

NO. 16-3537

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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

*Plaintiff-Appellants,*

v.

JON HUSTED, Ohio Secretary of State,

*Defendant-Appellee,*

STATE OF OHIO; GREGORY FELOSI,

*Intervenors-Appellees,*

On Appeal from the United States District Court  
Southern District of Ohio  
CASE No. 2:13-cv-00953

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**BRIEF OF AMICI CURIAE LIBERTARIAN NATIONAL COMMITTEE,  
Inc., AND THE LIBERTARIAN PARTY OF KENTUCKY**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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## INTEREST OF AMICI CURIAE<sup>1</sup>

The Libertarian National Committee, Inc. (“LNC”) is the governing body of the national Libertarian Party. Founded in 1971, the Libertarian Party is the third largest political party in the United States. It is active in all 50 states and has more than 250,000 registered voters. Its growth, particularly in the 2016 election cycle, has been exponential in light of dissatisfaction with the old parties. It’s activity in the various states is carried out by its autonomous affiliates. The Libertarian Party of Ohio (“LPO”) is one such affiliate. The Libertarian Party of Kentucky (“LPKY”) is another such affiliate. The Libertarian Party platform reflects its core commitments to the principles of a free-market economy, civil liberties and personal freedom, and a foreign policy of non-intervention, peace and free trade. The LNC’s primary functions are to conduct the nomination of its Presidential/Vice Presidential slate of candidates, to support their election efforts, to assist in securing ballot access for those candidates in each of the 50 states, and to assist, support and advance LNC’s state affiliates wherever the affiliates need or request such assistance.

LPKY is the Kentucky affiliate of the LNC. It has experienced exponential growth. LPKY has interest in this case, and the precedent set, in light of two federal

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<sup>1</sup> Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

lawsuits it has pending: one, an expedited case challenging ballot access requirements, pending for decision (*Libertarian Party of Kentucky, et. al. v. Grimes, et. al.*, 3:15-cv-00086); the second, involves viewpoint discrimination and political targeting by Kentucky Educational Television, when, in 2014, it repeatedly changed candidate debate criteria with an eye towards removal of the Libertarian and certain other candidates from its U.S. Senate debate (*Libertarian Party of Kentucky, et. al. v. Holiday, et. al.* 3:14-cv-00063).

This Brief is tendered pursuant to the authority in FRAP 29(a) and (b).

## **SUMMARY OF ARGUMENT**

This case presents issues of exceptional constitutional importance that repeatedly rear their head: the old (Republican and Democratic) parties, or one of them, engage in electoral chicanery, either through the enactment of discriminatory statutes, or through the application of those statutes, to exclude Libertarian candidates (and the voters that support them) from the ballot box, one of the most fundamentally important functions engaged in by a political party and its members. In the process, overtly or covertly, the old parties, or one of them, engages state actors who are members of those parties to assist them.

The decision below was wrong as matter of law and constitutional precedent, and it provides a pathway and roadmap for the old parties to systemically exclude and target Libertarians, and potentially others, and drive them off the ballot. Fundamentally, the decision below potentially disenfranchises millions of voters, at a time when dissatisfaction with the old parties is at an all-time high, and interest in third parties, and particularly Libertarians, is at unprecedented levels.

The determinations of the District Court that there was not state action, despite a continuous and systemic back and forth between arguably non-state actors, and state actors, defies decades of case law concerning what constitutes a conspiracy, and should be reversed.

Moreover, Ohio SB 193 violates Equal Protection, for several reasons. First, it treats new parties that must petition for access worse than major parties, giving them less time to reach the same level of electoral success that it is given to major parties in that gives them ballot access for a year or two at best, at which point they must poll in a state wide poll at or above 3%, or lose access; major parties, on the other hand, are given four years of ballot access. Second, the combined effects and burden of SB193, with other elements of Ohio's ballot access scheme, is a severe burden, subject to strict scrutiny, and is not narrowly tailored to meet a compelling government interest, or, at the very least, fails to satisfy the requirements of intermediate review under the *Anderson-Burdick* framework and is unconstitutional.

## **ARGUMENT<sup>2</sup>**

### **I. Selective Enforcement Violates the First and Fourteenth Amendments.**

The Supreme Court has recognized that it is constitutionally impermissible to "[f]enc[e] out' from the franchise a sector of the population because of the way they may vote." *Carrington v. Rash*, 380 U.S. 89, 94 (1965). Where a state "impose[s]

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<sup>2</sup> *Amici* do not intend to revisit the statement of facts set forth in the LPO Brief; which has set forth a compelling account of the coordinated chicanery of the Republican Party of Ohio, its members, staff in Governor Kasich's office, and staff and agents of Secretary Husted's office. Furthermore, *Amici* have not addressed every issue raised by LPO in its brief; *Amici* agree with LPO on the issues it has raised, but have chosen to narrow the issues they address to those that affect the national party and Libertarian state affiliates with unfortunate regularity.

burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the state shows some compelling interest." *Vieth v. Jubelirer*, 541 U.S. 267, 305, 315 (2004). Indeed, exclusions based on the identity of a political party is *ipso facto* impermissible viewpoint discrimination. *Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8<sup>th</sup> Cir. 2006). *See, also, LaRouche v. Fowler*, 152 F.3d 974 (D.D.C. 1998) ("the *sine qua non* of a political party [is] that it represent[s] a particular political viewpoint").

It is beyond dispute that selective application, or enforcement, of a law based on content distinctions, including political party affiliation, violates the First Amendment. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

To justify the unjustifiable, the District Court concluded that there was no state action involved in the selective enforcement that was amply demonstrated by LPO in this matter. The District Court appears to have concluded that the primary bad actors were Casey, the Kasich Campaign, and the Ohio Republican Party, and then attempted to explain away various connections between these bad actors and the state actors: Secretary Husted and his staff.

First, as LPO correctly noted, it is beyond dispute that where a political party exercises "power over the electoral process" it is indisputably a state actor. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). The actions of the Ohio Republican Party, and its agents, are indisputably state action where the party

engaged in various chicanery, to cause state action that resulted in the removal of the LPO candidate from the ballot. *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347 (3d Cir. 2014).

Second, *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6<sup>th</sup> Cir. 1990), cited by the District Court, is distinguishable from the case at hand. In that case, involving the certain political party election procedures and challenges, this Court determined that state action was not involved in *that case*. But this Court took pains to distinguish the normal functions of a political party, to those instances where a political party took action under state statute, commenting that in the latter scenario the party “may well be engaging in state action.” *Id.* at 1195.

This Court noted that “[w]hen engaging in party activities, such as electing ward chairmen, distinct from their official governmental duties, the members of the Central Committee do not continue to act under color of state law merely because they have some governmental duties. There must be some allegation that the activities directly influence the governmental duties.” *Id.* at 1195. Here, of course, there is such a direct influence of government duties: the use of the government to exclude from the ballot box Libertarian candidates.

Third, while the District Court correctly cited the law, namely that: “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,” *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985), its analysis of the facts to this law was error.

Damschroder, the Chief Elections Officer in Ohio Secretary of State Husted’s office, directly and through Secretary Husted’s legal counsel, was, contrary to the District Court’s conclusion, inextricably involved in the conspiracy to exclude the Libertarian candidate for Governor, Mr. Earl, off of the ballot box. It began with his being the eyes and ears of the conspiracy in the Secretary of State’s office, keeping his “ear to the ground” for Mr. Earl’s petition. [RE 227-1, PAGEID 5524]. It involved notifying Luketic (Kasich’s campaign political director) of the petition filing by Mr. Earl. [RE 227-1, PAGEID 5592, 5591].

The conspiracy by Damschroder and others then involved then involved receiving contacts about receipt of a filing of protest against Mr. Earl’s filing paperwork on the day of the deadline, and an unprecedented offer with those coordinating the challenge that the Secretary of State’s Office would keep the office open late to receive the protest. [RE#241-1, PAGEID 6261; RE#227-1, PAGEID 5476; RE#247; PAGEID 6609].

It then involved Damschroder notifying legal counsel for Secretary Husted to expect the protest challenge. [RE#227-1, PAGEID 5477].

Later in the conspiracy, it also involved carrying out on the promise to the other conspirators, with a directive to office staff to keep the office open late to receive the protest. [RE#227-1, PAGEID 5478, 5479, 5299]. And so concerned was Damschroder that the conspiracy succeed that he checked on the filing of the protest late in the afternoon on the day it was due. [RE#241-1, PAGEID 6376].

But Damschroder's involvement in the conspiracy did not end there. It involved unprecedented coordination by Damschroder and other members of Secretary Husted's staff on background checks of the petition circulators. [RE#221-1, PAGEID 4821-4824]. This unprecedented background check was coordinated through Secretary Husted's Chief Legal Counsel and Damschroder's attorney Jack Christopher. [RE#221-1, PAGEID 4846].

And, adding insult to injury, during the administrative hearing involving the challenge to Mr. Earl, communications between Damschroder and Jack Christopher about who was paying outside legal counsel, the objects, means, and ends of the conspiracy (which, again, indications collusion and participation in the conspiracy) make those points abundantly clear. [RE#221-1, PAGEID 5838-40, RE#241-1 PAGEID 6267].

This is in addition to Damschroder being kept in the loop in emails with the other conspirators.

Most significantly and troublesome, is the communications between Secretary Husted's legal counsel (and legal counsel for Damschroder), Jack Christopher, and the hearing officer who was assigned to hear the protest lodged against Mr. Earl. The hearing officer had proposed to deny the protest, and rule in favor of Mr. Earl, which was followed with a 3:30 a.m. e-mail by Jack Christopher on why that decision was wrong, and various telephone calls between the hearing officer and Jack Christopher. [RE#227-1, PAGEID 5336-5337, 5498, 5517; 223-1, PAGEID 5022-5023].

These facts and evidence demonstrate not only that there was a single plan, but also that there was a shared general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant. *Hooks*, 771 F.2d 935, 943-44. State action was clearly involved, and inappropriate selective enforcement conspiracy employed against the Libertarian candidate, Mr. Earl to remove him from the Ohio ballot box, by Damschroder, Jack Christopher, Casey, and a host of others, solely because Mr. Earl was the Libertarian candidate.

Again, the evidence in this case demonstrated that state actors, including Damschroder and Christopher acted as the eyes and ears of the conspiracy in the Secretary of State's office, directed that the office keep its hours of operation open longer than usual customary office hours in a move to further the conspiracy, used

state resources and time to conduct background research into the circulators to help assist with the challenge, engage in significant ex parte communications with the hearing officer on the protest, and then celebrated when the conspiracy succeeded. *United States v. Alexander*, 408 F.3d 1003, 1008-09 (8th Cir. 2005) (defendant's activities as lookout was evidence of participation in conspiracy); *United States v. Layne*, 192 F.3d 556, 567-568 (6th Cir.1999) (same); *United States v. Gibbs*, 190 F.3d 188, 199 (3d Cir. 1999) (holding that defendant shared conspiracy's goal when circumstantial evidence showed he knew about the larger conspiracy).

The District Court's holding, which apparently stands for the proposition that there must be a State Actor in each and every step of a wide-ranging conspiracy to selectively enforce the law to deny a political party ballot access defies logic, established precedent, and the Constitution. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Id.*

The Supreme Court has held that coordination between state actors and opposing campaigns to cause the exclusion of a candidate, from the ballot or public access television, is a form of impermissible viewpoint discrimination under the First

Amendment. *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 683 (1988) (suggesting political pressure from inside or outside the state actor would be impermissible, but noting that the jury found no such pressure in the Forbes case). Here, however, not only was there political pressure, it was well coordinated between the Ohio Republican Party and the Secretary of State's office.

Yet, through the sanctioning of the conspiracy and inappropriate slicing and dicing of the state action and actors with alleged private actors and actions, all the while ignoring the clear conspiracy that was present, the District Court approved of these practices. Its decision should be reversed.

## **II. Senate Bill 193 Violates the Equal Protection Clause.**

Ohio Senate Bill 193 violates the Equal Protection Clause. This Court had occasion to review (for the third time) Tennessee's ballot access regime in *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015) ("*Hargett III*"). *Hargett III* first addressed an important aspect of this case – whether the challenge is facial or as-applied. This Court explained: "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Id.* at 691, citing *Citizens United v. FEC*, 558 U.S. 310, 331, (2010). "In fact, a claim can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's particular case without

seeking to strike the law in all its applications.” *Id.*, citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194, (2010). In constitutional challenges reaching beyond the plaintiff's circumstances, the plaintiff must satisfy the "standards for a facial challenge to the extent of that reach." *Id.*

For a facial challenge to a statute or court rule, the courts, and in light of risk that "enforcement of an overbroad law" may "deter[] people from engaging in constitutionally protected speech" and may "inhibit[ ] the free exchange of ideas," the overbreadth doctrine permits courts to invalidate a law on its face "if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'” *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

As such, the facial challenge raised by LPO is likewise a hybrid as-applied challenge – as applied to the LPO and other minor parties that had or have to petition to get on the ballot, is the challenged law constitutional?

It is axiomatic that “the right of individuals to associate in political organizations, and the right of citizens to cast a meaningful vote, are among the most important values in our democracy.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Furthermore, “[a]ssociational rights and voting rights are closely connected, since ‘the right to form a party for the advancement of political goals means little if a party

can be kept off the election ballot.’” *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 545 (6<sup>th</sup> Cir. 2014) (*Hargett II*).

This Court in *Hargett II* noted that the “U.S. Supreme Court articulated the contemporary standard for evaluating constitutional challenges to a state's election laws in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), and again in *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).” 767 F.3d 533 at 546. “First, the court must ‘consider the character and magnitude of’ the plaintiff's alleged injury.” *Id.* Next, it “must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* Finally, it must assess the “legitimacy and strength of each of those interests,” as well as the “extent to which those interests make it necessary to burden the plaintiff's rights.” *Id.*

This Court in *Hargett II* explained that “[t]he first step in this analysis is important. When the restrictions imposed by the state are ‘severe,’ they will fail unless they are narrowly tailored and advance a compelling state interest.” *Id.* Conversely, if “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.* This Court then observed that “many regulations ‘fall in between these two extremes,’” in which case courts “engage in a flexible analysis, weighing the

burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.” *Id.*

Ohio SB 193 violates the Equal Protection Clause in at least two different respects. First, it gives minor parties that achieve ballot access by petition *only one or two years* of ballot access (until the next election for Governor or President), after which they are removed from the ballot unless they poll at least 3% of the vote in the presidential or gubernatorial race. That is an onerous requirement for a new party to meet in a single election cycle. By contrast, the major parties are virtually guaranteed to poll at 3% or more in a presidential or gubernatorial race, which entitles them to *four years* of ballot access. SB 193 thus *gives new minor parties that qualify by petition less time to achieve the same electoral success as the major parties.*

Second, the combined effect of (i) SB 193’s early deadline for petition submission (125 days before the general election), (ii) its requirement to submit signatures equal to 1% of the votes cast in the preceding Governor/Presidential election *and in addition* the petition must contain signatures numbering at least 500 valid signatures from each of eight separate Congressional Districts; (iii) for each candidate, a separate petition, signed by 50 voters for each statewide race, and 5 voters for each local race, to be submitted after the party petition, but before 110 days before the general election; and (iv) the petition, and each of its parts, must

comply with the requirements set forth in Ohio Rev. Code Ann. 3501.38. And, for each of the foregoing signatures that must be submitted, the signatories cannot be disaffected voters who voted in the preceding primary.

**A. SB 193 violates the Equal Protection Clause because it gives minor parties that qualify by petition less time to achieve equal electoral success as the major parties**

There is no doubt that SB193, and the resulting exclusion of the Libertarian Party Ohio from the ballot, forces the party into a petition status. Problematically, SB 193 gives minor parties that qualify by petition less time to achieve equal electoral success than the major parties. Major parties in Ohio, and parties that achieve at least 3% of the vote for Governor or President, enjoy four years of ballot access. Ohio Rev. Code. Ann. 3517.01(A)(1)(a); Ohio Rev. Code. Ann. 3501.01(F). A minor party that qualifies by petition does not enjoy four years of ballot access. Rather, they enjoy ballot access until the next general election for President or Governor, at which point they must poll 3% in that race or lose their ballot access and be forced to begin anew. Ohio Rev. Code. Ann. 3517.01(A)(1)(b); Ohio Rev. Code. Ann. 3501.01(F).

In *Williams v. Rhodes*, 393 U.S. 23, the U.S. Supreme Court was clear that “[n]o extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties

struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate.” *Id.* at 31.

*Williams* was likewise clear that “[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.” *Id.* “So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.” *Id.* “In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that ‘only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.’” *Id.*

This Court dealt with an identical Equal Protection Clause Challenge in *Hargett III*, 791 F.3d 684. In *Hargett III*, this Court determined that the burden imposed on the minor parties was severe, because “recognized minor parties must obtain 5% of the total number of votes cast for gubernatorial candidates in the last gubernatorial election to retain ballot access, we conclude that this burden is severe considering that established major parties, which have more institutional knowledge and financial resources, are given four years to obtain the same level of

electoral success.” *Id.* at 694. Replace “5%” in *Hargett III*, with “3%,” and the exact same situation is present in Ohio.

This Court went further in *Hargett III*, concluding that:

Even if we assume the burden is not severe, it is not justified by a sufficiently weighty state interest. Defendants argue that the burden is justified because statewide political parties are different from recognized minor parties and these differences justify the state's imposition of different burdens on them. *Id.*

As in *Hargett III*, “[i]f anything, here, the differences between these two types of parties **justify having less onerous burdens on recognized minor parties** than statewide political parties.” *Id.* (emphasis added). See, also, *Jenness v. Fortson*, 403 US 431 (1971) (“Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, *supra.*). And, Ohio’s “ballot-retention statute clearly imposes a heavier burden on minor parties than major parties by giving minor parties less time to obtain the same level of electoral success as established parties.” *Id.* at 695.

Unlike almost every other state, and like the scheme invalidated by this Court in Tennessee in *Hargett III*, Ohio’s “access-retention system forces minor political parties to attain the *same* vote percentage as major political parties in *less* time.” *Id.* Thus, “[b]ecause this statute imposes a greater burden on minor parties without a sufficient rationale put forth by the state, it violates the Equal Protection

Clause. It impermissibly ‘freezes the status quo’ and does not allow ‘a real and essentially equal opportunity for ballot qualification.’” *Id.*

While the District Court noted in this case that LPO could simply submit petitions each year, in *Hargett III*, the statute was struck despite the fact that an individual candidate could have petitioned his or her way onto the ballot and the party could have re-petitioned each year to be put back on the ballot. *Id.* In *Hargett III*, the right to the same automatic four years of ballot access and its denial was deemed a “severe burden,” and subject to strict scrutiny. *Id.* at 693.

Thus, *Hargett III* stands for a rather simple proposition: a State must provide a means for a party to petition to obtain ballot access to put all of its candidates on the ballot, and the access given when that occurs must be for the same period as that given to the major parties. *Id.* SB193 and Ohio’s ballot access scheme fails to do so. As in *Hargett III*, SB 193 constitutes a severe burden, and is unconstitutional.

Finally, as in *Hargett III*, “[e]ven if we assume the burden is not severe, it is not justified by a sufficiently weighty state interest. Defendants argue that the burden is justified because statewide political parties are different from recognized minor parties and these differences justify the state's imposition of different burdens on them. *Id.* No matter how this scheme is viewed, it is unconstitutional.

**B. SB193 in combination with the remainder of Ohio’s Ballot Access Scheme otherwise constitutes a severe burden, or at least triggers a balancing analysis for minor parties**

In *Hargett II* this Court analyzed whether the Tennessee 2.5% petition requirement was unconstitutional as applied to the Plaintiffs in that case (or, as noted above, facially as to minor parties). 767 F.3d 533, 546. In *Hargett II*, this Court noted that “[t]o answer this question, we evaluate the effects of the signature requirement on the plaintiff political parties, keeping in mind that other aspects of Tennessee’s ballot-access scheme might operate so as to make the signature requirement either harder or easier to meet.” *Id.* at 547.

In *Hargett II*, this Court observed that “[w]hether a voting regulation imposes a severe burden is a question with both legal and factual dimensions.” 767 F.3d 544, 547. Thus, “[i]f a restriction does not ‘affect a political party’s ability to perform its primary functions,’ such as organizing, recruiting members, and choosing and promoting a candidate, the burden typically is not considered severe.” *Id.*, citing *Blackwell*, 462 F.3d at 586.

This Court then held that “Tennessee’s ballot-access rules strike at the very heart of the plaintiffs’ primary functions and no doubt constrain their opportunities to effect political change. But this fact alone does not permit us to conclude that the burden is severe; we must also consider ‘the effect of the regulations on the voters,

the parties and the candidates’ and ‘evidence of the real impact the restriction has on the [political] process.’” *Id.*

Furthermore, the impact of the challenged legislation on voters is relevant to this inquiry. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (ballot access restrictions also burden the fundamental right of voters to "cast their votes effectively"). This is because "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). Ballot access regulations may impinge on voters' rights by "limit[ing] the field of candidates from which voters might choose." *Anderson*, 460 U.S. at 786 (*quoting Bullock*, 405 U.S. at 143).

The effects of SB 193, to submit a party petition at least 125 days before the general election, places the deadline at the beginning of July in an election year. As this Court noted in *Blackwell*, 462 F.3d 579, 586, “[e]arly deadlines also have the effect of ensuring that any contentious issue raised in the same year as an election cannot be responded to by the formation of a new political party.” In *Blackwell*, this Court cited favorably to *McLain v. Meier*, 637 F.2d 1159, 1163-64 (8th Cir. 1980), which struck a deadline more than ninety days before the primary and more than 150 days before the general election.

Standing alone, the requirement to submit the party petition containing signatures equal to 1% of the votes last cast for Governor or President, 125 days

before the general election, could be on the border of constitutionality. But that is not all the Ohio scheme requires. The scheme requires separate petition parts and signatures from voters of each of eight separate congressional districts numbering 500 each. That requires coordination, effort, and significant resources.

It also presents the party and its' candidates with an impossible Hobson's choice: either submit the petition well in advance of the 125-day deadline (making the 125-day deadline significantly earlier, and more burdensome than it appears at first blush), and give candidates time to gather signatures, or submit it at or near the deadline, and give candidates 15 days to submit signatures – a virtually impossible task for the candidates.

What is more, how are candidates, going to gather signatures at a time when the party is not even on the ballot? The Ohio scheme is designed to suppress minor party participation, by effectively requiring an early submission of a petition, while not appearing to do so.

But that is not all: the petitions with signatures must also conform to the requirements of Ohio Rev. Code Ann. 3501.38. That may not seem like a big deal, but ambiguities in that statute is the very reason that this case is before this Court today. Ohio Rev. Code Ann. 3501.38(E) provides that:

On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified

to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382 of the Revised Code. On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, the circulator shall identify the circulator's name, the address of the circulator's permanent residence, **and the name and address of the person employing the circulator to circulate the petition, if any.**

Thus, it appears to involve only circulators that are employed by a person, if any. And, in the absence of an employment relationship, does not appear on its face to require the disclosure of an independent contractor relationship. Yet that is not how the statute was construed after the fact (due to the conspiracy discussed *infra*). And, Ohio Rev. Code Ann. 3501.38 is unforgiving: it permits no ability to correct technical or other deficiencies. Ohio Rev. Code Ann. 3501.38(I). What, exactly, is the state interest in the failure to permit corrections for items other than number of valid signatures? It cannot be prevention of fraud, or the measurement of a modicum of support. If that were so, those interests could be vindicated by permitting correction. It can only be to make the submission of the petitions a high stakes effort that is designed to exclude minor parties.

The combined effect of the scheme constitutes a severe burden that violates minor parties Equal Protection Rights. *Blackwell*, 462 F.3d 579.

There is no legitimate state interest in burdening minor parties, but not major parties, with separate signature requirements on its candidates that are not imposed

on the major parties. There is no justification for such an early petition requirement, either for the party, or the individual candidates. There is no justification for not permitting an opportunity to correct deficiencies. Rather, “the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate.” *Williams*, 393 U.S. 23, 31. “If anything, here, the differences between these two types of parties justify having less onerous burdens on ... minor parties than statewide political parties.” *Hargett III*, 791 F.3d 684, 694.

Ohio’s scheme is severe, it does not meet strict scrutiny, and it is unconstitutional. “Even if we assume the burden is not severe, it is not justified by a sufficiently weighty state interest.” *Hargett III*, 791 F.3d 684, 694. SB 193 is unconstitutional.

## **CONCLUSION**

For the foregoing reasons, the decision of the District Court should be reversed, an emergency injunction issued to LPO to Ohio’s November, 2016 election ballot be granted, and the case remanded for further proceedings.

Respectfully Submitted,

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### **CERTIFICATE OF COMPLIANCE**

In accordance with Federal Rule of Appellate Procedure 29, which limits the allowable length of an amicus brief to one-half the maximum length authorized for a party's principal brief, counsel hereby certifies that the foregoing brief is double-spaced, with one-inch page margins, and written in proportionally spaced, 14-point typeface, pursuant to Federal Rule of Appellate Procedure 32, and that it contains 5,162 words.

/s/Christopher Wiest  
Christopher Wiest

### **CERTIFICATE OF SERVICE**

I certify that the foregoing Brief was filed using the Court's electronic filing CM/ECF system, and that copies will be automatically served on all parties of record through the Court's electronic filing system, this 24 day of June, 2016.

/s/Christopher Wiest  
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