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.
_____/

APPELLANTS' MOTION TO STAY
PENDING THEIR APPLICATION TO AND PETITION FOR
CERTIORARI FILED WITH THE SUPREME COURT

Appellants (hereinafter "LPO") respectfully move the Court to stay its judgment entered July 29, 2016 and enter an emergency injunction restoring the Libertarian Party of Ohio (LPO) to Ohio's 2016 general election ballot. LPO previously sought an emergency injunction from this Court seeking this same injunctive relief, but said relief was implicitly denied by the Court's July 29, 2016

judgment. For this reason, LPO alternatively seeks a stay of the Court's July 29, 2016 judgment pending LPO's emergency Application for Stay and Emergency Relief which LPO will immediately file with the Supreme Court following this Court's disposition of this Motion.

Supreme Court Rule 23.3 requires that parties seeking stays and/or emergency relief first address those requests to the Court whose judgment is under review. LPO therefore first directs this request for emergency relief and/or a stay to this Court.

LPO believes that a conflict exists between this Court's decision entered on July 29, 2016 and decisions of Sister Circuits. LPO also believes that this Court's decision of July 29, 2016 contradicts Supreme Court precedent. For these reasons, LPO requests emergency relief and a stay to allow the Supreme Court time to assess the credibility of LPO's Application and Petition for Certiorari.

ARGUMENT

I. The Panel's Decision Contradicts Decisions in Sister Circuits That Have Recognized that the *Anderson*/*Burdick* Analysis Incorporates a Non-Discrimination Principle.

The Supreme Court first clearly stated a non-discrimination principle in its ballot access jurisprudence in *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), which invalidated Ohio's draconian limitations on minor-party ballot access:

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

In *Anderson v. Celebrezze*, 460 U.S. 790, 793-94 (1983), which invalidated Ohio's early-filing deadline for independent presidential candidates, the Court further explained: "A burden that falls *unequally* on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It *discriminates* against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." (Emphasis added).

In *Burdick v. Takushi*, 504 U.S. 428 (1992), which sustained Hawaii's ban on write-in votes, the Court further elaborated on its non-discrimination principle:

> when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

(Citations omitted). This exact same framework was described in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), five years later. In sum, what has become known as the *Anderson*/*Burdick* framework presumes "nondiscriminatory restrictions." Discriminatory restrictions, according to the Supreme Court, may very well violate the First and Fourteenth Amendments even

though the same kind of restriction applied across-the-board would impose no severe burden on First and Fourteenth Amendment rights.

Reform Party of Allegheny County v. Allegheny County Department of Elections, 174 F.3d 305, 315 (3d Cir. 1999) (en banc), provides an example. There, the Third Circuit ruled that although Pennsylvania's anti-fusion law did not itself violate the First Amendment, Pennsylvania's denying only 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.

(Emphasis added).

Fulani v. Krivanek, 973 F.2d 1539 (11th Cir. 1992), offers another example. There, Florida required that minor party candidates for President submit signatures in order to access the ballot. Florida also required that these candidates pay signature-verification fees. Neither the signature collection requirement nor the verification fee were unconstitutional. *Id*. at 1540. Both had already been upheld by the Eleventh Circuit. The candidate's challenge, however, focused on Florida's allowing major-party candidates to waive the fee while prohibiting minor candidates from doing the same.

Even though the burden imposed by the signature-verification fee was not "severe," *id*. at 1544, the discriminatory treatment was found unconstitutional under *Anderson*/*Burdick* by the Eleventh Circuit. The minor candidate was impermissibly "forced to bear an unequal burden in order to gain access to the ballot." *Id*. Quoting *Anderson*, the Eleventh Circuit stated that "[a] burden that falls *unequally* on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It *discriminates* against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id*. (emphasis original).

The Panel's decision improperly assessed S.B. 193's denial of primaries and the state-recognized memberships they entail in a constitutional vacuum. It failed to recognize *Anderson*/*Burdick*'s nondiscrimination principle and in doing so not only improperly applied Supreme Court precedent, but also rendered a decision in conflict with decisions of the Third and Eleventh Circuit. This 'Circuit split' justifies Supreme Court review on an expedited basis.

II. Discriminatory Membership Laws Have Been Invalidated by Sister Circuits and by the Supreme Court.

The Panel's sustaining Ohio's discriminatory membership law conflicts with decisions of Sister Circuits, as well as a decision of the Supreme Court. Sister Circuits have invalidated discriminatory treatment of minor parties in the contexts

of both actual membership and the dissemination of information connected to that membership.

In terms of discrimination based on actual membership, the Second Circuit in *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), blocked enforcement of a New York membership law distinguishing between "political parties," which won at least 50,000 votes in the last gubernatorial election, and "political organizations," which had not. Both could run candidates, but "[a] number of unique benefits accrue[d] to a Party [that had won more than 50,000 votes]." *Id*. at 415. Among these benefits:

> only a Party can automatically place a candidate on the ballot for statewide election without first undertaking the burden of a special petition drive in order to do so. Further, a Party may choose their statewide candidate in a closed primary election, while an independent organization may not. A closed primary is an election in which only those voters enrolled as members of that particular Party are allowed to vote. For such an election to take place, the state, the Party, and the local boards of elections who administer primaries must be able to identify whether a voter is actually a member of a given Party and thus eligible to participate in the primary. New York's enrollment scheme allows registered voters to enroll in Parties, and requires the publication of voter enrollment information to facilitate such identification.

Id. at 415-16 (citations omitted).

New York relied on voter registration to conduct its closed primaries. Voters would check the appropriate political party on voter registration forms and then could participate in that party's primary. "There was no box labeled 'other,' or any other way for a voter to enroll in or express an affiliation with another political

organization." *Id*. at 416. Consequently, unlike parties, political organizations in New York had no state-created membership lists. "Parties use these enrollment lists to conduct closed primaries, but they also use the lists for many other purposes, such as identifying new voters, processing voter information, organizing and mobilizing Party members, fundraising, and other activities that influence the political process." *Id*.

Political organizations challenged this discriminatory treatment; they argued that New York law "deprives them of the ability to declare publicly their political affiliation, and to have that affiliation maintained and publicized in the enrollment lists. They additionally maintain that the challenged law deprives them of the ability to use the enrollment list information to conduct party building activities." *Id*.

The Second Circuit agreed with the District Court that New York's discriminatory treatment likely ran afoul of *Anderson*/*Burdick* and should be preliminarily enjoined. "We think the burdens imposed on plaintiffs' associational rights are severe. ... [W]hile the enrollment lists at issue here may have originally been intended solely for use in facilitating closed primary elections, we are required to look at the totality of the voter enrollment scheme in its present form. Currently, Parties use these lists for a number of different activities essential to their exercise of First Amendment rights." 389 F.3d at 420.

The Second Circuit added that "access to minimal information about political party affiliation is the key to successful political organization and campaigning." *Id*. (quoting *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984). "If an independent body does not have access to other information concerning who is affiliated with its party, it will be unable to determine from the word 'unaffiliated' whether a particular unaffiliated voter is or is not a supporter of its organization. ... That they are smaller, less developed—and hence less financially established parties—makes their situation even more difficult." 389 F.3d at 421. "As *Anderson* instructs, such limitation of opportunity for independent voters reduces diversity and competition in the marketplace of ideas." *Id*. (citing *Anderson*, 460 U.S. at 794). "Therefore, the district court did not abuse its discretion in ruling that New York's voter enrollment scheme could only withstand constitutional challenge if New York were able to show a compelling state interest." 389 F.3d at 421.

Green Party of New York is virtually indistinguishable from the present case. The only difference is that New York used voter registration forms to link voters with political parties, while Ohio uses primaries. The Second Circuit ruled that allowing only the established parties the privilege of state-recognized membership violated the First and Fourteenth Amendments. That the party preference in New York was put in place to facilitate primaries (which minor parties did not

participate in) did not insulate New York's law. It still placed minor parties at an unconstitutional political disadvantage. They did not have access to the same membership information, after all, that was being supplied to the major parties.

This same result was reached in *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984), where the Tenth Circuit invalidated a Colorado law that "prevented persons other than those affiliated with the two major political parties from obtaining and using such information in a manner similar to that of the major parties." This discrimination flowed from Colorado's refusal to allow qualified minor political parties to register members. The Court explained, "[t]he electors of the Democrats and Republicans can designate their party affiliation by name on the voter registration form. Plaintiffs [the Citizens and Libertarian Parties] are required to register as 'unaffiliated.'" *Id*. "[W]hile the Citizens and Libertarian parties are permitted the same access to voter registration lists, they are unable to determine from the welter of 'unaffiliateds' which of those unaffiliated voters are in fact supporters of their political organizations." *Id*.

The Tenth Circuit quoted from *Anderson* to invalidate the disparate membership registration procedure:

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral

> arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas.

Id. (quoting *Anderson*, 460 U.S. at 792).

The Panel's decision cannot be squared with the Tenth Circuit's decision. Rummaging through unaffiliated voters for support is a far cry from having lists of voters who are considered official party members.

Further, the Panel's decision cannot be read in harmony with a decision of the Supreme Court. In *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984 (S.D.N.Y.), *summarily aff'd*, 400 U.S. 806 (1970), the Supreme Court affirmed a decision of a three-judge District Court that invalidated New York's preference for established political parties in the context of membership lists. New York's law "provid[ed] that lists of registered voters be delivered free of charge to the county chairmen of each political party polling at least 50,000 votes for governor in the last preceding gubernatorial election." 314 F. Supp. at 995. Minor parties, in contrast, had to pay.

The District Court, and the Supreme Court by summarily affirming, concluded "that the effect of these provisions, when considered with other sections of the Election Law, is to deny independent or minority parties which have succeeded in gaining a position on the ballot but which have not polled 50,000 votes for governor in the last preceding gubernatorial election an equal opportunity to win the votes of the electorate." *Id.* "The State has shown no compelling state

interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefor." *Id*. (citation omitted).

The Second Circuit reached this same result in *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), where New York had re-passed essentially the same law invalidated twenty-plus years earlier in *Rockefeller*. "The reasons why the courts found the provision invalid in 1970 remain true today and apparently require repeating: It is clear that the effect of these provisions ... is to deny independent or minority parties ... an equal opportunity to win the votes of the electorate." *Id*. at 60 (citation omitted).

Official party membership, according to the Supreme Court and the Second and Tenth Circuits, is extremely important. In the words of the three-judge District Court in *Rockefeller*, official membership lists provide the established parties with a "significant subsidy." Even though unaffiliated voters remain options for minor parties, moreover, having to sort through the electorate in order to identify which unaffiliated voter identifies with which party presents a herculean task. *See Baer*. Ohio's discriminatory denial of this "significant subsidy" throws a severe burden minor parties. They cannot organize on an equal basis with the established parties.

Because of the Circuit split rendered by the Panel's decision and its tension with Supreme Court precedent, LPO believes it has a credible chance of gaining

Supreme Court review. A stay and emergency relief from this Court will facilitate that review.

III. The Panel's Conclusion that Major Parties Are Not Engaged in State Action When They Sabotage Minor Party Primaries is Supported By No Precedent.

The Panel concluded that the Ohio Republican Party -- the dominant political party in Ohio -- was not engaged in state action when it clandestinely recruited and funded an unwitting LPO member to protest LPO's top-of-the-ticket candidate, Charlie Earl. "Here, the Ohio Republican Party has not been 'assigned an 'integral part' in the election process' that is usually performed by the state." Panel at 15 (citations omitted). Cases like *Smith v. Allwright*, 321 U.S. 649 (1944), and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality), the Panel concluded, therefore have no application.

The Panel erred. Ohio, no less than Texas in *Smith v. Allwright* and Virginia in *Morse*, has assigned to the established parties (including the dominant Republican Party), an "integral role" in its election process. Just like in Texas, Ohio uses primaries. ORP benefits immensely from these primaries. Its successful primary candidates are automatically included on the general election ballot. And in Ohio, the successful Republican primary candidate usually wins the general election.

In *Smith v. Allwright*, 321 U.S. 649 (1944), where the Democratic Party of Texas forbade African-Americans from voting in its primaries, facts like these were controlling. "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." *Id*. at 663. It continued: "If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, ... it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary." *Id*. at 664. Lastly, the Court explained: "This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." *Id*.

Terry v. Adams, 345 U.S. 461, 469 (1953) (plurality), which invalidated the Texas Jaybirds' racial discrimination in voting, expanded on this logic: "It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election." In so holding, it observed that "[t]he only election that has counted in

this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections ...." *Id.* Lastly, "[i]t is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county." *Id*.

The Supreme Court endorsed this understanding of "integral" involvement 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 not only rejected the notion that *Smith* and *Terry* only apply to racial disenfranchisement, *id*. at 218, Justice Stevens focused on the power of the two major parties; Virginia "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). Justice Breyer agreed because the Virginia Republican Party used "a nominating

convention that resembles a primary about as closely as one could imagine," *id*., and "avail[ed] itself of special state-law preferences, in terms of ballot access and position." *Id*.

In terms of Ohio's primary system, there can be little doubt that the Ohio Republican Party plays an "integral" part. Its successful candidates automatically appear on Ohio's general ballot -- and usually win. It has been awarded a host of "special state-law privileges." It plays an integral party in Ohio's primary system. Were the Ohio Republican Party to have sabotaged one of its own candidates and clandestinely had him or her removed from its own primary ballot, there would be no doubt that it engaged in state action. *See Wilson v. Hosemann*, 185 So.3d 370, 375 (Miss. 2016) (holding that Democratic Party engaged in state action when it inadvertently omitted a candidate's name from primary ballot). That it directed its espionage at another party's primary does not change this conclusion. ORP is just as integral to the primary system.

The Panel relied on a District Court opinion, *Nader v. McAuliffe*, 593 F. Supp.2d 95 (D.D.C.), *aff'd on other grounds*, 2009 WL 4250615 *1 (D.C. Cir. 2009), to bolster its conclusion: "By filing a protest against a nomination petition under this statute—or having an agent file a protest—the Ohio Republican Party is not engaging in state action. To the contrary, any private citizen with standing is

authorized by Ohio law to file a protest against a candidate's nominating petition." Panel at 15.

The Panel erred. No authority other than *Nader v. McAuliffe* -- which was only affirmed on other grounds -- supports the Panel's proposition that because private actors may do what a state actor does the latter's conduct is not state action. The Supreme Court's white primary cases, and its later decision in *Morse*, prove the Panel's logic is incorrect. Those cases, after all, involved major parties, and their reach is limited to the two major parties. *See* Bode v. National Democratic Party: *Apportionment of Delegates to National Political Conventions*, 88 HARV. L. REV. 1460, 1463 (1972) ("several lower courts have agreed ... that the limitation of effective choice resulting from nomination by a major party is such a significant part of the election process that constitutional standards should apply"). A minor party, for example, may hold the same kind of nominating convention presented in *Morse* without being considered a state actor. This dichotomy has never led any court, to LPO's knowledge, to conclude that major parties cannot be state actors when they hold nominating conventions.

Smith, *Terry* and *Morse* make clear that just because some (even most) private entities may use state procedures without being deemed state actors, a major party's use of those same procedures is not automatically private. A major party is a state actor when it uses state-created procedures to regulate ballots. This

is true even though similar procedures are available to private persons and minor parties which cannot be deemed state actors. The Panel's decision contradicts this legal fact. Certiorari is proper and immediate relief warranted. This Court should stay its decision and grant emergency relief pending the Supreme Court's decision.

CONCLUSION

For the foregoing reasons, LPO respectfully requests that the Court enjoin enforcement of S.B. 193 pending LPO's petition for review by the Supreme Court and/or stay its decision until LPO's emergency Application and Petition for Certiorari are resolved by the Supreme Court.

Respectfully submitted,

s/ Mark R. Brown

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

Naila S. Awan
220 Fifth Avenue
Second Floor
New York, NY 10001
(212) 485-6065
(212) 485-2015 (fax)
awan.ns@gmail.com

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

CERTIFICATE OF SERVICE

I hereby certify that this Motion 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