UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

V. **CASE NO. 16-3537**

JON HUSTED,
Secretary of State,

Defendant-Appellee,

and

STATE OF OHIO;
GREGORY FELSOCI,

Intervenors-Appellees.
_____/

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

APPELLANTS' REPLY TO APPELLEES' RESPONSES TO APPELLANTS' MOTION FOR EMERGENCY RELIEF PENDING APPEAL AND/OR TO EXPEDITE BRIEFING

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

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

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3537 Case Name: Libertarian Party of Ohio v. Husted

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Ohio
Name of Party
makes the following disclosure:

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

No.

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

No.

CERTIFICATE OF SERVICE

I certify that on May 23, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark R. Brown

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

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

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

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

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

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

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

I. LPO Has Complied with Rule 8.

Intervenor-Appellee-Felsoci ("Felsoci") devotes significant effort to arguing that Appellants (collectively "the Libertarian Party of Ohio" or "LPO") have not complied with Federal Rule of Appellate Procedure 8. Felsoci Response at 7-9. Felsoci is wrong.[1] Sixth Circuit Rule 30(a) states: "*an appendix is unnecessary and must not be filed*. The court will have the district court electronic record available." (Emphasis added). LPO has cited in its Motion for Stay and Emergency Relief many portions of the extensive electronic record created in the District Court.

II. LPO Advanced a Proper Selective Enforcement Claim With Substantial Evidentiary Support Against the Ohio Republican Party.

Both Felsoci and the Secretary argue that LPO's Motion for Emergency Relief must fail because LPO has failed to advance a proper selective enforcement claim. *See* Secretary's Response at 15; Felsoci's Response at 9. The District Court rejected this same argument. It ruled that LPO had as a legal matter stated a proper selective enforcement claim against Felsoci (the Ohio Republican Party's (ORP) innocent agent) as well as the Secretary,[2] and as a factual matter had submitted

[1] Felsoci made a similar argument in an attempt to dismiss LPO's interlocutory appeal in *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 404 n.1 (6th Cir. 2014). This Court denied that motion and granted LPO's motion to strike the many duplicative papers Felsoci filed.

[2] LPO did not argue that the Secretary himself selectively enforced Ohio law; it argued that officials in his office did. Although not raised in this Motion for Emergency Relief, substantial evidence establishes that at least two elections

sufficient evidence to avoid summary judgment. *See* Doc. No.187 at PAGEID # 3794 (Opinion and Order) (observing that LPO's "proffered evidence may support a plausible assertion that state actors participated in selective enforcement of Ohio Revised Code § 3501.38(E)(1) [Ohio's employer-statement rule] to disqualify Plaintiffs' petitions on the basis of political affiliation and speech"). Whether LPO could identify other instances "of non-enforcement of the employer disclosure rule in similar circumstances," moreover, was "not necessarily fatal to Plaintiffs' selective enforcement claim." Doc. No. 187 at 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*. The District Court was correct, and neither Felsoci nor the Secretary have cross-appealed the District Court's conclusions in this regard.

The District Court ultimately, of course, rejected LPO's selective enforcement claim against Felsoci and his principals; but it did so not because LPO had failed to prove political animus on their parts, but because it concluded that they -- including ORP -- were not engaged in state action. Even if ORP had targeted Earl (LPO's gubernatorial candidate) for removal, the District Court concluded, ORP was not a state actor.

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officials in the Secretary's office assisted Casey's efforts to remove Earl from the 2014 primary ballot.

The evidence in the record leaves little (if any) doubt that Terry Casey and ORP[3] acted with political animus when they targeted Earl. They did not target (or even inquire of) the qualifications of any Green Party of Ohio candidates who were also running in the 2014 primary. Extensive documentation establishes dozens of contacts between Casey and members of the Kasich Campaign and ORP before, during and after Earl's removal. *See* Doc. No. 335-1 at PAGEID # 8320-37 (Memorandum summarizing evidence of communications between Casey, ORP and the Kasich Campaign). Casey did not communicate with or coordinate his activities with the campaigns of any other political campaigns or parties.

Casey, moreover, testified repeatedly that his objective in targeting Earl was political; he wanted to punish Democrats by removing Earl (whom he believed the Democratic Party had assisted). *See, e.g.*, Casey Dep., Aug. 28, 2014, Doc. No. 241-1 at PAGEID #6255 (Casey testifies that he 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[4] even

[3] The Secretary concedes that ORP was "likely responsible for orchestrating the protest against Earl." Secretary's Response at 17 ("The Party's 'new' evidence only confirms what this Court and the District Court acknowledged over two years ago: that Republicans were likely responsible for orchestrating the protest against Earl.").

[4] Felsoci argues out that Borges's retraction of his admission that ORP was involved in Earl's protest somehow wipes away this evidence. Felsoci's Response at 7-8. Judge Watson obviously did not believe Borges in this regard. He

admitted that ORP had paid Casey's lawyers $300,000 to reward Casey for hurting the Democratic Party. *See* Borges Dep., Oct. 7, 2015, Doc. No. 335-11 at page 22 ("anytime the democrats look bad in Ohio, the republicans look good ... [and] [w]e caught you guys and the democrats conspiring").[5]

Assuming that a state actor targeted Earl in an effort to hurt Democrats in the 2014 election, there can be no doubt that the First and Fourteenth Amendments would be violated. If the Secretary, for instance, had testified that he targeted Earl's candidacy in order to hurt Democrats this appeal would not be necessary -- no one would attempt to justify such plainly unconstitutional action. Here, both the District Court and this Court, *see Libertarian Party of Ohio v. Husted*, 751 F.3d at 409 ("Felsoci likely is the tool of the Republican Party"), have concluded that ORP was likely behind Felsoci's protest. The question then is whether ORP was engaged in state action. If so, the First and Fourteenth Amendments were violated and LPO should be restored to the ballot. *See, e.g.*, *Langone v. Secretary of Commonwealth*, 446 N.E.2d 43, 48 (Mass. 1983) (treating Democratic Party's application of its rules to primary candidates as state action for purposes of First Amendment).

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concluded notwithstanding Borges's belated retraction that one could reasonably infer that ORP was behind Earl's removal from the very beginning.

[5] LPO submitted substantial evidence demonstrating that ORP's decision to pay Casey's lawyers came much earlier and likely preceded the protest; but even taking Borges at his word, ORP's decision to pay Casey's lawyers and ratify their actions later was politically based nonetheless.

III. LPO Advances an Equal Protection Challenge to S.B. 193.

The Secretary seeks to convert LPO's Equal Protection Clause challenge to S.B. 193 into a facial First Amendment challenge. It does so because the District Court rejected Intervenor-Plaintiffs' (hereinafter "ACLU") First Amendment challenge to S.B. 193;[6] the Secretary hopes to benefit from that rejection here.

LPO's challenge, however, is (and always has been) distinct from the ACLU's unsuccessful First Amendment claim. LPO does not argue that S.B. 193 is unconstitutional because it denies minor parties a primary; nor does LPO argue that S.B. 193 is unconstitutional because it is cumulatively burdensome. LPO's claim under the Equal Protection Clause is precise; even assuming S.B. 193 satisfies the First Amendment (as Judge Watson ruled in rejecting the ACLU's challenge), it still violates the Equal Protection Clause by unequally affording some parties official party memberships. This disparity has both practical and legal implications. It awards the major political parties a significant political advantage during general elections.

LPO's Equal Protection theory is perhaps best-explained in *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (en banc), which neither the Secretary nor Felsoci bother to address. There, the Third Circuit recognized that although an across-the-board anti-fusion

[6] Contrary to the Secretary's suggestion, *see* Secretary's Response at 5, LPO did not join a facial First Amendment challenge to S.B. 193 in any of its Complaints.

law (preventing parties from cross-endorsing other parties' candidates) does not violate the First Amendment, an unequal ban allowing some parties but not others the use of fusion violates 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).

Senate Bill 193 violates the Equal Protection Clause for this same reason. Although its barring new and minor parties from using primaries does not itself violate the Constitution, its affording some parties a mechanism to enroll official members while not providing the same or even some other membership mechanism to other recognized parties violates Equal Protection. There is simply no justification for this kind of disparate treatment -- especially in the context of something so foundational as party membership.

Regardless of whether it is described as a severe burden, disparate treatment like that practiced by S.B. 193 cannot survive Equal Protection analysis. Even burdens that are not "severe" run afoul of the First and Fourteenth Amendments. *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"); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (striking down state's closed primary law without mentioning whether it constituted a severe burden); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring) ("When an election law burdens voting and associational interests, ... I am not at all sure that a coherent distinction between severe and lesser burdens can be culled from them.").[7] Ultimately, the question is whether the burden can be justified. Simply put, Ohio cannot offer any legitimate explanation for granting party membership to some recognized political parties but not others.

IV. LPO's Challenge is Not Moot.

The Secretary briefly argues that LPO's selective enforcement challenge is moot. This same argument was rejected by the District Court. The reason is simple;

[7] The Secretary argues that invalidating S.B. 193 cannot cure LPO's irreparable harm because it is too late to provide it a primary. *See* Secretary's Response at 1, 18-19. The Secretary is wrong. If S.B. 193 is invalidated, LPO will be relieved of the burden of having to comply with a law that places it at an unconstitutional political disadvantage. In the absence of a valid ballot access law, LPO must be returned to Ohio's general election ballot. *See*, *e.g.*, *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008) (restoring LPO to general ballot in July following primary because of lack of valid access law). How Ohio chooses to correct S.B. 193, of course, is left to Ohio's General Assembly. It may choose to extend a primary to LPO in future election cycles or alter how it registers members. Regardless, LPO is irreparably harmed by S.B. 193.

LPO's selective enforcement theory is designed to restore LPO to Ohio's ballot. LPO has yet to be restored to Ohio's ballot. Its injury is ongoing and its case is not moot.

Ballot access claims, moreover, routinely fall into the "capable of repetition yet evading review" exception. *See, e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) ("the party again will face the requirements that its candidates be selected in a March primary and that it file a petition for party recognition 120 days in advance of this primary. Considering the 'somewhat relaxed' repetition standard employed in election cases, this issue easily satisfies the 'capable of repetition, yet evading review' exception and is not moot."); *American Civil Liberties Union v. Taft*, 385 F.3d 641, 646 (6th Cir. 2004) (holding that action seeking special election was not moot even though election was over because Court could "still award declaratory relief and attorney's fees" if not the requested injunctive relief).[8]

[8] Felsoci asserts his lawyers sagely "urged Appellants to drop Felsoci from the case" because of mootness. Felsoci's Response at 6. In truth, Felsoci's lawyers (after having already unsuccessfully moved to dismiss LPO's complaint) threatened LPO and its lawyers under Rule 11 if they did not voluntarily dismiss Felsoci from the case. *See* Doc. No. 269 (filed Nov. 24, 2014). Felsoci's Rule 11 motion conveniently coincided with ORP's first $100,000 payment to his lawyers, which was made on November 19, 2014, *see* Doc. No. 335-3 at PAGEID # 8501, and which he obviously did not want LPO to uncover. The District Court summarily rejected Felsoci's Rule 11 motion. *See* Notation Order (Jan. 9, 2015).

V. LPO Correctly Continues to Seek Ballot Access Under S.B. 193.

Felsoci argues that LPO cannot claim irreparable harm because it is contemporaneously attempting to comply with S.B. 193. *See* Felsoci's Response at 18. His point seems to be that in order to seek immediate judicial relief one must forego alternative political efforts. A speaker who has been unconstitutionally foreclosed from handing out leaflets, then, must cease and desist all alternative efforts to communicate his message. Felsoci cites no authority for this remarkable suggestion, and LPO is aware of none.

In the event, LPO has and will continue to seek ballot access using all lawful means available. Until this Court rules to the contrary, one of those methods is S.B. 193. Should this Court conclude that S.B. 193 does not violate the Equal Protection Clause, after all, it will be the law of the land. Notwithstanding that compliance with S.B. 193 causes LPO irreparable harm and costs tens of thousands of dollars, LPO intends to do its best to satisfy S.B. 193 should it be found constitutional.

VI. LPO Challenged S.B. 193 in State Court Following the District Court's Dismissal of its Ohio Constitutional Claim.

As LPO reported in its initial Motion for Emergency Relief, following the District Court's dismissal of LPO's challenge to S.B. 193 under Ohio's Constitution LPO filed an original action in state court seeking similar relief under Ohio's Constitution. The Secretary briefly suggests that the pendency of this proceeding might counsel against relief here. Secretary's Response at 7.

The Secretary did not raise abstention under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), or any other abstention doctrine at any time during the two years LPO's Ohio constitutional law claim was pending before the District Court. Nor did the Secretary raise abstention in the District Court in the four months between LPO's state court filing and the District Court's award of final judgment. The Secretary's suggestion is belated to say the least. It should not now at this late date be allowed to argue the virtues of abstention. With Constitutional guarantees and the 2016 presidential election hanging in the balance, tardy attempts to defeat democracy should not be rewarded.

CONCLUSION

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

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

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

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