UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 16-3537

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

Plaintiffs-Appellants,

V.

JON HUSTED,
Secretary of State,

Defendant-Appellee,

STATE OF OHIO; GREGORY FELSOCI,

Intervenors-Appellees.

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

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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.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request oral argument while reserving their request for emergency relief by Ohio's August 10, 2016 deadline for presidential nominations.

STATEMENT OF JURISDICTION

Final judgment was entered on May 20, 2016. *See* Final Judgment, RE 370. This appeal, *see* Notice of Appeal, RE 372, is from that final judgment, the accompanying Opinion and Order entered that same day, *see* Opinion and Order, RE 369, and the Opinion and Order entered on October 14, 2015 awarding Defendants partial judgment and dismissing Plaintiffs' state-law claims. *See* Opinion and Order, RE 336. Jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Ohio Republican Party ("ORP") engaged in state action within the meaning of 42 U.S.C. § 1983 when it selectively enforced an Ohio law and sabotaged the Libertarian Party of Ohio's ("LPO") primary.

2. Whether Ohio's Chair of its Personnel Review Board engaged in state action within the meaning of 42 U.S.C. § 1983 when he selectively enforced an Ohio law and sabotaged LPO's primary.

3. Whether the Secretary's Chief Elections Officer engaged in an unlawful conspiracy under 42 U.S.C. § 1983 to selectively remove LPO's gubernatorial candidate from LPO's 2014 primary.

4. Whether Ohio's Senate Bill 193 ("S.B. 193") violates the Equal Protection Clause by providing only to some recognized political parties a mechanism for registering members.

5. Whether Ohio waived its Eleventh Amendment immunity by voluntarily intervening and actively defending S.B. 193.

STATEMENT OF THE CASE

Plaintiffs/Appellants (hereinafter "LPO") lodged this Appeal on May 20, 2016, the day the District Court entered final judgment. *See* Notice of Appeal, RE 372. This Court on June 7, 2016 "ORDERED that briefing in this appeal be expedited." Order, Sixth Cir. RE 18-2. The District Court on June 10, 2016 denied LPO's motion for stay and injunction pending appeal. Opinion and Order, RE 374.

This matter originated on November 6, 2013 with the signing of S.B. 193. This law dissolved LPO, *see* S.B. 193, § 3, Addendum 2 at 64, and required that it re-qualify as a political party by submitting over 30,000 signatures before the general election. Of critical importance here, S.B. 193 denied LPO its previously recognized right to participate in Ohio's primary, thereby not only stripping it of its members but also denying it the only mechanism Ohio provides for registering members.

Achieving this result required several changes to Ohio law. Sections 1 and 2 of S.B. 193 amended O.R.C. § 3517.01 to require that new political parties file

with the Secretary "a party formation petition" supported by "qualified electors equal in number to at least one percent of the total vote for governor [or president] at the most recent election ...." *See* Addendum 2 at 63. Of this total, 500 must come from each of "a minimum of one-half" of Ohio's congressional districts. *Id*. The petition and supporting signatures is due 125 days before the general election, *id.*, which translates into July 5, 2016 for the present election cycle.

Sections 1 and 2 of S.B. 193 also amended O.R.C. § 3517.012 to require that the candidates of these new political parties (including LPO) file their own nominating petitions within fifteen days of the party's formation. *See* Addendum 2 at 63. These nominating petitions must be supported by 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." *See* Addendum at 63. For local offices the number is five signatures. *Id.*

Neither S.B. 193 nor any other Ohio law provides minor parties formed pursuant to S.B. 193's petition requirement an alternative mechanism to register members. Political parties that were not dissolved by S.B. 193 (that is, the Democrats and Republicans), in contrast, continued to hold primaries, retained members, and registered new ones every election cycle.

S.B. 193 was enacted as a partisan measure[1] to benefit ORP 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 Chamber voted for it. In contrast, Republican support was enormous in both Chambers. In the Ohio Senate, 20 of 23 Republicans supported it. In the Ohio House, 50 of 59 Republicans voted for it.

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

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

On January 7, 2014, Judge Watson enjoined application of S.B. 193 to Ohio's 2014 election based on LPO's first claim. *See* Opinion and Order, RE 47, PAGEID # 837-38. He reserved ruling on the validity of S.B. 193 under LPO's Equal Protection Clause challenge and its state constitutional challenge. *Id.* at 834-36.

[1] Ohio Republicans unsuccessfully protested the presidential candidacy of LPO nominee Gary Johnson in 2012. *See* Protest of Gary Johnson, RE 227-1, PAGEID # 5612.

On January 10, 2014, the State of Ohio (which had just weeks before intervened) appealed the District Court's injunction barring S.B. 193's application to the 2014 election cycle. *See* Notice of Appeal, RE 50. On January 15, 2014, this Court refused to expedite, which led Ohio to dismiss its appeal.

On October 23, 2014, following its gubernatorial candidate's (Earl) removal from the 2014 primary ballot (discussed below) and two unsuccessful attempts to restore Earl to the ballot,[2] LPO filed an omnibus motion for summary judgment. This included its challenge to S.B. 193 under both the federal and state constitutions. *See* Motion for Summary Judgment, RE 261. The District Court resolved the bulk of this motion one year later when it dismissed LPO's state constitutional challenge on October 14, 2015,[3] Opinion and Order, RE 336, PAGEID # 8700-05, and granted judgment to the Secretary and Ohio under LPO's federal challenge. *Id*. at 8696-8700.

[2] LPO first unsuccessfully argued that Ohio's employer-statement rule violated the First Amendment. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014). Next, LPO argued the claim appealed here, that ORP selectively enforced Ohio's employer-statement rule against Earl. LPO's motion for preliminary relief was denied on October 17, 2014, *see* Opinion and Order, RE 260, LPO did not take an interlocutory appeal, and Judge Watson issued final judgment on May 20, 2016.

[3] Because of upcoming primary elections in 2015 and 2016, LPO urged the District Court to expeditiously resolve its challenge to S.B. 193 by submitting a Motion to Maintain Status Quo, RE 284 (filed Feb. 27, 2015), and a Request for Status Conference, RE 319 (filed Aug. 21, 2015). Judge Watson did not respond to either before those primaries and LPO did not appear in those primaries.

LPO moved under Federal Rule of Civil Procedure 54 on October 23, 2015 for an order allowing it to immediately appeal the rejection of its challenges to S.B. 193. Motion to Modify, RE 339. Judge Watson did not rule on that motion before entering final judgment eight months later on May 20, 2016. Following LPO's unsuccessful attempt to take a premature appeal anticipating Judge Watson's ruling on its Rule 54 motion, *see* Notice of Appeal, RE 353; *Libertarian Party of Ohio v. Husted*, 808 F.3d 279 (6th Cir. 2015), LPO filed an original action in the Franklin County Court of Common Pleas challenging S.B. 193 under Ohio's Constitution.

On June 7, 2016, relying on Judge Watson's rejection of LPO's federal challenge, the state court rejected LPO's state-law challenge to S.B. 193. *See Libertarian Party of Ohio v. Husted*, No. 16CV554 at 19 (Franklin County Ct. Common Pleas, June 7, 2016) (Addendum 3) ("the Court notes that it takes much guidance from the thorough analysis previously done regarding identical alleged burdens in the Southern District of Ohio case"). On June 8, 2016, LPO moved for a new trial in the state court and asked it to stay its judgment pending this Court's resolution of this appeal.

B. ORP's Removal of Charlie Earl.

Having won injunctive relief restoring it to the 2014 primary ballot, LPO qualified several candidates on February 5, 2014. However, ORP then targeted LPO's gubernatorial candidate, Charlie Earl, for removal. Without a gubernatorial

candidate, LPO could not re-qualify as a political party for future elections under Ohio's election test, which was 2% of the gubernatorial vote in 2014 and is now 3% of the presidential/gubernatorial vote. *See* S.B. 193, § 4, Addendum 2 at 64. Using an innocent agent (Gregory Felsoci), *see infra* at 8-22, ORP filed an administrative protest against Earl with the Secretary on February 21, 2014 claiming that Earl had violated Ohio's employer-statement rule found in O.R.C. § 3501.38(E)(1).[4] The protest proved successful. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014).

On March 7, 2014 (the day Earl was removed) LPO amended its federal Complaint to challenge Earl's removal. *See* Amended Complaint, RE 56. Felsoci immediately intervened. *See* Motion to Intervene, RE 58. Although its immediate effort failed, *see Libertarian Party of Ohio v. Husted*, 751 F.3d 403, LPO in the following months uncovered the truth behind Earl's removal. Far from resulting from a party member's neutral complaint about a commonly-enforced law, Earl's removal was carefully orchestrated by Terry Casey (Chair of Ohio's Personnel Board of Review who was appointed by Kasich), the Kasich Campaign and ORP.

[4] This rule requires that circulators disclose the identities of their "employers" on their part-petitions. Because he was an independent contractor, Hatchett failed to state that LPO was his employer on his part-petitions. The hearing officer, Professor Bradley Smith, before being convinced to change his mind by Damschroder and Christopher, *see infra* at 21-22, ruled that this employer-statement rule did not apply to independent contractors. *See* Documents, RE 227-1, PAGEID # 5497 ("only employees, and not independent contractors, are required to complete the employer disclosure form").

Officials in the Secretary's Office, meanwhile, provided assistance, including insuring that Felsoci's protest would be timely and convincing the hearing officer to change his mind about the outcome.

Casey was an unknown, "confidential" co-client of Felsoci throughout the protest proceedings. He was still an unknown, confidential co-client of Felsoci's for the first five months of these federal proceedings. While his presence has been constant throughout these proceedings, no one, including Felsoci, knew that Casey existed as the real-party-in-interest until LPO forced his disclosure. Casey hired Zeiger, Tigges & Little to protest Earl, helped locate Felsoci, orchestrated the plan with the Kasich Campaign and ORP, coordinated with the Secretary's Chief Elections Officer, and made sure ORP paid for it all. All of this was kept secret -- even from Felsoci. Only those involved with the conspiracy knew.

Judge Watson suspected early-on that ORP was behind Earl's removal, as ORP's Chair, Matt Borges, admitted to a news reporter when the protest was filed that "We're the ones who filed that complaint." *See* Supplemental Evidence, RE No. 68, PAGEID #1979-80. In his March 19, 2014 decision denying preliminary injunctive relief, Judge Watson described Felsoci as a "guileless dupe," Opinion and Order, RE 80, Doc. No. 80, 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. This Court agreed, stating that "Felsoci likely is the tool of the Republican Party." *Libertarian Party of Ohio*, 751 F.3d at 409.

During discovery and notwithstanding Casey's denials, LPO uncovered dozens of e-mails between Casey, the Kasich Campaign, and ORP confirming this fact. While the documentation is voluminous, the story is short. On February 14, 2014 (seven days before the protest was filed), Casey, the Kasich Campaign and ORP concocted a plan to protest Earl. *See infra* at 9-16. Casey hired the lawyers and coordinated the effort while the Kasich Campaign studied Earl's part-petitions for defects. *Id.* Earl's part-petitions, obtained from the Secretary by ORP, were delivered to Casey and the Kasich Campaign by ORP. *Id.* The Kasich Campaign located a protestor (Felsoci) and delivered him to Casey (and the Zeiger law firm). *Id.* ORP paid Zeiger. *Id.* Agents within the Secretary's Office insured that the hearing officer would rule against Earl. *See infra* at 16-22.

1. Documents Proving The Kasich Campaign's Involvement.

Notwithstanding Casey's and ORP's initial denials, documents uncovered over two years' worth of discovery leaves little doubt that this brief description is correct. Because this documentation additionally proves the purely political nature of the plan and adds to Matthew Damschroder's (the Secretary's Chief Elections

Officer) part -- two matters that are still contested -- the proof remains relevant and is briefly described here.

Matt Carle (Kasich Campaign Manager), Dave Luketic (Kasich Campaign's Political Director) and Jeff Polesovsky (Kasich Campaign's Deputy Manager) were e-mailed by Casey on February 14, 2014, "Just had a call back from John Zeiger. Will get together with him later this afternoon .... Will update later today ... Plus, what is next!!" Documents,[5] RE 335-3, PAGEID # 8438. These same individuals were e-mailed again on February 15, 2014 by Casey with detailed descriptions of "Legal Needs" flowing from "Attorney-Client Protected Notes." Casey instructed them to "Keep working on gaining potential Libertarian filers in each of these major counties. ... That will be the key as we get closer to our protest deadline." *Id*. at 8439.

On February 15, 2014, Polesovsky wrote to Luketic, with copies to Carle, Scott Blake (also a member of the Kasich Campaign), and Casey, "Dave, can we get copies of the petitions and the Form 14s over to Terry today? Scott - can you send around your findings on circulator statements/party ID of circulators? Then we can continue to work down the action item list." *Id*. at 8441.

On February 17, 2014, Casey wrote to Polesovsky, Luketic and Carle about his "two-hour plus meeting with these two attorneys this afternoon." *Id*. at 8442.

[5] All documents produced by Casey, Felsoci and the Secretary are described as "Documents."

Casey stated "we need to keep digging on Oscar [Hatchett]. He could be a key 'star' in this future production/show." *Id*. Casey added, "Jeff and I have discussed some 'creative' options for research with Oscar. Need to review more on Tuesday." *Id*.

On that same day Casey e-mailed Richard Lumpke -- with blind copies to one of Casey's lawyers (Mead) and Polesovsky -- that he (Casey) was "doing an high priority research project for the Governor's folks" and inquiring about a "527 group connected with" a Democratic Party law firm. Documents, RE 240-1, PAGEID # 6162. Later that same evening Casey e-mailed Polesovsky, Luketic and Carle -- with a blind copy to Mead -- that "Of the 39 petition parts filed up there, about half were done by our 'buddy', Oscar. The other half (except maybe one) was done by Sara Hart." *Id*. at 6164. Hatchett and Hart had collected most of Earl's signatures.

Casey followed the next morning with an additional e-mail to his lawyers and blind copies to Polesovsky, Luketic and Carle about Hatchett and Hart; he pointed out that "None of these petitions had anything filled out to reflect that they admitted being paid for this petition work." *Id*. at 6165. He followed with an e-mail to this same group and asked "When is good talk more this morning and/or get together today?" *Id*. at 6166.

Luketic responded to this group later that day with a "validity report" on all of Earl's 839 signatures. *Id*. at 6170. Casey immediately responded to this same

group, "Based what Dave just sent, if we can knock out those done by BOTH Oscar and Sara Hart, that would probably take them down, ..." *Id*. at 6175. Luketic responded minutes later, "Team, Our numbers may have been a little of [sic] (in a good way). We just went through and re-entered by county all Oscar (699) & Sara (174) petitions." *Id*. at 6178. An hour later, Luketic again e-mailed this same group, "Agree Terry. There is no way they are going to hit that number IF we could get rid of those circulators. Still awaiting the final part-petition copies from the SOS office." *Id*. at 6180.

Polesovsky replied to Casey on February 20, 2014, "Having Client, Working on Back-Up, Too!," and stated "just lost our client in Allen County. Looking for others by we might just have to roll with Cuyahoga." Documents, RE 335-3, PAGEID # 8502.

On February 19, 2014, the day before, Luketic had e-mailed Casey, Mead, Polesovsky and Zeiger (Casey's lawyer) that "We will work on all convictions as soon as possible." Documents, RE 240-1, PAGEID # 6182. (This was in reference to the their effort to uncover felony convictions that might disqualify Hatchett and Hart.) Luketic e-mailed Casey and his lawyers several times on February 19 and 20, 2014 about the validity of the signatures on Earl's part-petitions. *See id*. at 6187, 6190, 6192, 6198.

On February 19, 2014, Casey wrote to Polesovsky that "we now have a client from Cuyahoga County who is a Libertarian Party member and who is concerned about these types of issues. They are still working on a 'back-up' from Lima/Allen County. ... Matt Carle has been up in Akron today for the funeral of Lt. Gov. Mary Taylor's mother. ... Matt has been on the phone lining up those other needs for this process." Documents, RE 335-3, PAGEID # 8438.

Luketic on February 20, 2014 e-mailed to Casey "Hackett & Hart reports" from "Our Friends." *Id*. at 8451. This report contained criminal background information on Hatchett. *Id*. at 8453-58. On February 20, 2014, Luketic e-mailed to Casey "Gregory Felsoci Voting History" which identified Felsoci's party affiliation. *Id*. at 8459. On February 20, 2014, Luketic e-mailed Casey a "Lib. Petition Report," which was "Paid For By Kasich Taylor For Ohio," *id*. at 8450-60, and outlined in detail the signature collection efforts of Earl's circulators, including Hatchett and Hart. *Id*. at 8461-70.

On February 21, 2014, just four hours before the protest was filed, Polesovsky sent to Casey the name of an attorney, Chris Klym, at 11:21AM as a "Contact." *Id*. at 8472. Casey e-mailed to Klym at 12:39 PM that day Felsoci's name and telephone number. *See* Documents, RE 335-10, PAGEID # 8589. Klym obtained Felsoci's notarized signature no sooner than three hours before it had to be delivered 100+ miles away in Columbus, a two hour drive. They would be cutting

it close, but they had help from Matthew Damschroder, who instructed his staff to accept protests that would be filed after 4:00 PM that day. *See infra* at 19.

2. Documents Proving ORP's Involvement.

After denying any involvement with the Kasich Campaign or ORP at his August 2014 deposition, Casey admitted eight months later in his answer to a campaign finance complaint filed with the Ohio Election Commission that "[b]eginning in approximately mid-February 2014, ... [he] sought help from various individuals associated with the Franklin, Summit, Cuyahoga and Lucas County Republican Parties .... [and] also sought assistance in identifying an LPO member who would agree to initiate a protest of Mr. Earl's candidacy." Documents, RE 335-5, PAGEID # 8536. This admission was corroborated by numerous e-mails between Casey and Chris Schrimpf (ORP Communications Director), as well as Borges (ORP Chair), which are described below.

On February 19, 2014, Casey complained to Schrimpf that "Dems will be spinning big on the failure for this poll to account for the number of voters an Libertarian candidate will drain off." Documents, RE 335-3, PAGEID # 8447. On February 21, 2014, Casey reported to Schrimpf and Borges, as well as Carle, Polesovsky, Luketic (and others) that Hatchett had also collected signatures for Steve Linnabary, the LPO candidate for Attorney General. Documents, RE 335-12, PAGEID # 8683. Borges was copied again on a March 7, 2014 e-mail by Casey to

Schrimpf just after the Secretary announced the removal of Earl. Doc. Documents, RE 335-3, PAGEID # 8488.

Schrimpf responded to the Casey e-mail, copying Borges, and stating that he "aim[ed] to speak as little about this as possible and when I do it will be to say that it is important to follow the law." *Id.* at 8488. Borges responded, "Agree." *Id*. at 8491. In an effort at damage control over Borges's admission that ORP was behind Earl's protest, Schrimpf then on March 7, 2014 wrote to Borges, with a copy to Casey, "I did talk to Chrissie Thompson [the reporter] who was using Borges quote. Told her this is about whether or not people followed the law, not wild accusations that folks want to make." *Id*. at 8492.

Following the Secretary's decision to remove Earl, Casey on March 7, 2014 wrote to Carle, with copies to Borges, Schrimpf, Luketic and Polesovsky (as well as Governor Kasich's Press Secretary (Rob Nichols)), that Earl would "be filing tonight in Federal Court." *Id*. at 8494. Numerous e-mail exchanges between Casey, Schrimpf and Borges occurred while federal proceedings continued, *see, e.g*., Documents, RE 335-12, PAGEID # 8636, 8637, 8638, 8641, 8685, culminating with Casey's exchange of texts with Matt Carle and Matt Borges on May 1, 2014; "Big Sixth Circuit win this morning for GOP." *Id*. at 8675 (emphasis added). The two Matts responded "That's great news" and "Looks like Charlie Earl will have a lot of time to spend in the Garden this summer." *Id*.

If all of this were not enough, LPO in April of 2015 (as a result of the campaign finance complaint) uncovered $300,000 in payments from ORP to Zeiger on Casey's behalf for his protest of Earl. *See* Documents, RE 335-3, PAGEID # 8498-8502. This left little doubt as to ORP's involvement; it was (as Borges had stated back in March of 2014) behind it from the very beginning. It had if nothing else ratified Felsoci's and Casey's actions with payments to their lawyers.

Borges testified at his October 2015 deposition that "the Ohio Republican Party provides legal services to all of our candidates and campaigns," Testimony, RE 335-11, PAGEID # 8604-05, and that it is "standard practice" is to "pick up the bills of statewide candidates." *Id.* at 8607. Borges further testified that statewide candidates "are ... familiar with [this] practice[]." *Id.* Casey, the Kasich Campaign, ORP and Damschroder, *see infra* at 16-22, knew from the beginning that Casey's legal bills would be paid by ORP.

3. Documents Proving Damschroder's Involvement.

An additional piece in the puzzle to remove Earl was Matthew Damschroder, Secretary Husted's Chief Elections Officer. Documents establish that notwithstanding his denial, Damschroder (a long-time friend of Casey) and those in his Office were informed of Casey's plan days before the protest was filed,

shared its objective, and provided assistance that had never before been provided to anyone else.

On December 16, 2013, Damschroder was contacted by Luketic. *See* Documents, RE 227-1, PAGEID # 5524. Luketic questioned whether there were "any petitions gathering from the Charlie Earl (sic) the LIB candidate?" *Id*. Damschroder responded that he would "keep [his] ear to ground." *Id*.

The day after candidates for the 2014 primary filed their part-petitions (on February 5, 2014), Luketic texted Damschroder, "Any filing from Charlie Earl - libertarian running for Gov." *Id*. at 5592. Damschroder responded that Earl had filed. *Id*. Luketic then immediately texted to Damschroder that "ORP is sending a records request to you via email for all of them." *Id*. at 5591.

On or about February 17, 2014, Casey contacted Damschroder "about filing a protest" against Earl. Casey Testimony, RE 241-1, PAGEID # 6261. Casey and Damschroder had been "friends for a long time." Damschroder Testimony, RE 247, PAGEID # 6651. Late that same night Damschroder e-mailed Halle Pelger, Secretary Husted's Assistant Secretary, that he "got a call tonight that a protest is likely to come by Friday against Earl, probably from an unaffiliated voter (so our hearing officer or panel will also have to decide standing) and will be based on Form 14 stuff (alleging a circulator was compensated but no Form 14 was filed and the special box on the p-petitions was not completed)." Documents, RE 227-1,

PAGEID # 5476 (emphasis added). Damschroder later admitted that his source was likely Casey. Damschroder Testimony, RE 247, PAGEID # 6609.

On the morning of February 18, 2014, Schrimpf filed a request with the Secretary's Office for "validity reports" on Earl's part-petitions. Damschroder Testimony, RE 247, PAGEID # 6617-6618. On February 18, 2014, Luketic forwarded to Casey records that had been obtained by Schrimpf from the Secretary's Office. Documents, RE 335-3, PAGEID # 8444. These records were "all Form 14's filed for all Libertarian candidates for statewide office." *Id*. at 8445.

On February 18, 2014, Damschroder sent an e-mail (which was redacted) to Jack Christopher (Husted's Chief Legal Officer) about the "Protest," which had not yet been filed. Documents, RE 227-1, PAGEID # 5477. Christopher responded "Awesome." *Id.*

Damschroder denied during his August 2014 deposition knowing that Casey had been involved with the protest. Damschroder testified that although he had learned that a protest was going to be filed, he did not know who would file it and did not even know who the protest was going to be lodged against. Testimony, RE 227-1, PAGEID # 5278-79. Damschroder testified that he "did not recall" whether Casey had told him about the protest before it was filed. *Id*. at 5279, 5281. Only when confronted with his e-mail to Pelger did Damschroder admit that he knew on

February 17, 2014 that Earl was the target. *Id*. at 5282. Damschroder was not truthful. He knew who the target was and he knew Casey was involved.

On February 21, 2014, at 3:32 PM, just before the 4 PM statutory deadline, Damschroder e-mailed his staff that "[i]f any protests are filed, please let me know as soon as they come in." Documents, RE 227-1, PAGEID # 5478. Earlier that day, at 1:34 PM, just over two hours before the statutory deadline was to expire, Damschroder had instructed (via e-mail) his staff to accept Earl's anticipated protest "even if it is after 4 pm." *Id*. at 5479. Damschroder admitted that he had never done this before. Damschroder Testimony, RE 227-1, PAGEID # 5299.

Felsoci was not located until the day before the protest was filed. Felsoci signed his protest in Rocky River sometime after 12:39 PM on February 21, 2014, which was the precise time Chris Klym (who obtained Felsoci's signature) was given Felsoci's name by Casey. *See* Documents, RE 335-10, PAGEID # 8589. Damschroder by 1:34 PM that day -- the time he instructed his staff to accept any late protests -- knew that Felsoci had signed and the protest was on its way from northern Ohio. He therefore instructed his staff to accept it even if it were filed late. He was concerned enough that he checked to see whether the protest was received at 3:32 PM, just five minutes after it was filed.[6] *See* Documents, RE 241-

[6] Protests by Republicans against LPO candidates have become standard. On February 21, 2014 at 3:50 PM, Damschroder was texted by Avi Zaffini (campaign manager for Husted) that Doug Preisse (Chair of the Franklin County Republican

1, PAGEID # 6376. Damschroder had been in constant contact with Casey and his agents.

Casey asked Damschroder to investigate Hatchett. *See* Casey Testimony, RE 241-1, PAGEID # 6259-60. By Monday morning, February 24, 2014, Damschroder's Office did so. Brandi Seskes (Elections Counsel) on the morning of February 24, 2014 performed a criminal background check on Hatchett even though the formal protest said nothing about Hatchett being a criminal. Seskes Testimony, RE 221-1, PAGEID # 4822. Seskes could not remember ever doing this with any other participant in any other protest proceeding. *Id*. at 4821. She admitted she was looking for this information because if Hatchett were a felon, his circulation would be illegal and his efforts for naught. *Id*. at 4824.

Seskes reported to Jack Christopher (Husted's Chief Legal Counsel and Damschroder's attorney) on Monday, February 24, 2014, that "Mr. Hatchett pled guilty to 'indecent assault without consent of the other' and 'unlawful restraint with risk of serious injury' in Allegheny County, Pennsylvania in September 2001. Though the crimes sound serious to me, they are both misdemeanors under Pennsylvania law." Documents, RE 221-1, PAGEID # 4846. This was the only background information on any of the participants that Seskes could remember

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Party) and the "AG Campaign" were "coming over with a protest for a libertarian [Linnabary]." Documents, RE 227-1, PAGEID # 5525. Damschroder responded, "AG just filed. Time stamp 3:57." *Id*. (emphasis original).

looking for and the only background information she shared with Christopher or anyone else. Seskes Testimony, RE 221-1, PAGEID # 4823.

On March 4, 2014, during the administrative hearing, Christopher texted Damschroder (both of whom were present), "Zeiger just won't bend, will he." Documents, RE 227-1, PAGEID # 5538. Damschroder responded, "I like unbending." *Id.* Christopher then texted, "Not a bad idea to have Zeiger in court." *Id*. at 5539. Christopher followed minutes later with another text to Damschroder, "I hope nobody asks Zeiger who is paying them to do this!!" *Id*. at 5540. Damschroder responded, "It's a pretty penny I'm sure." *Id*. Casey testified during his deposition that before the protest was filed he told Damschroder that he (Casey) had hired the Zeiger law firm to protest Earl. Casey Testimony, RE 241-1, PAGEID #6267.

Later that day on March 4, 2014 Casey blind-copied Damschroder with an e-mail expressing concern over Borges' statement to the press. Documents, RE 335-3, PAGEID # 8479. Damschroder was copied again later that day when Casey discussed with Schrimpf, Polesovsky, and Luketic the "Borges Tie-in." *Id*. at 8482. Damschroder was kept fully aware of what was going on at all times with all the participants.

On March 6, 2014, the evening before the hearing officer's (Professor Bradley Smith) report was due, Christopher (using Damschroder's phone and office

with Damschroder present) phoned Smith and spoke to him for 33 minutes. *See* Damschroder Testimony, RE 227-1, PAGEID # 5336-37. Smith e-mailed Christopher three hours later that while Smith "knew this will anger and disappoint a bunch of people," Documents, RE 223-1, PAGEID # 5022, he was ruling in favor of Earl. Christopher at 3:30 AM on March 7, 2014 responded to Smith with his (Christopher's) explanation for why Smith had misinterpreted Ohio's employer-statement rule and why Felsoci should prevail. *Id.* at 5023. At 4:56 AM Smith asked Christopher to call him, *id*., and by 11:00 AM Smith's report had been rewritten to incorporate Christopher's analysis and rule for Felsoci. Compare Documents, RE 227-1, PAGEID # 5498 (ruling for Earl), with *id.* 5517 (ruling for Felsoci).

Damschroder received an additional dozen or more e-mails from Casey about the protest between March 10, 2014 (three days after Earl's removal) and May 6, 2014 (shortly after this Court rejected LPO's interlocutory appeal). *See infra* at 41. Damschroder never instructed Casey to stop.

4. LPO's Discovery Efforts.

Felsoci, for his part, remained ignorant of all of this. He was not told that Casey, ORP, and the Kasich Campaign were involved or that they were paying his lawyers. His lawyers, meanwhile, refused to allow LPO to question him or obtain documents from him. It took five months and two discovery orders, *see*

Libertarian Party of Ohio v. Husted, 302 F.R.D. 472, 475 (S.D. Ohio 2014) (directing Felsoci to sit for his deposition); *Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 at *4 (S.D. Ohio 2014) (directing Felsoci to produce invoices identifying who paid his lawyers), but by August 15, 2014 LPO finally uncovered part of the truth -- Casey hired Felsoci's lawyers.

Discovering the rest of the story took more effort. When deposed in August 2014, Felsoci still did not know who was paying his lawyers. At his deposition later that month, Casey testified that although he hired the lawyers, he would not pay them and did not know who would. Casey Testimony, RE 241-1, PAGEID # 6237 ("I haven't started contacting anybody;" "I haven't sat down and figured out a list."). Casey denied knowing that the Kasich Campaign and ORP were involved. *Id.* at 6367-69 ("Q: Did the leadership in the Ohio Republican Party know you were doing this? A: I'm not sure what they knew or didn't know;" "Q: Who else might have known you were doing this? ... A: I'm not sure who else would have known ...."). Only later, after LPO had uncovered dozens of e-mails proving that the Kasich Campaign had assisted Casey, did Casey admit he had sought the Kasich Campaign's assistance.

Casey's denial of knowing about ORP's involvement unraveled when LPO uncovered in April 2015 (through Earl's campaign finance charge) that ORP had paid $300,000 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 directed LPO to pursue this new evidence. *See* Order, RE 305. That very day Casey produced e-mails further establishing his connection with the Kasich Campaign. He also produced invoices establishing that his (Casey's) bill owed to the Zeiger firm approached $600,000.

LPO's discovery efforts continued during the summer of 2015 and again met stiff resistance. Still, by early October 2015, as result of yet additional court orders, *see, e.g.*, Order, RE 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 to the proof of ORP's involvement (which Casey had also denied at his deposition).

Ultimately, Magistrate Judge Kemp chose not to sanction Felsoci and Casey. Still, he chastised them:

> 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 Felsoci and Casey were upbraided for their obstructive discovery efforts. 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*, 2015 WL 5766518 at *3, and on October 17, 2014, Judge Watson admonished them for employing "tactics that resulted in delay," Opinion and Order, RE 260, PAGEID # 7102, as well as engaging in "harassing and obstructing" behavior during depositions. *Id*. at 7106.

* * *

On October 16, 2015, after LPO had supplemented the record with the evidence it uncovered, the District Court directed the parties to renew their cross-motions for summary judgment on LPO's selective enforcement claim against Felsoci, his principals and the Secretary. *See* Order, RE 337. LPO did so that same day. *See* Motion for Summary Judgment, RE 338. On May 20, 2016, the District Court awarded judgment to Felsoci and the Secretary on LPO's remaining selective enforcement claim. *See* Opinion and Order, RE 369.

SUMMARY OF ARGUMENT

1. ORP, acting together with the Kasich Campaign, Casey, and officials in the Secretary's Office, violated the Equal Protection Clause by selectively applying Ohio's "employer statement" rule to Earl. ORP's action was purely political in violation of the First and Fourteenth Amendments. Courts have uniformly recognized that the two major parties engage in state action when they regulate elections. ORP's conspiracy with a state actor (Casey), campaign of a state official (Kasich) for re-election, and agents in the Secretary's Office doubly demonstrates its state action.

2. Ohio's Chair of its Personnel Review Board, appointed by Governor Kasich, engaged in state action when he sabotaged LPO's primary. He represented to those he enlisted to help his plan that he was assisting "the Governor's folks." He leveraged his connection with Damschroder, Ohio's Chief Elections Officer, to achieve the desired end.

3. Ohio's Chief Elections Officer knew about and actively assisted Casey's plan. He was informed days before by Casey that the protest of Earl would be filed, knew that Casey was the principal, knew ORP was behind the protest and was paying the lawyers, knew that the Kasich Campaign was also behind the protest, and yet still offered active, affirmative assistance. He, with his lawyer, convinced the hearing officer to change his mind to rule in favor of Felsoci. The

District Court applied an incorrect legal standard, moreover, to his actions, inquiring not whether he conspired, but whether he controlled the decision making process.

4. Senate Bill 193 violates Equal Protection. It affords only to established political parties the sole mechanism for registering members. Newly recognized parties have no members and no way to enroll them because they are excluded from primaries. Party membership in Ohio has not only political, but also legal, advantages. Senate Bill 193's disparate award of party membership disadvantages LPO in violation of the Equal Protection Clause.

5. Ohio, by name, intervened in this action and actively defended S.B. 193. Ohio's litigation conduct constitutes a waiver of Eleventh Amendment immunity for all claims against S.B. 193. The District Court erred by dismissing LPO's state-law claim.

ARGUMENT

"Ohio is among the most restrictive, if not the most restrictive, states in granting minor parties access to the ballot." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006). *See also Williams v. Rhodes*, 393 U.S. 23 (1968) (striking down Ohio law); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (same). Ohio's efforts to stifle competition continue to this day. Senate Bill 193 was passed for just that purpose. Earl was removed for this very reason.

I. Selective Enforcement for Political Purposes Violates the First and Fourteenth Amendments.

Judge Watson correctly ruled that LPO's selective enforcement claim against Felsoci and the Secretary was proper: LPO's "proffered evidence may support a plausible assertion that state actors participated in selective enforcement of Ohio Revised Code § 3501.38(E)(1) [Ohio's employer-statement rule] to disqualify Plaintiffs' petitions on the basis of political affiliation and speech." Opinion and Order, RE 187, PAGEID # 3794. "Plaintiffs are positioned to plausibly plead direct evidence of conduct on the part of state actors motivated by Plaintiffs' political affiliation and speech, akin to direct evidence of discrimination in an employment case." *Id.*; *see also* Opinion and Order, RE 260, PAGEID # 7088 (stating that direct evidence will suffice).

Neither Felsoci nor the Secretary cross-appealed the District Court's legal ruling. It is the law of this case. Judge Watson, moreover, was correct. Whether a criminal law, *see, e.g.*, *Wayte v. United States*, 470 U.S. 594, 614 (1985) (holding that government cannot enforce an 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"),[7] or civil

[7] The Supreme Court in *Hartman v. Moore*, 547 U.S. 250, 254 (2006), ruled that to recover money damages for selective prosecution in violation of the First Amendment a plaintiff must demonstrate that it lacked probable cause. LPO does not seek money damages in the present case and does not challenge a prosecution.

measures are at stake, state actors cannot selectively enforce them based on a person's or party's protected First Amendment activity. *See Police Department of City of Chicago v. 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). As with race, religion and gender, proof of impermissible animus is enough.

This principle has been applied to elections and politics. *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). Simply put, state actors cannot selectively apply laws in an effort to "dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 525-26 (2001).

There is no question that Casey, the Kasich Campaign and ORP acted with political animus when they targeted Earl. They did not protest other party's candidates. The documents quoted above describe their plan to remove only a Libertarian, Earl. Even taking them at their word, both Casey and Borges admitted political reasons for their actions. Casey hoped to punish Democrats by removing

Earl, whom he mistakenly believed the Democratic Party had wrongly assisted.[8] *See* Casey Testimony, RE 241-1, PAGEID # 6255 (Casey challenged Earl because of "what the Ohio Democratic Party and their top agents were doing" and "[b]ecause Mr. Earl seemed to be the beneficiary of what they were doing"). Borges parroted this charge, testifying that ORP paid Casey's lawyers $300,000 to reward Casey for punishing Democrats. *See* Borges Testimony, RE 335-11, PAGEID # 8612 ("anytime the democrats look bad in Ohio, the republicans look good ... [and] [w]e caught you guys and the democrats conspiring"). Neither even attempted a neutral explanation. If this were not enough, at what they thought was the conclusion of this case on May 1, 2014, Casey, Carle and Borges joined in proclaiming "Big Sixth Circuit win this morning for GOP." Documents, RE 335-12, PAGEID # 8675 (emphasis added).

The Supreme Court reiterated this Term that "[t]he basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016). One therefore cannot be penalized for "support[ing] a

[8] The hearing officer determined that the 55 signatures collected for Earl by un affiliated voters who Casey erroneously claimed were Democrats were all properly collected. *See* Documents, RE 227-1, PAGEID # 5505-06. In short, contrary to Casey's rhetoric, these unaffiliated voters did not do much to assist Earl, were not Democrats, and did nothing wrong. Neither did LPO. In the event, Casey's mistake is irrelevant for First Amendment purposes. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016). His reason is what is relevant. *Id.*

particular political candidate." *Id.* One cannot be punished because his presence on the ballot might hurt a favored political party. No matter how Casey and Borges try to spin the justification for their plan, the reality is that they -- with the Kasich Campaign's assistance -- targeted Earl because they believed his presence on the ballot helped Democrats and hurt Kasich's re-election effort. They hoped to manipulate the electoral outcome by removing Earl. Had the Secretary himself done this, he clearly would have violated the First and Fourteenth Amendments. The question here is whether someone in the Secretary's Office (discussed *infra* at 37), Casey, the Kasich Campaign or ORP, engaged in state action. If so, selective enforcement is established.

The District Court concluded that neither Casey, the Kasich Campaign, nor ORP were engaged in state action. *See* Opinion and Order, RE 260, PAGEID # 7093-95; Opinion and Order, RE 369, PAGEID # 8940-41. "[E]ven if it was on behalf of the ORP," Judge Watson ruled, ORP was not a state actor. *Id*. at 8941. Casey, the District Court concluded, was acting as a "private citizen" when he coordinated Earl's protest. *Id*. at 8942. The standard of review for whether ORP, the Kasich Campaign and/or Casey engaged in state action is de novo. *See Deal v. Hamilton County Board of Education*, 392 F.3d 840, 850 (6th Cir. 2004).

A. ORP and the Kasich Campaign Engaged in State Action.

Felsoci was not himself a state actor. Judge Watson referred to him as a "guileless dupe," an innocent agent unwittingly employed by others. His innocence, however, does not absolve his principals of responsibility. If any one of them is a state actor, the entire enterprise is considered state action. *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").

Further, Casey, the Kasich Campaign and ORP are responsible for Felsoci's actions. That he, or even the Secretary himself, was innocent does not insulate their actions. The Supreme Court recognized in *Staub v. Proctor Hospital*, 562 U.S. 411, 419 (2011), that "it is axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." Casey's, ORP's and the Kasich Campaign's use of Felsoci is the proximate cause of Earl's removal. They are all responsible.

Courts across the country have ruled that the two major parties' state affiliates (and their agents, like the Kasich Campaign) are governmental actors when they regulate the electoral process. *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) (plurality), ruled that an agent of the Texas Democratic Party -- the Jaybird Democratic Association -- was also a state actor when it excluded African-Americans from its primary. The two cases make plain that state action takes place when a major party uses a state-created mechanism to regulate primaries.

The Court endorsed this conclusion in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality). Borrowing from *Smith* and Terry, it held that section 5 of the Voting Rights Act applies to major party conventions as well as primaries. 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 Ohio here) "gives a host of special privileges to the major parties ...." *Id*. at 224 n.36. "It is perfectly natural, therefore, to hold that [the state] 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 the major parties' "internal operation[s]," *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. That is, the Party -- like ORP here -- attempted to do what the State clearly could not.

Smith, *Terry* and *Morse* reach beyond primaries and extend to all kinds of constitutional violations. The Fifth Circuit, for example, applied Article I's Qualification Clause to the Texas Republican Party in order to thwart its 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).

Courts have likewise found that a candidate's removal or exclusion from a ballot by a major party constitutes state action for purposes of the federal Due

Process Clause. 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 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 primaryelections 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).

Ohio cannot hide behind its claim that its protest mechanism facilitates private conduct. The Third Circuit in *Constitution Party of Pennsylvania v. Aichele*, 757 F. 3d 347, 367 (3d Cir. 2014), rejected this argument:

> The Commonwealth cannot hide behind the behavior of third parties when its officials are responsible for administering the election code that empowers those third parties to have the pernicious influence alleged in the Complaint. ... Under this specific statutory scheme, it is not the actions of other actors alone that cause the injury. Those third parties could take no action without the mechanisms by which the Commonwealth's officials oversee the election code provisions at issue here.

Judge Watson's reliance on *Nader v. McAuliffe*, 593 F. Supp.2d 95 (D.D.C. 2009), *see* Opinion and Order, RE 260, PAGEID # 7094-95, fails for this same reason. Putting aside the fact that the Court of Appeals did not even embrace the District Court's logic -- affirming instead on the basis of an affirmative defense (the statute of limitations), *see Nader v. McAuliffe*, 2009 WL 4250615 *1 (D.C. Cir. 2009) -- *Nader*'s rationale was refuted by *Aichele*.

In terms of America's democratic ideal, ORP's action in sabotaging LPO's primary is more objectionable than its having done the same to one of its own. Nothing is served by excusing its espionage. The "operative test" is "whether a political party exercises power over the electoral process." *Morse*, 517 U.S. at 218 (Stevens, J., plurality opinion) (emphasis added). ORP did not exercise less "power over the electoral process" by secretly destroying another party as opposed to transparently disqualifying its own candidate. Both are state action.

Judge Watson also relied on *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), to support his conclusion. *See* Opinion and Order, RE 260, PAGEID # 7094. His reliance on *Banchy* is misplaced. *Banchy* did not involve 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, as Justice Breyer later observed, that matters of "internal party structure" are themselves protected by the First Amendment. *Banchy* is a far cry from the situation presented here.

B. Casey Engaged in State Action.

The District Court concluded that Casey was not engaged in state action. Opinion and Order, RE 369, PAGEID # 8942. This legal conclusion is reviewed de novo. *See Deal*, 392 F.3d at 850.

Casey was a state official at all relevant times during Earl's protest. Not only did he chair Ohio's Personnel Board of Review, he exercised authority over "classified state service" employees in the Secretary's Office. Casey's position 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).

Assessing whether a governmental official is engaged in state action when pursuing ostensibly "private" matters requires assessing "the entire pattern ... [and] ongoing series of events." *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1304 (11th Cir. 2001). Obviously, Casey's job description did not include sabotaging primaries. But his appointment by Kasich to Chair Ohio's Personnel Board of Review carried a large measure of cachet with ORP, the Kasich Campaign, Damschroder, and others. Casey, after all, was able to represent that he was doing a job "for the Governor's folks." His appointed position provided him with an "aura of official authority and power." He was able to do what ordinary citizens cannot; coordinate a major-party challenge to a minor-party candidate. His abusive act should not be rewarded just because it was an abuse of power.

C. Damschroder's Office Joined the Conspiracy.

Judge Watson concluded that Damschroder's many communications with Casey and others "have little, if any significance ... in the absence of evidence that they actually influenced or controlled the *decision making process* in the subject protests." Opinion and Order, RE 260, PAGEID #7091(emphasis original). This legal conclusion is subject to de novo review. *See Deal*, 392 F.3d at 850.

Judge Watson erred. This Court has applied the basic tort principle recognized in *Proctor Hospital*, 562 U.S. at 419 ("it is axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm"), to differing federal civil rights challenges, including those arising under § 1983. *See, e.g.*, *Chattam v. Toho Tenax America*, 686 F.3d 339, 351 (6th Cir. 2012); *Voltz v. Erie County*, 617 Fed. Appx. 417, 423 (6th Cir. 2015). The innocence of a final decision maker does not insulate agents (like ORP here) with discriminatory animus from responsibility.

Selective enforcement theory dovetails with this principle announced in *Staub*. Selective enforcement presumes the application of an otherwise valid law. The question is whether an enforcement officer was unlawfully motivated to enforce that law. *See Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 604 (2008) ("Of course, an allegation that speeding tickets are given out on the basis of

race or sex would state an equal protection claim"). This principle has been frequently applied to First Amendment activities. *See, e.g.*, *McGuire v. Reilly*, 386 F.3d 45, 60-61 (1st Cir. 2004) (selective application of ordinance to protestors violates Equal Protection); *Hoye v. City of Oakland*, 653 F.3d 835, 854-55 (9th Cir. 2011) (same). Whether an arresting officer with discriminatory animus has "control" over or can "influence" the judicial system is irrelevant. The arresting officer's animus invalidates the arrest.

The proper question is whether Damschroder joined the conspiracy. This Court in *Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir. 1985), identified what is needed to establish a civil conspiracy:

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary .... Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

When private persons conspire with a state actor, meanwhile, the entire conspiracy becomes state action. *See Wilkerson*, 545 Fed. Appx. at 421.

Judge Watson also erred in concluding that Damschroder was not part of Casey's conspiracy. *See* Opinion and Order, RE 369, PAGEID # 8943; Opinion and Order, RE 260, PAGEID # 7080-83. His conclusion was likely infected by his ruling that only Damschroder's actions influencing or controlling the Secretary's

decision were relevant. But even if not, his conclusion still constitutes clear error. *See Lion Uniform, Inc. v. National Labor Relations Board*, 905 F.2d 120, 123 (6th Cir. 1990). Damschroder and those in his Office were deeply involved in seeing that Earl was removed.[9]

As described above, Damschroder knew there was a "single plan" to protest Earl. He knew Casey was behind the protest at the time it was filed, Zeiger was Casey's lawyer, Zeiger was being paid a "pretty penny," and that the Kasich Campaign and ORP were involved. He shared the general conspiratorial objective, as evidenced by his cheering with Christopher for Zeiger at the the administrative hearing. His instruction to his staff to accept the protest even if filed late constitutes an overt act, as was his investigation of Hatchett. His and Christopher's successful effort to have the hearing officer (Smith) change his mind is another. Damschroder was part of the conspiracy.

[9] Contrary to Judge Watson's conclusion that LPO "rel[ied] on two e-mails" in its supplemental documentation filed on October 12, 2015, Opinion and Order, RE 369, PAGEID # 8942, LPO presented a dozen or more supplemental e-mails establishing communications about the protest between Casey, Damschroder, Schrimpf, and Borges from March 10, 2014 through May 6, 2014. *See* Memorandum in Support of Motion to Supplement, RE 335-1, PAGEID # 8324-27 (summarizing e-mails). These were in addition to the many documents LPO had already uncovered and presented to the District Court. *See supra* at 16-22 (describing documents).

II. Senate Bill 193 Violates the Equal Protection Clause.

LPO's challenge to S.B.193 is that although Ohio may deny minor parties primaries, it cannot deny them the only mechanism available for officially registering members. Consequently, even assuming that S.B. 193 otherwise satisfies the First Amendment, it still violates Equal Protection by placing newly recognized parties at a political disadvantage. Judge Watson's conclusion to the contrary, Opinion and Order, RE 336, PAGEID # 8698-8700, is reviewed de novo. *See Deal*, 392 F.3d 840 at 850.

Ohio officially registers voters' political affiliations through primaries. *See*, *e.g.*, O.R.C. § 3513.05; JON HUSTED, OHIO SECRETARY OF STATE, FREQUENTLY ASKED QUESTIONS: GENERAL VOTING & VOTER REGISTRATION (2015)[10] ("you declare your political party affiliation by requesting the ballot of a political party in a partisan primary election."). No alternative mechanism exists. S.B. 193 alters Ohio law by denying to newly qualified political parties this sole mechanism for registering members. And without members, these parties are placed at a distinct disadvantage.

Official Party membership, of course, carries many practical benefits. Official lists, created and provided by the state, are "invaluable." *See, e.g.*, *Baer v. Meyer*, 577 F. Supp.2d 838, 843 (D. Colo. 1984) ("lists are invaluable in

[10] http://www.sos.state.oh.us/sos/elections/Voters/FAQ/genFAQs.aspx#declare (last visited June 19, 2016).

organizing campaigns, enlisting party workers and raising funds"). They not only may be sold, *see* O.R.C. § 3517.19 (allowing political parties in Ohio to sell their membership lists), they provide the building blocks for party infrastructure.

In Ohio, party membership has important legal ramifications, too. Official party membership restricts associational rights. For example, S.B. 193 (amending O.R.C. § 3517.012) imposes party-membership requirements on those who sign newly recognized parties' candidates' nominating petitions. *See also* O.R.C. § 3513.05. Those who voted in another party's primary within the last two years cannot sign. Ohio law also prohibits electors who vote in one party's primary from freely running as independents or switching to run as another party's candidates. *See Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006). Without a primary, a newly recognized party does not enjoy these 'closed party' benefits available to parties with official members.

The disadvantages do not end there. Members do more than just sign nominating petitions and run as candidates. Members help parties perform core political functions. Members recruit more members. They develop parties. They vote. They perform as poll workers. They protest candidates within their parties. They contribute. They do the things this Court has identified as core political functions. *See Blackwell*, 462 F.3d at 587 (stating 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). Official party membership and the lists it creates fuel Ohio politics.

Anderson v. Celebreeze, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), establish the modern "sliding scale" framework used by this Court to assess the constitutionality of ballot access laws. As described by this Court in *Ohio Council 8 American Federation of State, County & Municipal Employees, AFL-CIO v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016):

> If a state imposes "severe restrictions" on constitutional rights, then the state law must pass strict scrutiny to survive, meaning that it must be "narrowly drawn to advance a state interest of compelling importance." If, however, the regulations are minimally burdensome and nondiscriminatory, a less-searching examination closer to rational basis applies, and "the State's important regulatory interests are generally sufficient to justify the restrictions." Further, if the regulation falls somewhere in between the two extremes, "the burden on the plaintiffs [is weighed] against the state's asserted interest and chosen means of pursuing it."

(Citations omitted).

LPO and the ACLU separately argued that S.B. 193 violated Equal Protection by denying to newly recognized parties Ohio's sole mechanism for registering members. In rejecting the ACLU's challenge on March 16, 2015, Judge Watson concluded that this burden was not severe and warranted only rational basis review. *See* Opinion and Order, RE 285, PAGEID # 7500-19. He applied this

same rationale to reject LPO's challenge to S.B. 193 on October 14, 2015. *See* Opinion and Order, RE 336, PAGEID # 8697.[11]

The District Court erred in two ways. First, it erred in concluding that S.B. 193's discriminatory treatment of political parties in terms of membership is not a severe burden. Second, it erred in concluding that S.B. 193's discriminatory treatment was so minimally burdensome that it warranted only rational basis review. At bare minimum, S.B. 193 is "somewhere in between the two extremes" and warrants the balancing approach prescribed by this Court in *Ohio Council 8*, 814 F.3d at 335.

The District Court's erred by assessing S.B. 193's denial of membership in isolation. The constitutional problem is not that newly recognized parties re denied members; it is that they are denied members while the established parties are awarded members. Disparate treatment like this "exacerbates" burdens that might otherwise not prove severe. In *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (en banc), for

[11] Judge Watson used his prior rejection of the ACLU's challenge to S.B. 193, to criticize LPO for not distinguishing its challenge. Opinion and Order, RE 336, PAGEID # 8698. LPO, however, filed its motion for summary judgment five months before Judge Watson rejected the ACLU's challenge. Moreover, because LPO's Equal Protection challenge to S.B. 193 mirrored the ACLU's, it was not "as-applied," as Judge Watson erroneously stated. *See id*. at 8698. LPO could not have known that it was expected to demonstrate that S.B. 193 uniquely burdened it more than the parties represented by the ACLU. *See* Third Amended Complaint, RE 188, PAGEID # 3842-43; 3849.

example, the Third Circuit ruled that although Pennsylvania's anti-fusion law did not itself violate the First Amendment, its denying fusion to minor parties violated Equal Protection:

> because of the discriminatory aspects of the Pennsylvania statutes, the burdens imposed by them on voters and on political parties are more onerous than those involved in *Timmons* [*v. Twin Cities Area New Party*, 520 U.S. 551 (1997).] In *Timmons*, the asserted burdens existed in the context of an across-the-board ban on fusion. In the instant case, the burden is exacerbated because Pennsylvania has allowed the major parties to cross-nominate but has disallowed minor parties from doing the same.

Id. at 314-15 (citation omitted). *See also Green Party of Pennsylvania v. Aichele*, 89 F. Supp.3d 723, 749 (E.D. Pa. 2015).

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 precise kind of discriminatory treatment now practiced by Ohio. Indeed, no other state apparently allows only established political parties the privilege of 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. 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 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 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 distinguished *Land* as involving "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 ...." Opinion and Order, RE 336, PAGEID # 8699. This distinction should make no difference. The constitutional point in *Land* was that minor parties cannot be treated differently in terms of party membership lists: "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.

Judge Watson further distinguished *Land* on the ground that it "specifically found the issue of a minor party's access to the ballot was not implicated ...." Opinion and Order, RE 336, PAGEID # 8699-8700. Ballot access was not implicated in *Land*, however, only because the plaintiffs there did not seek it. Michigan's ballot access machinery was raised in defense by the state; Michigan argued that because minor parties could be treated differently in terms of the mechanics of ballot access, their memberships could also be treated differently. The Court disagreed:

> 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 (emphasis added).

The *Land* Court's reasoning applies equally here. Even though Ohio may use different procedures for nominating candidates (a point LPO has never challenged), legislating membership advantages for established parties places a severe burden in the path of new parties.

Judge Watson's conclusion that S.B. 193's denial of official party membership is not severe because newly recognized parties can associate with

non-official members in other ways, *see* Opinion and Order, RE 285, PAGEID # 7500-02, is therefore beside the point. So can the major political parties. They can do all of what Judge Watson describes, plus enjoy the added benefit of official membership. Senate Bill 193 provides no similar mechanism for registering members to newly recognized parties. Its burden is severe.

Even assuming that it is not, it is plainly more than minimally burdensome. Rational basis review is therefore not appropriate. The District Court should have applied this Court's balancing approach and forced Ohio to identify its "important" interests. Burdens that are not "severe," after all, have been invalidated under this approach. *See, e.g., Block v. Mollis*, 618 F. Supp.2d 142, 151 (D.R.I. 2009) (holding that Rhode Island's "early-start" date for signature collection was unconstitutional even if not "severe"); *Guare v. State of New Hampshire*, 117 A.3d 731, 738 (N.H. 2015) (sustaining challenge to voter registration forms "even if we assume ... that the burden in this case is not severe"). Ohio has offered no actual and "important" interests to justify its disparate treatment. Nor can it. S.B. 193 was passed as a partisan measure to assist Republican candidates. Nothing is served by providing only established parties official memberships. S.B. 193 cannot pass the balancing test required by this Court in *Ohio Council 8*, 814 F.3d at 335.

III. The District Court Erroneously Dismissed LPO's State-Law Challenge.

This case originated on September 25, 2013, following Ohio's changing its law to require that circulators of nominating petitions be Ohio residents. *See* Complaint, RE 1. On October 3, 2013, Ohio (by name) intervened to defend this change. *See* Motion to Intervene, RE 5.

On November 8, 2013, two days after Ohio passed S.B. 193, LPO amended its Complaint to add its challenge S.B. 193. *See* First Amended Complaint, RE 16. Because this Court in *Blackwell*, 462 F.3d at 582, stated that Ohio's "Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections," and because Ohio had intervened, LPO joined Ohio and added a challenge to S.B. 193 under the state constitution. LPO then on November 10, 2013 sought emergency injunctive relief against the Secretary and Ohio under both Constitutions. *See* Motion for Preliminary Injunction, RE 17, PAGEID # 131-39.

Neither Ohio nor the Secretary objected to LPO's amended Complaint. They both defended S.B. 193 under the federal Constitution. *See* Ohio's Answer, RE 21, PAGEID # 219 ("Ohio admits that this Court has jurisdiction over Plaintiffs' federal claims").[12] *See also* Secretary's Response, RE 31, PAGEID # 296-99;

[12] Ohio's answers to the Second and Third Amended Complaints likewise defended S.B. 193's constitutionality under the federal Constitution while attempting to

Ohio's Response, RE 32, PAGEID # 307-15. While both defended S.B. 193 under the federal Constitution, they then both attempted to invoke the Eleventh Amendment against LPO's state-law challenge. Secretary's Response, *supra*, at 299-300; Ohio's Response, *supra*, at 303-06.[13]

The District Court sided with Ohio and dismissed LPO's state-law claim. *See* Opinion and Order, RE 336. It erred twice: First, it erroneously ruled that "Plaintiffs' reliance on *Lapides* [*v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002),] is misplaced." Opinion and Order, RE 336, PAGEID # 8703. Second, it incorrectly concluded LPO was required to show that Ohio "unequivocally expressed" its consent to suit. *Id*. Both conclusions are reviewed de novo. *See Deal*, 392 F.3d at 850.

A. *Lapides* Applies to Intervention as Well as Removal.

LPO's federal challenge to S.B. 193 is proper against the Secretary because of *Ex parte Young*, 209 U.S. 123 (1908), which creates an exception to the Eleventh Amendment for federal claims seeking prospective relief against state officers sued in their "official capacities." *Ex parte Young*, of course, does not

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invoke the Eleventh Amendment as a shield to state law. *See* Answers, RE 99 & RE 232.

[13] Following Judge Watson's January 7, 2014 injunction barring enforcement of S.B. 193, *see* Opinion and Order, RE 47, PAGEID # 837-38, Ohio and the Secretary both appealed. *See* Notice of Appeal, RE 50. Their appeal was unsuccessful.

authorize suits against state officials seeking prospective relief under state law. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984). LPO thus conceded below that it could not have forced Ohio to join the suit and defend LPO's state-law claim.

Ohio, however, voluntarily intervened in this action to defend its new circulator law, O.R.C. § 3503.06. After voluntarily intervening it then chose to voluntarily defend S.B. 193. This litigation conduct, a combination of its voluntary intervention and active defense of S.B. 193, waives Ohio's Eleventh Amendment immunity. *See Ku v. State of Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003) (holding that Tennessee's defense waived Eleventh Amendment).

Lapides establishes that a State's voluntarily invoking the jurisdiction of a federal court waives its Eleventh Amendment immunity. Just as importantly, *Lapides* holds that the State cannot have it both ways; once it voluntarily invokes the jurisdiction of the federal court it waives its immunity from suit under both federal and state law**.**

Lapides expressly rejected the District Court's conclusion to the contrary. The Supreme Court ruled that a State may not voluntarily invoke federal jurisdiction, argue federal law, and retain Eleventh Amendment immunity over state-law claims. The waiver of immunity from federal claims through litigation conduct necessarily carries with it a waiver for state-law claims.

In *Lapides*, Georgia was sued in state court.[14] It removed the action to federal court and attempted to assert Eleventh Amendment immunity relative to the plaintiff's state-law claims. *Id.* at 616. This litigation tactic was rejected; Georgia's voluntary invocation of federal jurisdiction, the Supreme Court ruled, waived its Eleventh Amendment immunity completely:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.

Id. at 619.

The Court explained that "[t]o adopt the State's Eleventh Amendment position would permit States to *achieve unfair tactical advantages*, if not in this case, in others." *Id.* at 621 (emphasis added, citations omitted). *See also People of Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914) ("[T]he immunity of sovereignty from suit ... cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will"). A State that voluntarily invokes

[14] Georgia had waived its immunity from suit in its own courts. Ohio law authorizes declaratory and injunctive actions against Ohio -- both those against it by name and through its agencies (including the Secretary of State) -- in Ohio's Courts of Common Pleas. *See* O.R.C. § 2743.03(A); *Mega Outdoor, L.L.C., v. Dayton*, 878 N.E.2d 683, 692 (Ohio App. 2007) ("Sovereign immunity applies to money damages, not to claims for equitable relief, such as injunctive relief."); *Racing Guild of Ohio, Local 304 v. State Racing Commission*, 503 N.E.2d 1025, 1028 (Ohio 1986).

federal jurisdiction cannot have it both ways and thereby make use of "unfair tactical advantages." Waiver through litigation conduct extends to challenges under both federal and state law. *See Stroud v. McIntosh*, 722 F.3d 1294, 1300 (11th Cir. 2013) ("the source of a plaintiff's claim against a state (state law or federal law) is irrelevant to whether a state waives its immunity against that claim by removing to federal court.").

The District Court distinguished *Lapides* as applying to removals. Opinion and Order, RE 336, PAGEID # 8703. It erred. *Lapides* itself relied on *Clark v. Barnard*, 108 U.S. 436 (1883), where Rhode Island had intervened in federal litigation: "[T]he Court has made clear in general that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Lapides*, 535 U.S. at 619 (emphasis in original); *see also Ramos*, 232 U.S. at 631-32; *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906).

In *Clark*, Rhode Island intervened to claim an interest in a fund that formed the *res* of the litigation. It then attempted to defend itself from the claims of other suitors by asserting the Eleventh Amendment. The Supreme Court rejected this unfair tactical advantage: "Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to

the litigation to the full extent required for its complete determination." *Clark*, 108 U.S. at 448 (emphasis added).

Contrary to the District Court's conclusion, courts have uniformly recognized that the Supreme Court's ruling in *Lapides* is not limited to removal. In *Board of Regents of Wisconsin v. Phoenix International Software, Inc*., 653 F.3d 448, 461 (7th Cir. 2011), for instance, it was argued that "*Lapides* turned on the fact that the case reached the federal court through removal." The Court responded: "We think not." *Id*. "When a state chooses to intervene in a federal case, it waives its immunity for purposes of those proceedings." *Id*. at 463.

In *Carty v. State Office of Risk Management*, 733 F.3d 550, 554 (5th Cir. 2013), where the State had intervened in a federal action and then attempted to assert Eleventh Amendment immunity, the Court stated that the litigation conduct principle recognized in *Lapides* "finds waiver [of immunity from suit] through invocation of federal court jurisdiction by an attorney authorized to represent the state in the pertinent litigation." "For over a century," the Court stated, "this principle has been applied to cases like the present one, in which a state intervenes in a case asserting a claim to a fund." *Id*.

In *Biomedical Patent Management Corp. v. California, Dept. of Health Services*, 505 F.3d 1328, 1333 (Fed. Cir. 2007), to add another example, the Court stated that "it is clear that, by intervening and asserting claims against BPMC in

the 1997 lawsuit, DHS voluntarily invoked the district court's jurisdiction and, thus, waived its sovereign immunity for purposes of that lawsuit." *See also Reeder v. Carroll*, 2010 WL 797136 *2 (N.D. Iowa 2010) ("A state may also waive its Eleventh Amendment immunity when it intervenes in a federal lawsuit."); *Ameripride Services, Inc. v. Valley Industrial Service*, 2008 WL 5068672 at *6 (E.D. Cal. 2008) ("*Lapides* surveyed earlier Supreme Court cases finding waiver of sovereign immunity by voluntary appearance in federal court as an intervenor"); *Galassini v. Town of Fountain Hills*, 2013 WL 5445483 at *28 -*29 (D. Az. 2013) (holding that state's voluntary intervention waived its Eleventh Amendment immunity).

B. The District Court Applied an Incorrect Standard.

Because he erroneously strayed from *Lapides*, Judge Watson applied an incorrect analysis to the problem of waiver. Relying on cases that did not involve a state's litigation conduct, he stated that "the test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." Opinion and Order, RE 336, PAGEID # 8702 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676 (1999)). Waiver, Judge Watson ruled, must be "unequivocally expressed." *Id*. at 8702 (quoting *VIBO Corp., Inc., v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012).

Neither *College Savings Bank* nor *VIBO* involved litigation conduct. The plaintiffs in *VIBO* argued that the State had consented to suit through a master settlement agreement entered into with tobacco communities. The plaintiffs in *College Savings Bank* argued alternatively that Congress abrogated state immunity and that the State had consented to suit by merely participating in commerce.

A different standard applies when a State's litigation conduct is at issue. With litigation conduct, the question is not whether a State expressly consented to suit or somehow made its consent "unequivocally" clear. The question is whether that State freely and voluntarily invoked the jurisdiction of the federal court. If its express consent were required under these circumstances, after all, *Lapides* would have come differently. Georgia expressly reserved its Eleventh Amendment immunity to state-law claims, just as Ohio has done here.

Courts have recognized the differing standards for waiver through litigation conduct and the consent analysis stated in cases like *College Savings Bank*. The former is a function of a state's voluntarily invoking federal judicial involvement; the latter focuses on the intent of the state. In *Skelton v. Henry*, 390 F.3d 614, 618 (8th Cir. 2004), for example, the court stated: "We focus on whether the state's action in litigation clearly invokes the jurisdiction of the federal court, not on the intention of the state to waive immunity." It explained that "[a] state may waive its immunity from suit in federal court by voluntarily submitting its rights for judicial

determination. Waiver in litigation prevents states from selectively invoking immunity to achieve litigation advantages." *Id. See also Beckham v. National Railroad Passenger Corp*., 569 F. Supp.2d 542, 552 (D. Md. 2008) ("Unlike in a case of waiver by statute, waiver by litigation conduct does not require a showing of clear intent").

Although not relied upon by the District Court, Ohio argued below that it remained immune because its intervention preceded LPO's amended Complaint challenging S.B. 193. This argument may have had some appeal had Ohio not chosen after LPO amended its Complaint to actively and separately defend S.B. 193. But even if it had not, the argument still fails under its own terms.

Lapides applies to amended pleadings. In *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004), where a State had removed a state-court action to federal court, the Ninth Circuit concluded that "the rule in *Lapides* applies ... to claims asserted after removal as well as to those asserted before removal." (Emphasis added). It explained: "Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original complaint[.]... As for timing of the claims, the State removed the case, not the claims, and like all cases in federal court, it became subject to liberal amendment of the complaint." *Id*. at 564-65 (emphasis added); *see also id*. at 565 ("Amendment of a complaint does not affect waiver ... of Eleventh Amendment immunity").

The Third Circuit in *Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190, 197 (3d Cir. 2008), approved this reasoning: "in *Embury*, the Court of Appeals for the Ninth Circuit determined that the waiver-by-removal rule established in *Lapides* applied to both state and federal claims, as well as to claims asserted after removal. ... We agree."

This does not mean that a State subjects itself to any and all subsequently asserted claims. When they intervene, after all, States (like all parties) are free to object to amended pleadings, something neither Ohio nor the Secretary did here. The Federal Rules of Civil Procedure offer protection from far-fetched amended complaints.

What a State cannot do is what Ohio did here; voluntarily intervene, allow an amended pleading to be made without objection, actively defend against the amended pleading, and then attempt to "smuggle in" an Eleventh Amendment defense. "Additional limits" on a State's amenability to federal procedural rules, the Supreme Court has observed, "cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 260 (2011).

CONCLUSION

The Decision of the District Court should be **REVERSED**, an emergency injunction restoring LPO to Ohio's 2016 November election ballot **GRANTED,** and the case **REMANDED** for any further required proceedings**.**

Respectfully submitted,

s/*Mark R. Brown*

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CERTIFICATE OF SERVICE

I hereby certify that this Brief was 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 Brief complies with the typeface limitations found in Federal Rule of Appellate Procedure 32(a)(5), (6) & (7) in that it uses 14-point Times New Roman font and contains 13,985 words.

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

ADDENDUM 1

Relevant Originating District Court Documents

Complaint, RE 1

Motion to Intervene, RE 5

Motion for Preliminary Injunction, RE 17, PAGEID # 131-39

Ohio's Answer, RE 21, PAGEID # 219, 222.

Secretary's Response, RE 31, PAGEID # 296-300

Ohio's Response, RE 32, PAGEID # 303-15

Opinion and Order, RE 47, PAGEID # 837-38

Notice of Appeal, RE 50

Motion to Intervene, RE 58

Supplemental Evidence, RE No. 68, PAGEID # 1979-80

Opinion and Order, RE 80, PAGEID # 2148-49

Ohio's Answer, RE 99

ACLU Memorandum in Support of Summary Judgment, RE 165-1, PAGEID # 3276-77

Opinion and Order, RE 187, PAGEID # 3794

Third Amended Complaint, RE 188, PAGEID # 3842-43, 3849

Testimony, RE 221-1, PAGEID # 4821-24, 4846

Documents, RE 223-1, PAGEID # 5022-23

Protest of Gary Johnson, RE 227-1, PAGEID # 5612

Documents, RE 227-1, PAGEID # 5476-49, 5497-98, 5506-07, 5517, 5525, 5538-40, 5591-92

Testimony, RE 227-1, PAGEID # 5278-82, 5299, 5336-37

Ohio's Answer, RE 232

Documents, RE 240-1, PAGEID # 6162, 6164-66, 6170, 6175, 6180, 6182, 6187, 6190, 6192, 6198

Testimony, RE 241-1, PAGEID # 6237, 6255, 6259-61, 6267, 6367-69

Documents 241-1, PAGEID # 6376

Testimony, RE 247, PAGEID # 6609, 6617-18

Opinion and Order, RE 260, PAGEID # 7080-83, 7088, 7091, 7093-95, 7102, 7106

Motion to Maintain Status Quo, RE 284

Opinion and Order, RE 285, PAGEID # 7500-02, 7506

Order, RE 305

Request for Status Conference, RE 319

Order, RE 322

Memorandum in Support of Motion to Supplement, RE 335-1, PAGEID # 8324-27

Documents, RE 335-3, PAGEID # 8438 8439, 8442, 8447, 8479, 8444-45. 8448,

8450-70. 8472, 8488, 8498-8502

Documents, RE 335-5, PAGEID # 8536.

Documents, RE 335-10, PAGEID # 8589

Testimony, RE 335-11, PAGEID # 8604-05, 8612

Documents, RE 335-12, PAGEID # 8636-38, 8641, 8675, 8683, 8685

Motion for Summary Judgment, RE 338

Opinion and Order, RE 336, PAGEID # 8696-8705

Notice of Appeal, RE 353

Opinion and Order, RE 369, PAGEID # 8940-43

Final Judgment, RE 370

Motion for Stay, RE 371

Notice of Appeal, RE 372

Opinion and Order, RE 374

ADDENDUM 2

Text of Relevant Statutes

S.B. 193, §§ 1 & 2 (amending O.R.C. § 3517.01):

...

(b)(1) The group filed with the 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. ...

S.B. 193, §§ 1 & 2 (amending O.R.C. § 3517.012):

...

(B)(1) Not later than one hundred ten days before the day of the general election ... each candidate ... wishing to appear on the ballot at the general election as the nominee or nominees of the party that filed the party formation petition shall file a nomination petition ....

(2)(a) If the candidacy is to be submitted to electors throughout the entire state, 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.

(b) ... if the candidacy is to be submitted only to electors within a district, ... the nomination 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.

S.B. 193, § 3:

Directives 2009-21, 2011-38, and 2013-02 issued by the Secretary of State are hereafter void and shall not have effect on or after the effective date of this act.

S.B. 193, §4(B):

A political party that polls for its candidate for Governor at least two per cent ... of the entire vote cast for that office at the 2014 general election remains a minor political party for a period of four years after meeting that requirement.

ADDENDUM 3

Unreported Cases

Libertarian Party of Ohio v. Husted, No. 16CV554 at 19 (Franklin County Ct. Common Pleas, June 7, 2016) (text follows)

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Libertarian Party of Ohio,	:	
	:	**Case No. 16 CV 554**
Plaintiff,	:	
	:	
v.	:	**Judge David C. Young**
	:	
Jon Husted,	:	
Ohio Secretary of State, *et al.*,	:	
	:	
Defendants.	:	

Decision & Entry Granting Defendants' Motion for Summary Judgment and Rendering Moot Plaintiff's Motion for Preliminary Injunction

I. Introduction

This matter is before the Court on the Motion of Defendants Ohio Secretary of State Jon Husted ("Secretary Husted") and Ohio Attorney General Mike DeWine ("AG DeWine") for Summary Judgment filed February 19, 2016. Plaintiff Libertarian Party of Ohio ("LPO") filed a Response to the Motion for Summary Judgment on March 2, 2016. Defendants then filed a Reply on March 9, 2016. This matter is fully briefed and, pursuant to Loc. R. 21.01, deemed submitted.

The Court notes that LPO has filed numerous Notices of Supplemental Authority to the record without requesting, or being granted, leave to do so. However, no objections to these Notices were filed by Defendants.

II. Background

The instant matter was commenced on January 19, 2016. LPO filed a Complaint seeking declaratory and injunctive relief. (Compl. ¶ 62-68). LPO asserts that Senate Bill 193 ("S.B. 193") is void, unconstitutional, and unenforceable because it violates Article V, § 7 of Ohio's

Constitution and it violates the equal protection guarantee contained in Article I, § 2 of Ohio's Constitution. (*Id.* at ¶ 63-64, 67-68).

LPO named two defendants in the Complaint. Defendant Jon Husted, the Ohio Secretary of State, is Ohio's chief elections officer, pursuant to R.C. 3501.04. Secretary Husted is charged with enforcing Ohio's election laws. R.C. 3501.05(M). LPO has brought suit against Secretary Husted in his official capacity only. (Compl. ¶ 8). The other named Defendant in this matter is Mike DeWine, the Ohio Attorney General. AG DeWine is Ohio's chief law enforcement officer with principal authority to defend the constitutionality of Ohio's laws. (*Id.* at ¶ 9). He is also named only in his official capacity as Ohio Attorney General. (*Id.* at ¶ 10).

S.B. 193 was passed and signed on November 6, 2013. (Compl. Intro.; Ans. ¶ 1). LPO challenged S.B. 193 in the United States District Court for the Southern District of Ohio ("Southern District of Ohio") on November 8, 2013. (Compl. ¶ 54; Ans. ¶ 19). The Southern District of Ohio dismissed LPO's claim that S.B. 193 violates Article V, § 7 of the Ohio Constitution for lack of subject matter jurisdiction on October 14, 2015. (Compl. ¶ 58; Ans. ¶ 21). LPO unsuccessfully appealed that dismissal. (Compl. ¶ 60; Ans. ¶ 21).

The United States Court of Appeals for the Sixth Circuit declared Ohio's previous minor party ballot access law unconstitutional in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir.2006). (Compl. ¶ 17). From 2008 to 2014, LPO sought and had access to Ohio's primary ballot. (*Id.* at ¶ 17-20; Ans. ¶ 12).

S.B. 193 took effect on or about February 5, 2014. (*Id.* at ¶ 27). LPO sought, and was granted, a preliminary injunction by the Southern District of Ohio, preventing Secretary Husted from retroactively enforcing S.B. 193. (*Id.*). This gave the LPO access to the primary and general election ballots in 2014. The preliminary injunction was issued on the ground that

changing ballot access law in the midst of an election cycle violated due process. (Ex. 2 to Defs.' Memo. Opp. to Pl.'s TRO Motion, Opinion and Order Southern District Case No. 2:13-cv-953 (Jan. 7, 2014)). When the preliminary injunction was issued, the Southern District of Ohio found it unnecessary to address prospective application of S.B. 193 at that time. (*Id.*). That court later granted summary judgment as to both facial and as applied challenges to S.B. 193 brought under the United States Constitution ("U.S. Constitution"). (Exs. 5 and 6 to Defs.' Memo. Opp. to Pl.'s TRO Motion, Opinion and Order Southern District Case No. 2:13-cv-953 (October 14, 2015 and March 16, 2015)).

S.B. 193 expressly voids the Secretary of State's previous directives which recognized minor parties as ballot qualified for both primary and general elections. Specifically, Section 3 of S.B. 193 states: "Directives 2009-21, 2011-01, 2011-38, and 2013-02 issued by the Secretary of State are hereafter void and shall not be enforced or have effect on or about the effective date of this act."

Instead, S.B. 193 provides two methods for a political group to obtain minor party recognition and qualify for ballot access. The first method provides that a minor party may obtain party status if its candidate for governor or nominee for presidential electors obtain the requisite number of votes. R.C. 3501.01(F)(2)(a). The second method provides that a minor party may obtain recognition by filing a formation petition. R.C. 3501.01(F)(2)(b).

> "Minor political party" means any political party organized under the laws of this state that meets either of the following requirements:
>
> (a) Except as otherwise provided in this division, the *political party's candidate for governor or nominees for presidential electors received less than twenty per cent but not less than three per cent of the total vote cast for such office at the most recent regular state election*. A political party that meets the requirements

> of this division remains a political party for a period of four years after meeting those requirements.
>
> (b) The political party has *filed with the secretary of state, subsequent to its failure to meet the requirements of division (F)(2)(a) of this section, a petition that meets the requirements of section 3517.01 of the Revised Code.*
>
> A newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.

(Emphasis added.) R.C. 3501.01(F)(2).

If a minor party files a formation petition, that petition must meet the following requirements:

> (i) The petition is signed by qualified electors equal in number to at least one per cent 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. If an odd number of congressional districts exists in this state, the number of districts that results from dividing the number of congressional districts by two shall be rounded up to the next whole number.
>
> (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 nor more than five individuals of the petitioners, who shall represent the petitioners in all matters relating to the petition. Notice of all matters or proceedings pertaining to the petition may be served on the committee, or any of them, either personally or by registered mail, or by leaving such notice at the usual place of residence of each of them.

R.C. 3517.01(A)(1)(b). When a party formation petition that meets the criteria stated above is filed with the Secretary of State, the new minor party comes into legal existence on the day of the filing. R.C. 3517.012(A)(1). Party formation petitions must be filed more than 125 days before a general election in even-numbered years in order for that party's candidates to appear on the ballot for that election. *Id.* Then, not later than the ninety-fifth day before general election, the Secretary of State must determine whether the petition that has been filed is sufficient. R.C. 3517.012(A)(2)(d).

Individual minor party candidates must file nominating petitions to appear on the ballot in addition to the formation petition. R.C. 3517.012(B)(1). S.B. 193 sets forth the following requirements which the nominating petitions must meet:

> (a) If the candidacy is to be submitted to electors throughout the entire state, the nominating petition, including a petition for joint candidates for the offices of governor and lieutenant governor, 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.
>
> (b) Except as otherwise provided in this division, if the candidacy is to be submitted only to electors within a district, political subdivision, or portion thereof, 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.

R.C. 3517.012(B)(2). The candidate's nominating petition must be filed after the formation petition, but not later than 110 days before the general election. R.C. 3517.012(B)(1). As with the formation petitions, the Secretary of State must determine whether the nominating petition that has been filed is sufficient not later than the ninety-fifth day before general election. R.C. 3517.012(B)(3).

III. Standard of Review for Summary Judgment

Under Civ.R. 56, summary judgment is proper when "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. *Ceglia v. Youngstown State Univ.*, 2015-Ohio-2125, ¶ 12 (10th Dist.), citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992).

Pursuant to Civ.R. 56(C), a movant bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. "In other words, the burden of demonstrating an entitlement to summary judgment rests with the moving party who must direct the court's attention to properly admissible evidence which demonstrates that the nonmoving party cannot support his or her claim or defense." *Davis & Meyer Law, Ltd. v. Pronational Ins. Co.*, Franklin App. No. 06AP-730, 2007-Ohio-3552, at ¶ 12. "Once a movant discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial." *Id.*

IV. Law and Analysis

In favor of summary judgment, Defendants make several arguments. They assert that the LPO's Art. V, § 7 claim fails as a matter of law because Art. V, § 7 is not self-executing and that

even if it was, S.B. 193 complies with it. Further, Secretary Husted and AG DeWine argue that the LPO's Ohio constitutional equal protection claim fails under the *Anderson-Burdick* test.

A. Presumption of Constitutionality

First, the Court must apply the presumption of constitutionality to S.B. 193. An enactment of the General Assembly is presumed to be constitutional. *Haight v. Minchak*, 2016-Ohio-1053, ¶ 11. "[B]efore a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.,* quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus. Courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. *Id.,* citing *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 1999 Ohio 368, 706 N.E.2d 323 (1999); *Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 12.

The challenging party bears the burden of proving constitutional infirmity. *Id.,* citing *Univ. Hts. v. O'Leary* (1981), 68 Ohio St.2d 130, 135, 429 N.E.2d 148 (1981). In order to overcome the presumption of constitutionality, "the party challenging the statute must prove 'beyond a reasonable doubt that the statute is unconstitutional.'" *City of Akron v. State*, 9th Dist. Summit No. 27769, 2015-Ohio-5243, ¶ 11, quoting *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, P 18, 981 N.E.2d 814. "The necessity for a court adhering to this time-honored presumption is that it prohibits one branch of state government from encroaching on the duties and prerogatives of another." *Id.,* quoting *State v. Renalist, Inc.*, 56 Ohio St.2d 276, 278, 383 N.E.2d 892 (1978). Therefore, the Court begins this analysis with the presumption that S.B. 193 is constitutional.

B. Article V, § 7

The LPO argues that S.B. 193 violates Art. V, § 7 of the Ohio Constitution. Art. V, § 7 provides:

> All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors in a manner provided by law. Each candidate for such delegate shall state his first and second choices for the presidency, but the name of no candidate for the presidency shall be so used without his written authority.

Oh. Const. Art. V, § 7. The relevant portion of the provision for this analysis is contained in the first sentence: "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law * * *." *Id.*

a. <u>Self-executing</u>

A constitutional provision by itself has no force unless it is self-executing. *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 22. "A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation." *State v. Williams*, 88 Ohio St.3d 513, 521, 2000-Ohio-428, 728 N.E.2d 342, citing *In re Protest Filed by Citizens for the Merit Selection of Judges, Inc.* (1990), 49 Ohio St. 3d 102, 104, 551 N.E.2d 150, 152. Hence, "the words of a constitutional provision must be sufficiently precise in order to provide clear guidance to courts with respect to their application if the provision is to be deemed self-executing." *Jackson* at ¶ 22, quoting *Williams* at 521. "Likewise, a constitutional provision is not self-executing if its language, duly construed, cannot provide for adequate and meaningful enforcement of its terms

without other legislative enactment." *Williams* at 521, citing *State ex rel. Russell v. Bliss* (1951), 156 Ohio St. 147, 151-152, 46 Ohio Op. 3, 5, 101 N.E.2d 289, 291.

Defendants argue that Art. V, § 7 is analogous to Art. V, § 2 and the Ohio Supreme Court found the latter provision was not self-executing in *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68. Art. V, § 2 provides that "[a]ll elections shall be by ballot." The Court in *Jackson* stated that "'ballot' must mean 'secret voting'" and, further, that Art. V, § 2 "aspires to 'a method of conducting elections which will ensure secrecy.'" *Jackson* at ¶ 21, quoting *State ex rel. Automatic Registering Mach. Co. v. Green*, 121 Ohio St. 301, 307, 168 N.E. 131 (1929). Further, *Jackson* held that

> Section 2, Article V is silent in the scope of the privacy to which it aspires. Moreover, beyond the aspiration of secrecy at the polls, the process of how the voting will be conducted remains within the sound discretion of the General Assembly. Without such specifics regarding the voting process, it is impossible to determine whether a proposed election process would satisfy the Constitution's aspiration of secrecy.
>
> Accordingly, we hold that Section 2, Article V of the Ohio Constitution aspires to ballot secrecy, but it is not self-executing.

Id. at ¶ 23-24. The Court agrees with Defendants that these sections are analogous. Art. V, § 7 does not contain specifics for the petition by which nominations may be made. It explicitly reserves that for the discretion of the General Assembly by stating "as provided by law." Oh. Const. Art. V, § 7. Without supplemental legislation, it would be impossible to determine the standard for the petitions.

LPO then argued that the Ohio Supreme Court in *State ex rel. Gottlieb v. Sulligan*, 175 Ohio St. 238, 193 N.E.2d 270 (1963) found that Art. V, § 7 was not unclear, and further did not hold that it was not self-executing or otherwise unenforceable. LPO provides a quotation from *Sulligan* to support its assertion that the Ohio Supreme Court had no difficulty interpreting Art.

V, § 7. (LPO's Response to Defendants' MSJ, pg. 11, March 2, 2016). The following encompasses the quotation which LPO provided:

> Inasmuch as Section 3513.04, Revised Code, specifically refers to a "nominating petition," it is necessary to determine the meaning of this phrase under the Ohio statutes. An examination of the election laws indicates that the phrase, "nominating petition," has a specific meaning. Under our statutes the candidates for public office may gain nomination by two methods: One, by filing a declaration of candidacy accompanied by a petition entitling one to be a participant in the direct party primary wherein candidates from all political parties seek their nomination; or, two, by what is designated as a nominating petition, the method by which the independent candidate may seek his place on the elective ballot. (See Section 3513.252, Revised Code.) In other words, the nominating petition is the method by which the independent candidate seeks his place on the elective ballot.

Sulligan at 240-241. In this quotation, the Ohio Supreme Court stated that it was determining the meaning of the phrase nominating petition "under the Ohio statutes." *Id.* at 240. Further, that Court specifically noted that Art. V, § 7 left a void as far as the specific situation before them was concerned. *Id.* at 242. The *Sulligan* Court looked to supplemental legislation, which Art. II, § 27 authorized the General Assembly to enact, in evaluating the facts of the case before it. *Id.*

LPO's argument that the Ohio Supreme Court made a holding as to whether Art. V, § 7 was self-executing in *Sulligan* is not persuasive. That Court used supplemental statutes in order to evaluate whether the action before it was appropriate under Art. V, § 7. The specific notation that a void existed under Art. V, § 7 in *Sulligan* leads this Court to believe that supplemental legislation is necessary to make it operative.

Although the issue of whether Art. V, § 7 is self-executing was not directly before the Ohio Supreme Court in *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913), the Court found the concurrence instructive. The following contained in Judge Wanamaker's Concurring Opinion in *Fitzgerald* aided in this Court's decision.

> The part of the primary amendment in question reads as follows: "Section 7, Article V. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law." * * *
>
> The layman reading this language would at once say that either one of two methods for making nomination of municipal officers was here authorized when so provided by law: the one, direct primaries, the other, by nominating petitions; *but that it was for a law duly enacted after the passage of this amendment to determine which method should be adopted and the necessary legislative regulations therefor.*
>
> *Manifestly this provision of the constitutional amendment is not self-executing. Legislation in some form is needed.* Suppose the legislature were to make no provision whatsoever for primary elections, but did provide for all nominations by petition for state, county, district and other offices. Does any one seriously doubt that under this amendment such legislation would be constitutional?

(Emphasis added.) *Fitzgerald* at 371-372 (Wanamaker, J., concurring).

Based on the foregoing, the Court finds that Art.V, § 7 is not self-executing, as it relies on supplemental legislation to become operative.

b. <u>Compliance with Article V, § 7</u>

Moreover, even if Art. V, § 7 was self-executing, S.B. 193 complies with it. By the plain language of the provision, there are two methods by which nominations must be made. "All nominations for elective state, district, county and municipal offices *shall be made at direct primary elections or by petition as provided by law* * * *." (Emphasis added.) Oh. Const. Art. V, § 7.

LPO offers *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968), *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir.2006), and the Secretary of State's "official interpretation of *Sulligan",* 2006 Ohio Atty.Gen.Ops. No. 2006-035, at 2-318 to support its position that S.B. 193

does not comport with Art. V, § 7 and Defendants are not entitled to judgment as a matter of law. (LPO's Memo Contra at 11-12).

The Court will first look to *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). In that United States Supreme Court decision, the Ohio American Independent Party and the Socialist Labor Party brought suit to challenge the validity of a series of election laws, as applied to them, under the Equal Protection Clause of the U.S. Constitution. *Williams* at 26. Upon reviewing this case, the Court found that *Williams* did not once mention Art. V, § 7. Instead, that Court analyzed the election laws that were in place at the time under the U.S. Constitution.

Similarly in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir.2006), the Sixth Circuit did not analyze this issue. *Blackwell* dealt with challenges under the First and Fourteenth Amendments to the U.S. Constitution. *Blackwell* at 582. LPO correctly points out that the Sixth Circuit stated that "[t]he Ohio Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections." *Id.,* citing Oh. Const. Art. V, § 7. However, as discussed above, the plain language of Art. V, § 7 provides two mechanisms for nomination and this statement, in dicta, does not persuade this Court otherwise. Further, at the time that *Blackwell* was decided, the then-existing law only allowed for nomination by primary, unlike S.B. 193.

As previously stated above, *Sulligan* defined the term nominating petition by using the statues that were in place at the time. *Sulligan*, 175 Ohio St. at 240-241, 193 N.E.2d 270. The Ohio Attorney General Opinion cited by LPO as the "official interpretation of *Sulligan"* is far from what the LPO purports it to be. (LPO's Memo Contra at 11); 2006 Ohio Atty.Gen.Ops. No. 2006-035. The Court notes that this Opinion was written by Secretary of State Kenneth Blackwell, who was in office on August 10, 2006. While this Opinion does cite *Sulligan,* it does

not extend itself to be the Attorney General's official interpretation of that case. 2006 Ohio Atty.Gen.Ops. No. 2006-035.

For the foregoing reasons, the Court finds that even if it had found Art. V, § 7 to be self-executing, S.B. 193 complies with the plain language of that provision.

C. Equal Protection

LPO claims, in its Complaint, that S.B. 193 violates the equal protection guarantee contained in Art. I, § 2 of Ohio's Constitution. (Compl. ¶ 67). Art. I, § 2 provides

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Defendants argue that this claim fails as a matter of law under the *Anderson-Burdick* test. LPO then argues that the *Anderson-Burdick* test is not the appropriate test. However, LPO fails to state what test it believes applies in its stead.

As stated above, Art. V, § 7 provides two methods by which a candidate may obtain access to the general election ballot in Ohio. Therefore, nomination of candidates by primary is not a fundamental right under the Ohio Constitution. Further, the United States Supreme Court has rejected the notion that the U.S. Constitution affords any right to reach a general election ballot by primary. *Am. Party of Tex. v. White*, 415 U.S. 767, 780-781, 94 S.Ct. 1296 (1974); *Morse v. Republican Party*, 517 U.S. 186, 198, 116 S.Ct. 1186 (1996), fn. 16.

a. Applicable Test

First, the Court will address LPO's argument that Judge Watson did not apply the *Anderson-Burdick* test when he evaluated the federal Equal Protection claim LPO had put before the Southern District of Ohio. This argument is misleading, as Judge Watson stated

> Plaintiffs argue that S.B. 193 violated their First Amendment and Equal Protection rights under the United States Constitution by placing LPO at a political disadvantage. Plaintiffs make the same arguments, some verbatim, as did Intervenor Plaintiffs when they moved for summary judgment on the statute's facial validity. In fact, the only new argument Plaintiffs make is an attempt to analogize a district court case out of Michigan to the application of S.B. 193 to LPO.
>
> Plaintiffs fail 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.

(Internal citations omitted.) (Ex. 5 to Defs.' Memo. Opp. to Pl.'s TRO Motion, Opinion and Order Southern District Case No. 2:13-cv-953 at 12 (October 14, 2015). When the Southern District of Ohio ruled on Intervenor Plaintiffs' Motion for Summary Judgment, it applied the *Anderson-Burdick* test. (Ex. 6 to Defs.' Memo. Opp. to Pl.'s TRO Motion, Opinion and Order Southern District Case No. 2:13-cv-953 (March 16, 2015)). Based upon a reading of the entirety of the Opinion which discusses LPO's Equal Protection arguments, it is clear that the Southern District of Ohio was not stating that *Anderson-Burdick* should not be used. Instead, it is apparent that Judge Watson did not feel it necessary to repeat the same analysis twice on identical arguments. Judge Watson referred to his previous ruling and reasoning contained in the Opinion and Order regarding Intervenor Plaintiffs' Motion for Summary Judgment and analyzed the only new argument LPO had provided, which was based upon *Green Party v. Land*, 541 F.Supp.2d 912 (E.D.Mich.2008). For those reasons, the Court finds that the Southern District of Ohio did not hold that the application of the *Anderson-Burdick* test was inappropriate regarding LPO's Equal Protection claim.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides: "No State shall * * * deny to any person within its jurisdiction the equal protection of

the laws." Article I, § 2, the Equal Protection Clause, of the Ohio Constitution provides: "All political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." The two provisions are functionally equivalent and, therefore, require the same analysis. *Pickaway Cnty. Skilled Gaming, L.L.C. v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 17; *State v. Williams*, 126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 38; *Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 11; *State v. Thompson*, 95 Ohio St.3d 264, 2002 Ohio 2124, 767 N.E.2d 251, P 11.

LPO specifically argues that since the Equal Protection claim is not coupled with a First Amendment claim, the *Anderson-Burdick* test is not appropriate. In reviewing the case law, it is apparent that most often the two claims, Equal Protection and First Amendment, are brought together, as they were by LPO and the Intervening Plaintiffs in the Southern District of Ohio case. The majority of the cases cited by the parties apply the *Anderson-Burdick* test to election law challenges that are not exclusively brought under the Equal Protection Clause.

However, the Sixth Circuit dealt with a strictly Equal Protection argument in *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir.2015). That court made the following statement regarding the applicability of the *Anderson-Burdick* test to the Equal Protection claim before it:

> The Supreme Court has developed a three-part test to evaluate election statutes challenged under the First and Fourteenth Amendments. *See Burdick v. Takushi*, 504 U.S. 428, 434, 441, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). While the Supreme Court has not yet applied this test to ballot-access challenges on pure equal-protection grounds, ***our cases hold that the Anderson-Burdick test serves as "a single standard for evaluating challenges to voting restrictions."*** *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012). Further, many federal courts of appeals have applied the *Anderson-Burdick* balancing test to both First Amendment and

> Equal Protection Clause challenges to ballot-access laws. *See e.g., Rogers v. Corbett*, 468 F.3d 188, 193-94 (3d Cir. 2006) (abandoning traditional tiers of equal-protection scrutiny and applying *Anderson*); *Republican Party of Ark. v. Faulkner Cnty.*, Ark., 49 F.3d 1289, 1293 n.2 (8th Cir. 1995) ("In election cases, equal protection challenges essentially constitute a branch of the associational rights tree."); *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992) (applying the *Anderson* balancing test).

(*Obama for Am.* citation corrected.) (Emphasis added.) *Hargett* at 692.

Further, that court found that although First Amendment claims were not expressly made, they naturally followed from the Equal Protection claims. *Id.* at 692-693, quoting *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 551 (6th Cir.2014). In that case, "the plaintiffs argue that the ballot-retention statute denies them an equal opportunity to exercise their rights to association and political expression." *Id.* at 693.

The Court finds that the *Hargett* case cited above is analogous to the situation at hand. It seems that LPO attempts to argue that *Anderson-Burdick* test does not apply in order to avoid the same fate that their claim suffered in the Southern District of Ohio case. However, LPO alleges the same injuries in both cases, which naturally draw on First Amendment rights of association and political expression.

Chief Justice O'Connor addressed the applicability of *Anderson-Burdick* to Equal Protection claims in her Concurring Opinion in *State ex rel. Brown v. Ashtabula Cnty. Bd. of Elections*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596 (O'Connor, C.J., concurring in judgment only).

> Equal protection applies not just to the initial allocation of the franchise, but also to the manner of its exercise. *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The court made clear in *Crawford* [*Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 128 S.Ct. 1610 (2008)] that equal-protection election challenges are subject to the same *Anderson/Burdick* analysis as are First Amendment ballot-access challenges. See *Northeast*

> *Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir.2012).
>
> The state argues that rational-basis review should apply because the classifications at issue are neutral. The state's position misconstrues the law. Rational-basis review applies to laws that draw nondiscriminatory classifications and impose no burden on the right to vote. *McDonald v. Bd. of Election Commrs. of Chicago*, 394 U.S. 802, 807-809, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). But where a plaintiff alleges that the state has burdened voting rights through disparate treatment, the *Anderson/Burdick* balancing test is applicable. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir.2012).

Brown at 378 (O'Connor, C.J., concurring in judgment only). The Court, in the plurality Opinion, in that matter did not apply the *Anderson-Burdick* test. *Id.* at 374-375. Instead, the Court noted that the cases applying the *Anderson-Burdick* test informed the analysis, but the Court went on to differentiate the case at hand because it was a writ of mandamus action. *Id.*

The Ohio Supreme Court in *Brown* does not make a holding as to the applicability of the *Anderson-Burdick* test to challenges made only on Equal Protection Grounds. However, Chief Justice O'Connor's Concurring Opinion was informative on the issue and aided this Court in finding that the *Anderson-Burdick* test is properly applied in the instant matter.

b. <u>Application</u>

Having found that the proper test to apply in this matter is the *Anderson-Burdick* test, the Court now proceeds under that framework.

Election laws inevitably impose some burden on individual voters. *State ex rel. Purdy v. Clermont Cnty. Bd. of Elections*, 77 Ohio St.3d 338, 342, 1997-Ohio-278, 673 N.E.2d 1351, quoting *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059 (1992). In order to determine the constitutionality of S.B. 193, the Court must apply the modified balancing test the Untied States Supreme Court has adopted in voting and ballot access cases. *State ex rel. Watson v. Hamilton*

Cnty. Bd. of Elections, 88 Ohio St.3d 239, 2000-Ohio-318, 725 N.E.2d 255, 259, citing *Purdy* at 342 and *Burdick* at 253-254.

In *State ex rel. Brown v. Ashtabula Cnty. Bd. of Elections*, 142 Ohio St.3d 370, 372, 2014-Ohio-4022, 31 N.E.3d 596, the Ohio Supreme Court explained the applicable *Anderson-Burdick* test:

> To assess the constitutionality of a state election law, the court must first "consider the character and magnitude of" the claimant's alleged injury. *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). If the regulation severely restricts voting rights, then strict scrutiny applies and the law must be narrowly tailored to advance a compelling state interest. *Burdick* at 434. We have explained that "a law severely burdens voting rights if it discriminates based on political content instead of neutral factors or if there are few alternative means of access to the ballot." *Watson*, 88 Ohio St.3d at 243, 725 N.E.2d 255. But "not every statutory restriction limiting the field of candidates need advance a compelling state interest," *id.,* and if the regulation is minimally burdensome and nondiscriminatory, then "'the State's important regulatory interests are generally sufficient to justify' the restrictions," *Burdick* at 434, quoting *Anderson* at 788.

i. <u>Magnitude of Burdens</u>

The inquiry, when ballot access is at issue, "focus[es] on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir.2006), quoting *Anderson*, 460 U.S. at 793. The Court must also consider the extent to which the challenged law burdens the rights of voters. *Id.* The first step of the analysis is significant. This step determines which level of scrutiny applies.

> When the restrictions imposed by the state are "severe," they will fail unless they are narrowly tailored and advance a compelling state interest. *Burdick*, 504 U.S. at 434. If, however, the regulations are minimally burdensome and nondiscriminatory,

> rational-basis review applies, and the regulations will usually pass constitutional muster if the state can identify "important regulatory interests" that they further. *Id.* Of course, many regulations "fall in between these two extremes." *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). In these situations, courts engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it. *See Anderson*, 460 U.S. at 789; *Obama for Am.*, 697 F.3d at 429.

Hargett, 767 F.3d at 546.

As a preliminary matter, the Court notes that it takes much guidance from the thorough analysis previously done regarding identical alleged burdens in the Southern District of Ohio case. (Ex. 6 to Defs.' Memo. Opp. to Pl.'s TRO Motion, Opinion and Order Southern District Case No. 2:13-cv-953).

First, LPO argues that S.B. 193 prevents it from identifying supporters and inhibits the ability of voters to affiliate with it. Specifically, LPO contends that it will not have the ability to obtain party membership lists and use those lists for fundraising purposes.

Recruiting supporters is a core function of a political party. *See Blackwell* at 567. However, the LPO has failed to demonstrate that lack of access to a primary significantly burdens its ability to identify supporters. As Judge Watson noted in his Opinion, the internet has several well-known social media platforms that reach large numbers of people. (Ex. 6 to Defs.' Memo. Opp. to Pl.'s TRO Motion at 16). Facebook, alone, has become a household name and has a wide domestic and international reach. Minor parties may use any number of online platforms to reach out to potential supporters and gain exposure.

Further, it is not alleged that S.B. 193 inhibits communication with potential supporters through other means outside of primary participation. Traditional methods for gaining supporters and party members still remain available. As noted by the Eleventh Circuit, these methods include "commercials, signs, speeches, debates, town-hall meetings, endorsements,

canvassing, social networking, websites, newsletters, bumper stickers, handshaking, baby-kissing, robodialing, leafleting, good-old-fashioned stumping, *etc.*" *Stein v. Ala. Sec'y of State*, 774 F.3d 689, 695 (11th Cir.2014), fn. 7.

The LPO then argues that the only way for a person to associate with the Libertarian Party is by choosing that party's ballot at the primary. However, voters are free to ask for an issues-only ballot if they choose not to affiliate with any of the party's that are conducting primaries. Further, "[a]t the first primary election held by a newly formed political party * * * any qualified elector who desires to vote the new party primary ballot is not subject to section 3513.19 of the Revised Code and shall be allowed to vote the new party primary ballot regardless of prior political party affiliation." R.C. 3517.016.

The Southern District of Ohio rejected the idea that primaries are the only means for voters to choose to associate with minor parties. (Ex. 6 to Defs.' Memo. Opp. to Pl.'s TRO Motion at 17). That court held that party affiliation under Ohio law is a form of association, but that the right of association is a broader concept than the term affiliation as used in Ohio's election laws. (*Id.*).

The main interest of voters in a primary is to choose a party's candidate to run in the general election. LPO argues that the primary gives it a mechanism for deciding between multiple candidates, and without it, there is no way to do so. Minor parties rarely have contested primary elections. (Richard Winger Deposition, December 11, 2013, pgs. 59-60). This alone supports Defendants' contention that this burden is not significant.

Further, voter turnout in Ohio primaries is low in general, as evidenced by the statistics submitted by Defendants. Mr. Winger testified that requiring newly qualifying parties to participate in a primary is a hardship and that the party may be better served by making the

choice between candidates at a convention. (*Id.*). He further warned that even when a minor party primary is contested, voters tend to not be well informed. (*Id.* at 60). An illustration was provided by Mr. Winger, detailing an instance in a primary election in Alaska where the liberatarian candidate who won the primary had fled the state after being indicted for fraud. (*Id.*).

The LPO has failed to offer any explanation as to why primaries are the only way it can identify supporters. Defendants have demonstrated that there is no merit to the assertion that denial of access to the primaries deprives the LPO of the ability to reach potential supporters. Further, the LPO is not entirely foreclosed from participating in primaries. S.B. 193 allows minor parties that qualify by election access to the primary ballot. Therefore, the Court finds that these rights are not severely burdened by S.B. 193.

Although not specifically argued, the Court further notes that the petition requirements set forth in S.B. 193 do not severely burden the rights of the LPO or voters. Since the decision in *Blackwell,* the petition requirements promulgated by the legislature have changed. Early petition deadlines are inherently burdensome, but late deadlines are less so. *See Blackwell,* 462 F.3d at 586. The late deadline coupled with the low number of signatures required by S.B. 193, means the LPO is not severely burdened.

Although the Court has determined none of the separate requirements of S.B. 193 constitute a severe burden, the Court must also look to the combined effect of the requirements. *See id.* at 595. "Insofar as combined burdens are concerned, in this instance, the whole is not greater than the sum of its parts." (Ex. 6 to Defs.' Memo. Opp. to Pl.'s TRO Motion at 35). None of the burdens alone are severe, and the aggregate of the burdens imposed by S.B. 193 are minimal. Therefore, S.B. 193 is not subject to strict scrutiny.

Instead, the Court has found the regulation is minimally burdensome and now must examine whether the State has demonstrated important regulatory interests to justify such restrictions. *See Burdick,* 504 U.S. at 434, quoting *Anderson,* 460 U.S. at 788.

ii. State's Interests

The State of Ohio has a legitimate interest in creating an efficient election process. *See State ex rel. Purdy v. Clermont Cnty. Bd. of Elections,* 77 Ohio St.3d 338, 344, 1997-Ohio-278, 673 N.E.2d 1351; *State ex rel. Wilcoxson v. Harsman*, 2d Dist. Montgomery No. 24095, 2010-Ohio-4048, ¶ 47. In *Purdy,* the Ohio Supreme Court outlined some of the important state interests that have been recognized to uphold the constitutionality of various elections provisions:

> (1) having orderly, fair, and honest elections instead of chaos, (2) maintaining the integrity of the political process by preventing interparty raids and intraparty feuds, (3) maintaining the integrity of various routes to the ballot, (4) avoiding voter confusion, ballot overcrowding, or frivolous candidacies, (5) ensuring that elections are operated equitably and efficiently, (6) preventing candidacies that are prompted by short-range political goals, pique, or personal quarrel, and (7) preventing parties from fielding an independent candidate to capture and bleed off votes in a general election that might otherwise go to another party.

Purdy at 344.

LPO argues that the legislative intent behind S.B. 193 was purely political. (LPO's Memo Contra at 14-15). However, the LPO referred to "[d]ocuments uncovered in July of 2015," but those documents were not submitted for review. (*Id.* at 14). When employing the rational-basis standard, "a party challenging the constitutionality of legislation cannot prevail where the rationality of that legislation is at least debatable." *State ex rel. Wilcoxson v. Harsman*, 2d Dist. Montgomery No. 24095, 2010-Ohio-4048, ¶ 46, quoting *Cook v. Wineberry Deli, Inc.* (July 17, 1991), Summit App. No. 14841, 1991 Ohio App. LEXIS 3360, 1991 WL

131485, at *7, citing *Minnesota v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659. Further, LPO did not otherwise provide sufficient evidence to demonstrate that the legislative intent was for purely political or otherwise nefarious reasons.

Therefore, the Court is left to consider the interests proffered by Defendants. Here, Defendants argue that based upon the low voter turnout and the fact that minor party primaries are rarely contested, it is not efficient to put minor parties, such as the LPO, on primary ballots unless they otherwise qualify. In support, Defendants cite to the deposition of Richard Winger and previous voter turnout statistics for minor parties participating in primaries. Specifically, Defendants argue that S.B. 193 aids in curtailing the considerable cost to taxpayers in primary ballot creation and distribution. Specific to this purpose is the State's interest "in requiring some preliminary showing of a significant modicum of support" before printing the name of a candidate on the ballot. *State ex rel. Wilcoxson v. Harsman*, 2d Dist. Montgomery No. 24095, 2010-Ohio-4048, ¶ 47, quoting *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970 (1971). Further, "[t]he State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates." *Anderson*, 460 U.S. at 788, fn. 9. The Court finds that Defendants have demonstrated that S.B. 193 serves important state interests. *See Purdy* at 344.

Other, more onerous, state laws have been upheld against constitutional challenges. In *Rainbow Coal. of Okla. v. Okla. State Election Bd.*, 844 F.2d 740 (10th Cir.1988), an Oklahoma law requiring a new party to submit a petition containing signatures of at least 5% of the total votes case in the last general election for either governor or president *and* requiring petitions be filed no later than May 31 of an even numbered year was upheld. (Emphasis added.) A

Pennsylvania statute requiring minor party candidates to gather signatures of at least 2% of the vote total of the candidate who obtained the highest number of votes for statewide office over a five month period of time coupled with a condition that one of the minor party's candidates polled 2% of the vote total of the candidate who obtained the highest number of votes for statewide office in the previous election was upheld by the Third Circuit in *Rogers v. Corbett*, 468 F.3d 188 (3d Cir.2006). The Eighth Circuit, in *Green Party v. Martin*, 649 F.3d 675 (8th Cir.2011), found an Arkansas law constitutional that defined political party as a group with at least 3% of the vote in most recent gubernatorial or presidential election or allowed minor party ballot access via petition with 10,000 signatures collected within a 90 day period.

S.B. 193 passes rational-basis scrutiny. S.B. 193 is minimally burdensome and passes constitutional muster because the State can identify "important regulatory interests" that it furthers. *Burdick*, 504 U.S. at 434.

The Court notes that Chief Justice O'Connor stated that "rational-basis review is not appropriate in ballot-access cases" in the Concurring Opinion in *Brown*, 142 Ohio St.3d 370, 378, 2014-Ohio-4022, 31 N.E.3d 596 (O'Connor, C.J., concurring in judgment only). Chief Justice O'Connor explains that rational-basis does not impose a burden on the state to prove that the legislation is justified, which is improper. *Id.* at 379. Instead, the Concurring Opinion states that

> *Anderson* instructs courts to weigh 'the precise interests *put forward by the State* as justifications for the burden imposed by its rule.' (Emphasis added.) *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564, 75 L.Ed.2d 547. 'The State need not provide empirical evidence justifying its interest; however, the State cannot rely on hollow or contrived arguments as justifications.' *Trudell v. State*, 193 Vt. 515, 2013 VT 18, 71 A.3d 1235, at ¶ 21; *Price v. New York State Bd. of Elections*, 540 F.3d at 110. Thus, the state plainly has a burden to proffer justifications for the law, along with an explanation of how the law satisfies that state interest.

Id. This Court notes that the State has met the standard discussed in the Concurrence by putting forth precise interests and supporting those interests with statistical data.

Based on the foregoing, this Court finds that the LPO cannot overcome the presumption of constitutionality afforded to S.B. 193. The State's interest in avoiding unnecessary expense justifies the reasonable ballot access requirements set forth by S.B. 193.

V. Conclusion

Secretary Husted and AG DeWine have met their burden, pursuant to Civ.R. 56, and demonstrated that they are entitled to judgment as a matter of law. LPO then failed to show that genuine issues exist.

For the foregoing reasons, the Court hereby **GRANTS** the Motion of Defendants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine for Summary Judgment filed February 19, 2016. This matter is hereby **DISMISSED.** Further, based upon this ruling, Plaintiff LPO's Motion for Preliminary Injunction filed January 19, 2016 has been **RENDERED MOOT.**

This is a final, appealable order. The Court hereby directs the Clerk to notify all parties of this judgment and its date of entry upon the journal.

IT IS SO ORDERED.

Copies electronically to:

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Counsel for Defendants

Franklin County Court of Common Pleas

Date: 06-07-2016

Case Title: LIBERTARIAN PARTY OHIO -VS- OHIO SECRETARY STATE ET AL

Case Number: 16CV000554

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge David C. Young

Court Disposition

Case Number: 16CV000554

Case Style: LIBERTARIAN PARTY OHIO -VS- OHIO SECRETARY STATE ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 16CV0005542016-02-1999980000
   Document Title: 02-19-2016-MOTION FOR SUMMARY JUDGMENT - DEFENDANT: OHIO SECRETARY STATE
   Disposition: MOTION GRANTED