

**IN THE SUPREME COURT
OF THE UNITED STATES**

**LIBERTARIAN PARTY OF OHIO, KEVIN
KNEDLER, CHARLES EARL and AARON HARRIS,**

Petitioners,

v.

Case No. 16A181

**JON HUSTED,
in his Official Capacity as Ohio
Secretary of State,**

**On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit**

Respondent,

STATE OF OHIO,

Intervenor-Respondent,

and

GREGORY FELSOCI,

Intervenor-Respondent.

**PETITIONERS' REPLY TO RESPONDENT-SECRETARY'S
AND RESPONDENT-FELSOCI'S RESPONSE TO PETITIONERS'
APPLICATION FOR STAY AND EMERGENCY RELIEF**

I. Party Labels Are Critical.

The Secretary argues that because the Johnson/Weld ticket has now been certified as an independent presidential ticket, nothing is served by adding the Libertarian Party label to their candidacy. Indeed, the Secretary even goes so far as to assert that the Johnson/Weld campaign is better off without a party label. Studies routinely show that party labels are critical to voters and candidates. *See, e.g.,* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 370 ("Voters benefit

greatly from on-ballot tools, such as political party labels, that help them translate their policy preferences or retrospective evaluations into responsive votes."). "[T]here is compelling evidence that party labels on the ballot substantially affect vote choice" *Id.* at 410. *See also* Richard Winger, *Must Candidates Be Treated Equally?*, 45 CLEVE. ST. L. REV. 87, 96-97 (1997) (finding that in Ohio the lack of a party label has "hurt" LPO candidates).¹

II. Petitioners' Selective Enforcement Theory Was Accepted By the Lower Courts.

The Secretary and Felsoci argue that Petitioners are not entitled to emergency relief because they did not fully address their selective enforcement claim under the Fourteenth Amendment in their emergency Application filed with this Court. The Secretary and Felsoci ignore the District Court's ruling that Petitioners' theory and proffered proof were sound, *see, e.g.,* Opinion and Order, RE 187, PAGEID # 3794, as well as their own failure to cross-appeal the District Court's adverse decision. The Sixth Circuit did not question Petitioners' selective enforcement argument (either legally or factually). Petitioners lost only because the Sixth Circuit concluded that no state action supported their selective enforcement claim.

Selective enforcement, of course, is a well-recognized theory of liability. The question is whether an otherwise valid rule has been enforced or applied for an impermissible reason. *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"). Whether because of race, gender, or speech, *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); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[s]elective exclusions from a public forum may not be based on content alone, and may not be

¹ Without emergency relief, Ohio will be one of only three States (the other two being Tennessee and Alabama) that does not print the "Libertarian" label next to the Johnson/Weld ticket.

justified by reference to content alone"); *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682-83 (1998) (holding that a state cannot selectively exclude a candidate from a debate based on his viewpoint), state actors cannot selectively apply otherwise valid laws. Government actors, in particular, cannot do so in order to "dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 525-26 (2001). *See also Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016) ("[t]he basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics'").

There is now no dispute surrounding ORP's involvement in the destruction of LPO as a political party. Republican agents, including the chair of the Kasich Campaign for Governor, participated in the planning and ORP financed the lawyers. Although ORP (after falsely denying its involvement for eighteen months) continues to contest its motive for doing so, there can be little doubt that it targeted LPO's gubernatorial candidate for political reasons. ORP's objective was to manipulate Ohio's gubernatorial election ballot. It challenged no other political party's candidate. It was eager to allow the Green Party's gubernatorial candidate on the ballot.

Dozens of e-mails, all part of the record below, prove this to be true. Casey even admitted that he was trying to hurt the Democratic Party. *See* Casey Testimony, RE 241-1, PAGEID # 6255. ORP's Chair parroted his claim, apparently believing it somehow exonerated ORP. *See* Borges Testimony, RE 335-11, PAGEID # 8612. Neither even attempted a credible, neutral explanation. If this were not enough, at what they thought was the conclusion of their espionage (when the Sixth Circuit in May of 2014 refused to restore Earl to the ballot), they joined in proclaiming "Big Sixth Circuit win this morning for GOP." Documents, RE 335-12, PAGEID # 8675 (emphasis added).

The Secretary argues that because he was not personally involved, this Court cannot fashion meaningful relief. His argument not only ignores the dozens of selective enforcement cases which have awarded relief notwithstanding the innocence of supervisors, judges and juries, it ignores basic notions of causation. This Court in *Staub v. Proctor Hospital*, 562 U.S. 411, 419 (2011), stated 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." The Secretary's Chief Elections Officer (Matthew Damschroder) testified that but for the protest filed by Felsoci (and paid for by ORP), the Secretary would not have removed Earl from the ballot. *See* Damschroder Deposition, RE 227-1 at PAGEID # 5240, 5243, 5247.

ORP's wrong is not insulated by the Secretary's personal innocence. ORP's wrong is the but-for and proximate cause of LPO's injury. If ORP is a state actor, its constitutional wrong can be corrected through timely equitable relief.

III. This Court Has the Authority to Restore LPO and its Candidates to the Ballot.

The Secretary argues that because Petitioners can challenge S.B.193 and ORP's action after the 2016 election, this Court has no authority to order emergency relief placing the Johnson/Weld campaign on Ohio's ballot. The Secretary is wrong. He ignores many of this Court's precedents, all of which recognize that elections are fleeting. They cannot be repeated. For this reason, this Court and individual Justices have stayed judicial changes to election laws, *see, e.g., Husted v. Ohio State Conference of the National Association for the Advancement of Colored People*, 135 S. Ct. 42 (2014), ordered that candidates be added to ballots, *see, e.g., McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976) (Powell, J., in chambers); *Williams v. Rhodes*, 393 U.S. 23, 27 (1968) (Stewart, J., in chambers), and enjoined elections outright. *See Lucas v.*

Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). *See also Veasey v. Abbott*, 136 S. Ct. 1823 (2016) (Thomas, J., in chambers) (stating that "[t]he Court recognizes the time constraints the parties confront in light of the scheduled elections in November, 2016" and directing the Applicant to re-file its Application if the Court of Appeals did not act by July 20, 2016).

Emergency relief is available even though some other form of relief might be available in the future. That George Wallace in *Williams v. Rhodes* could have pressed his challenge to Ohio's election law after the 1968 presidential election did not prevent his name from being added by Justice Stewart to Ohio's presidential ballot. That Eugene McCarthy in *McCarthy v. Briscoe* could have continued his challenge to Texas's law after the election did not prevent Justice Powell from ordering that McCarthy's name be placed on the Texas ballot. Justices Stewart and Powell acted in order to preserve the issues for further Supreme Court review. Their orders were appropriate aids to the Court's jurisdiction.

Presidential elections, moreover, "implicate a uniquely important national interest." *Anderson v. Celebrezze*, 460 U.S. 780, 795-96 (1983). "[T]he President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation." *Id.* at 796. Once the 2016 presidential election is over, it cannot be repeated. Petitioners' constitutional right to have Johnson/Weld run as their presidential ticket in Ohio in 2016 will be forever lost following the election. A remedy is needed now, lest this Court lose jurisdiction over LPO's challenge to Ohio's refusal to run their candidates in the 2016 presidential election.

If the Johnson/Weld ticket is not restored to Ohio's ballot as LPO's candidates for President and Vice-President, moreover, LPO will forever lose a unique opportunity to meet Ohio's 3% vote-test for continuing political party status. The Johnson/Weld campaign is polling

between 10% and 13% in national polls. It is very likely to win at least 3% in Ohio. If listed as Libertarian this will ensure LPO four years of continuing ballot access. No future relief can correct Ohio's denial to LPO of this opportunity.

The only way to preserve this opportunity is to restore LPO to the position it would have occupied but for S.B. 193's passage and ORP's political espionage. Before S.B. 193 was passed, LPO was a fully qualified political party that would have been entitled to participate as such in the 2016 election. It would have been entitled to run the Johnson/Weld ticket in Ohio. It asks that it be restored to this original position.

IV. S.B. 193 Violates Equal Protection.

The Secretary asserts that LPO demands a federal right to a primary. The Secretary is wrong. Petitioners have conceded from the day they filed suit that they have no federal right to a primary. Their demand is that they be treated equally. They have a federal right to enroll members on an equal basis with the established parties. Ohio enrolls members using primaries. Ohio now, because of S.B. 193, denies these primaries to new parties.

Further, contrary to the Secretary's apparent suggestion, Secretary's Response at 19-20, Ohio provides no alternative mechanism for new parties to register members. Signing a new party's petition does not somehow enroll a voter in a new party's official (or even unofficial) membership log. It does not equate with voting in an established party's primary.² It has no effect in terms of party membership whatsoever. Further, the argument is novel to this

² The Secretary also asserts that under Ohio law "any qualified elector who desires to vote the new party primary ballot" is allowed to do so. Secretary's Response at 5. This is true but it is meaningless. Any voter may vote in any party's primary regardless of prior party affiliation. That is how voters change party affiliation in Ohio. Further, new parties do not now have primaries because of S.B. 193. So this possibility has no application to the present case.

proceeding. It was not made by the Secretary in either the District Court or the Court of Appeals.

Official membership is a "significant subsidy." See *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y.), *summarily aff'd*, 400 U.S. 806 (1970). Even the free delivery of these membership lists, separate and apart from whether they exist, is a significant subsidy. Charging some parties for these lists but not others, according to this Court's summary ruling in *Rockefeller*, violates the Equal Protection Clause. Prohibiting new parties from having the lists in the first instance, while officially creating them and providing them to the established parties, is an *a fortiori* violation of the Equal Protection Clause.

The Secretary fails to distinguish *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), and *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984), in any meaningful way. Those two cases stand for the unremarkable proposition that a state cannot officially register party members for some political parties but not others. That is precisely what Ohio does with S.B. 193. Ohio's approach is equally unconstitutional.

V. The Balance of Equities Favors Identifying Johnson/Weld as Libertarians.

Refusing emergency relief risks voter confusion. Another independent presidential ticket has been certified in Ohio. That ticket -- which is a real independent ticket -- is Duncan/Johnson. See Ohio Secretary of State News Release, *Husted Announces Independent Candidates for President and Vice-President*, Aug. 24, 2016.³ The potential for voter confusion is obvious. Two independent tickets, under Ohio's scheme, will include Johnson as a candidate. Voters looking for the Gary Johnson ticket could easily confuse it with the Duncan/Johnson ticket and vote accordingly. States ordinarily challenge ballot corrections because they risk causing voter

³ <http://www.sos.state.oh.us/sos/mediaCenter/2016/2016-08-24.aspx> (last visited Aug. 26, 2016).

confusion. The Secretary here, in contrast, seeks to foster voter confusion by keeping Johnson/Weld's political affiliation a secret. Other than assisting ORP, possibly assisting the Trump campaign (and perhaps that of Clinton), and spreading alternative votes among two tickets with the same names, nothing is served by misleading voters. The fact is that Johnson/Weld will now be on Ohio's ballot; voters should know that they are Libertarians. Ohio's refusal to supply this information risks confusion with the Duncan/Johnson campaign and misinforms voters. The balance of equities supports correctly identifying Johnson/Weld on Ohio's ballot as Libertarians.⁴

Granting emergency relief will not harm Ohio in any way.⁵ The Secretary's claim that Petitioners waited unnecessarily is belied by the record. Petitioners challenged S.B. 193 within days of its enactment. They challenged ORP's action the day following Earl's removal. Given these facts, neither the Secretary nor Felsoci argued laches or unnecessary delay in the Sixth Circuit. The argument the Secretary now makes is novel to these proceedings.

That Ohio must now include the names of Johnson and Weld on its 2016 presidential ballot, moreover, is due solely to the emergency efforts of the Johnson/Weld campaign and LPO. Ohio had nothing to do with it. Any suggestion that this should inure to the benefit of Ohio and the Secretary should be met with a large measure of skepticism. LPO should not be denied what it would have otherwise won because of its and the Johnson/Weld's campaign independent

⁴ Ohio's deadline for filing protests is 4:00 PM Friday, August 26, 2016. Gary Johnson's 2012 presidential campaign, which was run on the LPO party line, was unsuccessfully protested by Republican operatives under this same protest mechanism. *See* Protest of Gary Johnson, RE 227-1, PAGEID # 5612. It is not far-fetched to assume that Republicans might protest the Johnson/Weld campaign again in 2016.

⁵ The Secretary argues that LPO could have foregone litigation and simply complied with Ohio's signature collection requirement now embodied in S.B. 193. No political party in Ohio has satisfied any of Ohio's draconian signature collection requirements since 2000. The reason is that all of these, including the present one found in S.B. 193, are extremely costly and difficult to meet.

efforts. Ohio did its best to keep Johnson/Weld off the ballot. That it failed should not justify refusing the relief Petitioners' continue to seek.

The Secretary argues that Petitioners misstate the appropriate standard for an award of emergency relief. Secretary's Response at 15. He briefly cites *Maine PAC v. McKee*, 562 U.S. 996 (2010) (stating that "the difficulties in fashioning relief so close to the election" were a concern), as a definitive statement by this Court in support of his position. Suffice it to say that the Court's members have disagreed over the precise description and application of the requirements or an emergency injunction. *See, e.g., Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (granting emergency injunction over three dissents which argued that the right at stake was not "indisputably clear"). The best that can be said, especially in the context of elections, is that a holistic balancing of the importance of the right, the equities presented, and the Applicant's ultimate likelihood of success is required.

Presidential elections are of national importance. The right to be free from political espionage by government actors is indisputably clear, as is the right to be free from laws that are designed to award established parties "significant subsidies" and advantages not made available to new and minor parties. Balancing Petitioners' likelihood of success and the equities presented, Petitioners are entitled to emergency relief.

CONCLUSION

Petitioners' Application for a stay and emergency relief should be **GRANTED**.

Mark G. Kafantaris
625 City Park Avenue
Columbus, OH 43206
(614) 223-1444
(614) 300-5123 (fax)
mark@kafantaris.com

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

Respectfully submitted,

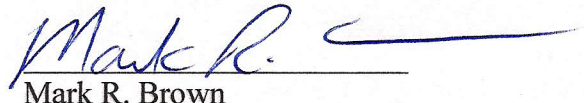


Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that copies of this Application were mailed, with first-class postage affixed, and e-mailed to: Eric Murphy, Ohio Attorney General's Office, 30 East Broad Street, 16th Floor, Columbus, OH 43215, Eric.Murphy@ohioattorneygeneral.gov, counsel for Respondent/Secretary and Respondent/Ohio, and John Zeiger, Zeiger, Tigges & Little, 3500 Huntington Center, 41 S. High Street, Columbus, OH 43215, zeiger@litohio.com, counsel for Respondent/Felsoci, this 26 day of August, 2016.

Dated: August 26, 2016


Mark R. Brown