efforts to remove Earl.

Americans from its primary. The two cases together make plain that when a major party either itself or through an agent regulates primaries, state action has taken place.

The Supreme Court endorsed this conclusion in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality). There, the Court borrowed from *Smith* and *Terry* to hold that section 5 of the federal Voting Rights Act applies to major state party conventions as well as primaries. Thus, the Virginia Republican Party's use of registration fees for delegates to its Virginia state convention was found to be subject to the preclearance requirements of section 5 of the federal Voting Rights Act.

Justice Stevens wrote the plurality opinion. He rejected the notion that *Smith* and *Terry* only applied to racial disenfranchisement. “The operative test,” he concluded, “is whether a political party exercises power over the electoral process.” *Id.* at 218. Justice Stevens then observed that such a “situation may arise in two-party States just as in one-party States,” *id.*, especially where the state (like Virginia) granted “automatic ballot access to only two entities, and requires everyone else to comply with more onerous requirements.” *Id.* at 224 n.36.

Justice Stevens noted:

Virginia gives a host of special privileges to the major parties, including automatic access, preferential placement, choice of nominating method, and the power to replace disqualified candidates .... It is perfectly natural,

therefore, to hold that Virginia seeks to advance the ends of both the major parties.

*Id.*

Justice Breyer, together with Justices O'Connor and Souter, joined Justice Stevens's judgment to form a majority. *Id.* at 235 (Breyer, J., concurring). Because of possible First Amendment protections afforded major parties' "internal operation[s]"--like resolutions and platforms, *id.*, -- Justice Breyer observed that the Court was not required to "decide just which party nominating convention practices fall within the scope of the Act." *Id.* Justice Breyer thought it enough that the Virginia Republican Party used "a nominating convention that resembles a primary about as closely as one could imagine," *id.*, "avail[ed] itself of special state-law preferences, in terms of ballot access and position," *id.*, and acted "well outside the area of greatest 'associational' concern" by charging a registration fee "of a kind that is the subject of a specific constitutional Amendment." *Id.* at 239.

Lower courts have routinely used *Morse* to limit major-party involvement in elections -- both under the Constitution and the Voting Rights Act. For instance, the Fifth Circuit has noted that "the conduct of party primary elections under the auspices of the State is subject to preclearance under the Voting Rights Act." *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 542 n.4 (5th Cir. 2008); *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp.2d 700, 708 (W.D.

Tex. 2009) (holding that Voting Rights Act applies to the Texas Democratic Party).

*Morse's* principles, moreover, extend to all kinds of constitutional violations and even reach well-beyond primaries. The Fifth Circuit, for example, applied Article I's Qualification Clause to the Texas Republican Party to thwart its "friendly" removal of Tom Delay's name from the state's general election ballot. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589 n. 9 (5th Cir. 2006) (noting that state action was not in dispute and holding that removal of DeLay's name violated the federal Qualifications Clause).

Courts have likewise found that a candidate's removal or exclusion from a ballot by a major party<sup>13</sup> constitutes state action for purposes of the federal Due Process Clause. *See Alabama Republican Party v. McGinley*, 893 So. 2d 337, 342-43 n.3 (Ala. 2004) ("the Party assumes, without admitting, that it was acting as a 'state actor' when it disqualified McGinley."). The Mississippi Supreme Court in *Wilson v. Hosemann*, 185 So.3d 370, 375 (Miss. 2016), recently reiterated this point:

Without doubt, election to public office is a public function and any integral part of that function must be constitutional. The nomination process may

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<sup>13</sup> This is in contrast to actions taken by the two major parties' national organizations. In *LaRouche v. Fowler*, 152 F.3d 974, 986 (D.C. Cir. 1998), the Court ruled that actions taken by the national Democratic Party do not constitute state action.

appear to be more a private than a governmental function because it is conducted by political parties. Appearances notwithstanding, our law recognizes that the selection of party nominees by primary elections is an integral part of the entire election process.... [T]he primary election process is sufficiently state action that persons affected by it and participating in it have available due process protections.

(Footnote and citation omitted). It therefore had no trouble concluding that Mississippi Democratic Party violated the federal Due Process Clause when it excluded a candidate.

Judge Watson's apparent distinction between a major party's manipulation of its own primary ballot and that of another party consequently makes no sense. Courts have not limited state action in this fashion. In *Benkiser*, for example, the Fifth Circuit applied Article I to the Republican Party even though it attempted to manipulate the general election ballot. Its action was not limited to its own primary. State action therefore does not depend on a major party's manipulation of its own primary ballot. The "operative test ... is whether a political party exercises power over the electoral process." 517 U.S. at 218 (Stevens, J., plurality opinion) (emphasis added). ORP's action in the present case is no less an exercise of "power over the electoral process" because it was kept secret. It cannot be insulated merely because it was a nefarious effort to sabotage a competitor's candidate. Indeed, these facts are all the more reason to hold that state action took place.

Where a state, like Ohio, grants "automatic ballot access to only two entities, ... requires everyone else to comply with more onerous requirements," *id.*

at 224 n.36, and "gives a host of special privileges to the major parties, including automatic access, preferential placement, choice of nominating method, and the power to replace disqualified candidates ..., [i]t is perfectly natural ... to hold that [the state] seeks to advance the ends of both the major parties." *Id.* It is "perfectly natural" to treat major parties who benefit from special privileges as agents of the state when they attempt to manipulate electoral machinery --- whether it is that party's own machinery or that of another political party. A major party that has "avail[ed] itself of special state-law preferences, in terms of ballot access and position," *id.* at 235 (Breyer, J., concurring), must be treated as a state actor when it surreptitiously sabotages the primary ballot of a minor-party competitor.

Judge Watson relied on *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), to support his conclusion. *See* Doc. No. 260 at PAGEID # 7094; Doc. No. 336 at PAGEID # 8696-8700 (referencing prior opinion). His reliance on *Banchy* is misplaced. That case did not involve any sort of regulation or manipulation of a popular ballot. The issue presented was merely "whether the election of political party officers is arguably state action." *Id.* at 1193. The Court correctly ruled that it was not. Matters of "internal party structure," after all, are themselves protected by the First Amendment. The Court correctly expressed "grave doubts" about whether the party's selection of its own officers could be regulated in any way. *Id.* at 1195. The Court observed that "there

is no evidence in the record and no explanation by the plaintiffs of how the ward chairmen play an integral part in the electoral process, as opposed to the purely internal affairs of the party." *Id.* at 1196. *Banchy* is a far cry from the present case.

Judge Watson also placed great weight on *Nader v. McAuliffe*, 593 F. Supp.2d 95 (D.D.C. 2009), a damage action filed by Ralph Nader against the chair (McAuliffe) of the Democratic National Committee. Nader unsuccessfully argued that McAuliffe conspired with others, including state Democratic Party affiliates, to remove him from various state ballots.

Putting aside the many factual differences between the present case and that presented in *McAuliffe*, the District Court's decision there has little, if any, precedential value. The Court of Appeals did not affirm the District Court's logic. Instead, the Court of Appeals affirmed on a completely different ground, ruling that Nader's challenge was barred by the statute of limitations. *Nader v. McAuliffe*, 2009 WL 4250615 \*1 (D.C. Cir. 2009). *McAuliffe* offers a slender reed of support.

## **II. The Libertarian Party of Ohio is Threatened With Irreparable Injury.**

The Libertarian Party of Ohio was removed from Ohio's 2016 ballot by operation of S.B. 193. LPO cannot now qualify its presidential nominee, likely Gary Johnson, for Ohio's 2016 general election. Any impediment to the exercise of First Amendment rights, even for brief periods, causes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury."). The exclusion of the third-most-popular presidential candidate would certainly cause irreparable harm.

### **III. Appellees Risk No Harm.**

The State of Ohio, Defendant-Secretary, Intervenor-Defendant-Felsoci, and his principal, the Ohio Republican Party, risk no harm should the LPO be restored to Ohio's ballot. "States do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties." *Clingman v. Beaver*, 544 U.S. 581, 609 (2005) (Stevens, J., dissenting).<sup>14</sup>

### **IV. The Public Will Benefit.**

"[T]hird parties are often important channels through which political dissent is aired." *Williams v. Rhodes*, 393 U.S. 23, 39 (1968). Emergency relief will benefit the public by insuring that voters are afforded a choice of candidates. The past several elections prove that LPO is Ohio's third most popular political party. Its state-wide candidates in 2010 and 2014 won nearly 5% of the total vote. The Libertarian Party of Ohio has participated in every presidential election in Ohio

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<sup>14</sup> Justices Souter and Ginsburg joined Justice Stevens. *Id.* at 608. Justice O'Connor's concurring opinion, which was joined by Justice Breyer, similarly explained that a state's "asserted interests [in restricting the ballot] [cannot be] merely a pretext for exclusionary or anticompetitive restrictions." *Id.* at 598, 603 (O'Connor, J., concurring). Stevens thus spoke for a majority on this point.

since 2008. Its presumptive nominee for President this year, Gary Johnson, on May 18, 2016 ranked third among all presidential candidates with at least 10% of the expected vote. *See* Fox News Poll, May 18, 2016<sup>15</sup> (stating that Johnson polled 10% behind Trump and Clinton on May 18, 2016). In the absence of emergency relief, this third-most popular presidential candidate (who will likely appear on every other state's ballot) will be excluded from Ohio's ballot. This will irreparably harm Ohio's voters.

#### **V. No Security is Required.**

"[T]he court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant." C. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2954. This Court has so held. *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). Appellees risk no monetary harm should an emergency injunction be issued.

### **CONCLUSION**

Appellants' motion for emergency relief and/or expedited briefing should be **GRANTED.**

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<sup>15</sup> <http://www.foxnews.com/politics/interactive/2016/05/18/fox-news-poll-2016-national-release-may-18/> (last visited May 20, 2016).

Respectfully submitted,

s/Mark R. Brown

Mark R. Brown  
303 East Broad Street  
Columbus, OH 43215  
(614) 236-6590  
(614) 236-6956 (fax)  
mbrown@law.capital.edu

Mark Kafantaris  
625 City Park Avenue  
Columbus, Ohio 43206  
(614) 223-1444  
(614) 221-3713 (fax)  
mark@kafantaris.com

**CERTIFICATE OF SERVICE**

I hereby certify that this Motion and included Memorandum were filed using the Court's electronic filing system and that copies 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 Motion complies with the typeface limitations found in Federal Rule of Appellate Procedure 32(a)(5) & (6) in that it used 14-point Times New Roman font.

s/Mark R. Brown

Mark R. Brown