

**IN THE OHIO TENTH DISTRICT
COURT OF APPEALS**

Franklin County, Ohio

NO. 16APE-07-496

REGULAR CALENDAR

LIBERTARIAN PARTY OF OHIO,

Appellant,

VS.

OHIO SECRETARY OF STATE, et al.,

Appellees.

**On Appeal from the Franklin County
Court of Common Pleas**

BRIEF FOR APPELLANT

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ASSIGNMENTS OF ERROR

1. The Court of Common Pleas erred by concluding that S.B. 193, Ohio's new ballot access denying to new political parties their previous right to hold primaries, does not violate Article V, § 7 of Ohio's Constitution. *See Libertarian Party of Ohio v. Husted*, Doc. # 102 (0D086-F20 at F30).
2. The Court of Common Pleas erred by concluding that S.B. 193's violation of Article V, § 7 of Ohio's Constitution presents a political question and is not justiciable. *See Libertarian Party of Ohio v. Husted*, Doc. # 102 (0D086-F20 at F27).
3. The Court of Common Pleas erred by concluding that Ohio's guarantee of equal protection of the laws, located in Article I, § 2 of the Ohio Constitution, is limited by federal precedents interpreting the federal Equal Protection Clause found in the Fourteenth Amendment to the United States Constitution. *See Libertarian Party of Ohio v. Husted*, Doc. # 102 (0D086-F20 at F32).
4. The Court of Common Pleas erred by not applying the more-protective constitutional analysis prescribed by the Ohio Supreme Court

under Article I, §2 of Ohio's Constitution to Appellant's claim that S.B. 193 violates equal protection of the law. *See Libertarian Party of Ohio v. Husted*, Doc. # 102 (0D086-F20 at F32).

5. The Court of Common Pleas erred in concluding that S.B. 193 is constitutional under federal Equal Protection Clause precedents and the *Anderson/Burdick* analysis, which establish a floor for Ohio's constitutional guarantee of equal protection of the law. *See Libertarian Party of Ohio v. Husted*, Doc. # 102 (0D086-F20 at F32).

6. The Court of Common Pleas erred by refusing to allow Appellant to conduct discovery in order to properly respond to Appellees' motion for summary judgment. *See Libertarian Party of Ohio v. Husted*, Doc. # 96 (0D006-Q80).

ISSUES PRESENTED FOR REVIEW

1. Whether S.B. 193, Ohio's 2013 ballot access law denying to new political parties their previously recognized right to hold primaries, violates Article V, § 7 of Ohio's Constitution. (First Assignment of Error).

2. Whether S.B. 193's violation of Article V, § 7 of Ohio's Constitution presents a nonjusticiable political question. (Second Assignment of Error).

3. Whether Ohio's guarantee of equal protection found in Article I, § 2 of Ohio's Constitution is limited to the protections prescribed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Third and Fourth Assignments of Error).

4. Whether S.B. 193, which not only denies new and minor political parties their right to hold primaries but also denies them recognized party memberships and state-created membership lists, violates the federal Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Fifth Assignment of Error.)

5. Whether LPO had the right under the Ohio Rules of Civil Procedure to conduct some measure of discovery in order to properly respond to the Secretary of State's immediate motion for summary judgment filed just one month after the lodging of Appellant's complaint and contemporaneously with its answer denying practically every allegation in Appellant's complaint. (Sixth Assignment of Error.)

STATEMENT OF THE CASE

This is a declaratory judgment and injunctive action brought by Appellant, the Libertarian Party of Ohio (LPO), challenging Senate Bill 193 ("S.B. 193") under Article V, § 7 and Article I, § 2 of the Ohio Constitution. Senate Bill 193 was passed on November 6, 2013 and was scheduled to take effect on or about February 5, 2014. Because of LPO's federal challenge to S.B. 193 filed in the United States District Court for the Southern District of Ohio two days after S.B. was signed into law, S.B. 193 was enjoined from applying to the 2014 election cycle. *See Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio, Jan. 7, 2014). Senate Bill 193 thereafter went into effect on or about November 6, 2014 immediately following the general election.

In the same federal proceeding that enjoined S.B. 193's application to the 2014 election cycle, LPO also sought permanent relief invalidating S.B. 193 under both the federal Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Ohio's Constitution. In terms of the latter, LPO challenged S.B. 193 under Article V, § 7 of Ohio's Constitution in federal court, arguing that S.B.

193 unconstitutionally denied Plaintiff its right to nominate candidates for office by primary election. LPO did not make a claim under Ohio's equal protection guarantee in federal court. Ohio's Secretary of State and the State of Ohio immediately moved to dismiss LPO's state-law claim under Article V, § 7 of Ohio's Constitution, arguing that subject matter jurisdiction was improper in federal court because of the Eleventh Amendment to the United States Constitution.

Approximately two years later, on October 14, 2015, the United States District Court for the Southern District of Ohio dismissed LPO's state-law challenge under Article V, §7 of Ohio's Constitution to S.B. 193 for lack of subject matter jurisdiction. LPO accordingly on January 19, 2016 filed this action in the Franklin County Court of Common Pleas seeking declaratory and injunctive relief. In the present case, LPO's complaint sought relief under not only Article V, § 7 of Ohio's Constitution, but also under Ohio's equal protection guarantee found in Article I, § 2 of the Ohio Constitution. *See* Doc. # 5 (0C863-M650).

LPO immediately moved for preliminary relief in the Court of Common Pleas. *See* Doc. # 6 (0C863-N1). Appellees, Ohio's Secretary

of State and its Attorney General, opposed LPO's motion on January 27, 2016. *See* Doc. # 30 (0C878-C68). On February 2, 2016 the Court of Common Pleas scheduled a hearing on LPO's motion for preliminary injunction for April 5, 2016. *See* Doc. # 57 (0C886-W20). On February 19, 2016, two months before the hearing on LPO's motion for preliminary injunction and just one month following the filing of the complaint, Appellees filed both their answer and a motion for summary judgment. *See* Docs. # 62 (0C886-W20) & # 66 (0C916-W60).

LPO responded to Appellees' motion for summary judgment on March 2, 2016 by moving under Ohio Rule of Civil Procedure 56(F) to continue the motion for summary judgment until after some measure of discovery could be completed. Discovery was not scheduled to close until November 8, 2016. *See* Doc. # 74 (0C936-F34).

Following the April 5, 2016 hearing on LPO's motion for preliminary injunction, the Court on April 18, 2016 denied LPO's Rule 56(F) motion and closed discovery before it had begun. *See* Doc. # 96 (0D006-Q80). On June 7, 2016, the Court granted Appellees' motion for

summary judgment without any discovery having taken place. *See* Doc. # 103 (0D086-F20).

On that same day, LPO moved the Court of Common Pleas for a new trial. *See* Doc. # 109 (0D087-N98). On July 6, 2016, with its motion for a new trial undecided, LPO filed a timely notice of appeal with this Court. *See* Doc. # 115 (0D1218-L66). The following day, on July 7, 2016, the Court of Common Pleas stayed resolution of LPO's motion for a new trial pending the outcome of this appeal. *See* Doc. # 120 (0D130-U97).

On August 5, 2016, this Court stayed the appeal and directed the Court of Common Pleas to resolve LPO's motion for a new trial. *See* Doc. # 127 (0D172-G1). On September 1, 2016, the Court of Common Pleas denied LPO's motion for a new trial. *See* Doc. # 136 (0D211-C39). On September 7, 2016, this Court lifted the stay on LPO's appeal. *See* 0A237-076. The Court additionally ruled that if LPO wished to appeal the Court of Common Pleas' denial of a new trial, LPO would have to file an additional appeal. *Id.* LPO did not file an additional appeal challenging the Court of Common Pleas' denial of its new trial motion.

FACTS

Ohio has long placed significant hurdles in the paths of minor parties that seek to gain access to Ohio's ballot. Following a series of successful suits brought by LPO striking down these many hurdles, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, 497 Fed. Appx. 581 (6th Cir. 2012), on November 6, 2013 Ohio once again changed its ballot access law. These changes mark the focus of this renewed litigation.

Ohio's new ballot access law, S.B. 193, made scattered changes to several provisions in the state's election code. Relevant here, Section 3 of S.B. 193 dissolved all minor political parties (including LPO). Sections 1 and 2 of S.B. 193, meanwhile, changed the definition of "minor political party" found in R.C. § 3501.01(F)(2):

"Minor political party" means any political party organized under the laws of this state that meets ... the following requirements: ...
(b) The political party has filed with the secretary of state ... a petition that meets the requirements of section 3517.01 of the Revised Code.

Section 3517.01(A)(1)(a) of the Revised Code was likewise changed to state:

A political party ... is any group of voters that meets ... the following requirements: ... (b) The group filed with the secretary of state ... a party formation petition that meets all of the following requirements:

(i) The petition is signed by qualified electors equal in number to at least one per cent of the total for governor or nominees for presidential electors at the most recent election for such office.

(ii) The petition is signed by not fewer than five hundred qualified electors from each of at least a minimum of one-half of the congressional districts in the state. ...

(iii) The petition declares the petitioners' intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding general election, held in even-numbered years that occurs more than one hundred twenty-five days after the date of filing.

...

Section 3517.012(A)(1) of the Revised Code was amended to provide:

When a party formation petition ... is filed with the secretary of state, the new party comes into legal existence on the date of the filing and is entitled to nominate candidates to appear on the ballot at the general election, held in even-numbered years that occurs more than one hundred twenty-five days after the date of the filing.

The result was that S.B. 193 not only dissolved all minor parties, it also excluded all parties except Ohio's two major parties from Ohio's

primaries. This marked a significant change in Ohio law. Before S.B. 193 took effect all parties for 100 years had participated equally in Ohio's primaries. Senate Bill 193's changes to R.C. § 3517.012 now require that candidates of new parties (including LPO) file nominating petitions with supporting signatures rather than be popularly elected in primaries. (The candidates of the major parties, meanwhile, are still elected in primaries.) Assuming a new-party nominating petition with sufficient signatures filed 125 days before the general election, that new party qualifies for Ohio's *general* election ballot.

In addition to denying new parties primaries, S.B. 193 also denied these new parties recognized, official memberships. Ohio officially registers political parties' members through its primaries. No alternative mechanism exists. S.B. 193's exclusion of new parties from Ohio's primary process therefore necessarily denies them the official memberships and official membership lists that Ohio creates for the established parties.

This denial of official memberships further burdens new parties in two discriminatory and severe ways. First, party members (which new

parties no longer have) are "wedded" to their parties for two years. One who votes in a party primary in Ohio, for example, cannot protest, circulate or sign the nominating papers of another party's candidate. R.C. § 3513.05. Nor can she circulate the nominating petition of a new party that seeks to gain access under S.B. 193, *see* R.C. § 3517.012(B)(2) (as amended by S.B. 193), or run as either an independent or new party's candidate. *See Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006). Further, for a new-party candidate's nominating petitions to comply with S.B. 193, the petition must be supported by voters who are not members of another political party. R.C. § 3517.012(B)(2) (as amended by S.B. 193). This means that one who votes in a primary cannot sign a new-party candidate's nominating petition.

Second, the established parties are provided official lists of members (which new parties no longer have) by the State of Ohio. These state-created membership lists facilitate party-building, party-planning and fund-raising endeavors conducted by the established parties. New parties are denied both official members and official membership lists by S.B. 193.

Senate Bill 193, LPO believes,¹ was passed as a purely partisan measure designed to benefit Republicans. No Democrats joined the six Republicans who co-sponsored the bill, and only one Democrat in either Chamber voted for it. Republican support, in contrast, was enormous in both Chambers. In the Ohio Senate, 20 of 23 Republicans supported it. In the Ohio House, 50 of 59 Republicans voted for it.

LPO challenged S.B. 193 in the federal district court both because it denied new parties official memberships in violation of the federal Equal Protection Clause and because it denied new parties primaries in violation of Article V, § 7 of Ohio's Constitution. LPO has always conceded that the federal Constitution does not require primaries. LPO's federal argument in federal court was that the Equal Protection Clause demands that Ohio treat political parties equally in terms of recognized party membership and state-created membership lists.

S.B. 193's denial of official memberships to new political parties runs afoul of several federal precedents. *See Socialist Workers Party v.*

¹ Because LPO was denied discovery, it is unable to confirm this as fact other than to refer to the party-affiliations of those who voted for it.

Rockefeller, 314 F. Supp. 984, 995 (S.D.N.Y.), *summarily aff'd*, 400 U.S. 806 (1970) (holding that discriminatory denial of free membership lists violates Equal Protection); *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994) (same); *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004) (holding that refusal to register official members of some parties but not others violates Equal Protection); *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984) (same); *Constitution Party of Kansas v. Kobach*, 695 F.3d 1140 (10th Cir. 2012) (same). Both the District Court and the Sixth Circuit, of course, disagreed. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382 (6th Cir. 2016). Because of the Circuit-split created by the Sixth Circuit's decision, LPO is presently pursuing certiorari in the United States Supreme Court to resolve whether the Equal Protection Clause prohibits a State from recognizing one party's membership but not another's. That petition for writ of certiorari will be filed on or before October 26, 2016.

LPO did not make this or any other federal Equal Protection Clause argument in the Court of Common Pleas. Instead, LPO rested its argument solely on state law, that is, Article I, §2 and Article V, §7 of

Ohio's Constitution. The former guarantees equal protection of the laws. The latter guarantees to political parties direct primaries. Specifically, Article V, § 7, of Ohio's Constitution provides that "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law"

The Court of Common Pleas rejected LPO's arguments. First, it concluded that S.B. 193's alleged violation of Article V, § 7 of Ohio's Constitution presents a non-justiciable political question. *See* Doc. # 102 (0D086-F20 at F27). Second, it concluded that even if Article V, § 7 were judicially enforceable, S.B. 193 complied with it. *Id.* at F30. Third, it concluded that LPO's equal protection clause argument under Article I, § 2 of Ohio's Constitution was limited by federal standards. *Id.* at F32. Last, leaning heavily on the federal District Court's rejection of LPO's federal Equal Protection Clause challenge to S.B. 193, the Court of Common Pleas concluded that the federal analysis employed by the federal District Court to reject LPO's federal Equal Protection Clause claim required that it reject LPO's equal protection argument under Article I, § 2 of Ohio's Constitution, too. *Id.*

ARGUMENT

I. S.B. 193 Violates Article V, § 7 of Ohio's Constitution.

The Court of Common Pleas ruled that S.B. 193 is consistent with Article V, § 7. It erred. The United States Court of Appeals for the Sixth Circuit in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), which invalidated a previous Ohio law limiting minor party access, specifically ruled that Ohio's "Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections." *Id.* at 582 (emphasis added). The Sixth Circuit specifically cited Article V, § 7 of Ohio's Constitution to support this conclusion. *Id.* Nothing has changed in Ohio since that ruling was handed down. No court in Ohio or elsewhere (before the ruling below) has stated anything to the contrary. Ohio's Constitution has not changed. The Sixth Circuit's ruling in *Blackwell* remains correct to this day. Indeed, because Ohio's Secretary of State and its Attorney General

defended that case, they are now precluded from denying that Article V, § 7 requires primaries for all parties.²

Even assuming that the Secretary and Attorney General are now in a position to challenge the Sixth Circuit's conclusion, Ohio precedent proves that the Sixth Circuit was and remains correct. It was not writing on a blank slate. The Ohio Supreme Court in *State ex rel. Gottlieb v. Sulligan*, 175 Ohio. St. 238, 193 N.E.2d 270 (Ohio 1963), reached this same conclusion. There, the question of whether a major party's substitution of a candidate under O.R.C. § 3513.31 following a primary under was permissible under Ohio's laws and Constitution.

The candidate who was to be substituted had run in the party's primary, as had the candidate who withdrew. Because the candidate who was to be substituted had run in the primary, the challenger argued that his substitution would violate Ohio's sore loser law, which then

² State courts apply state preclusion principles to state-law decisions handed down by federal courts. *See Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). Even assuming that mutuality is required, *see Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 193, 443 N.E.2d 978 (1983), that requirement is met here. The parties in the *Blackwell* litigation are identical to the parties in the present case.

stated: "No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in." *Id.* at 240, 193 N.E.2d at 272.

Because the substituted candidate was being selected by the party rather than by a nominating petition or via write-in, the Court rejected the claim that Ohio's sore-loser law applied. It ruled as a matter of statutory construction that Ohio's sore loser law applied only to later nomination as an independent candidate: "[t]he nominating petition is the method by which the independent candidate may seek his place on the elective ballot." *Id.* at 241, 193 N.E.2d at 273. A party's selection of a substitute therefore was not precluded by Ohio's sore-loser law.

This, however, was not the end of the matter. The Court still had to determine whether O.R.C. § 3513.31's substitution mechanism was valid. In this regard, the Court construed Article V, § 7 to determine whether it supported § 3513.31. It concluded it did not:

Although it is true that Section 7, Article V of the Ohio Constitution, provides that all nominations must be by direct primary or by petition, this section leaves a void in the election

laws. It does not make provision for those situations which necessarily must arise where vacancies occur in nominations at a time when it is not practicable to select a new candidate either by direct primary or petition.

Id. at 241, 193 N.E.2d at 273. Because Article V, § 7 only authorized direct primaries for party candidates, and nominating petitions for independent candidates, it could not support § 3513.31. In order to fill this void, the Court turned to Article II, § 27 of the Ohio Constitution:

The framers of the Constitution, apparently anticipating that there might be certain areas in the elective process untouched by specific provisions of the Constitution, included in the Constitution the provisions of Section 27, Article II, which reads in part as follows:

'The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law * * *.'

Id. at 242, 193 N.E.2d at 273. Because of Article II, § 27, R.C. § 3513.31 survived constitutional scrutiny: "Section 3513.31, Revised Code, relating to the selection of candidates to fill vacancies, is, therefore, valid, and a selection thereunder does not constitute a selection by nominating petition." *Id.* at 242, 193 N.E.2d at 273-74.

Had Article V, § 7 left discretion to the General Assembly to supply the proper mechanism for selecting political party candidates, as the Court of Common Pleas here ruled, the *Sulligan* Court would not have needed to look to Article II, § 27 at all. That the *Sulligan* Court found it necessary to look beyond Article V, § 7 proves both that Article V, § 7 is justiciable and that it does not authorize the legislature to prescribe alternative mechanisms for a political party's selection of its candidates. As far as Article V, § 7 is concerned, political parties select their candidates through direct primaries.

The Court below concluded that *Sulligan* was not a constitutional case at all: "*Sulligan* defined the term nominating petition by using the statutes (sic) that were in place at the time." Doc. # 102 (0D086-F20 at F31). The Court of Common Pleas is only partly correct. While it is true that statutory construction solved the sore-loser question, the Ohio Supreme Court in *Sulligan* still had to search for constitutional authority to support R.C. § 3513.31. It found support not in Article V, § 7 but in a separate constitutional provision that has no application to the present

case. It specifically rejected the notion that Article V, § 7 authorized the legislature to use nominating petitions interchangeably with primaries.

The Common Pleas Court also erred by dismissing the Sixth Circuit's conclusion in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). The Sixth Circuit was not needlessly commenting off-the-cuff. It was repeating what the Secretary had represented to it to support its ballot access law: Ohio's Constitution requires that Ohio extend direct primaries to all political parties.

Not only did the Secretary's and Attorney General's claim in *Blackwell* support Ohio's existing (albeit unconstitutional) ballot access law, the claim is supported by 100 years of practice and precedent. Recognized ballot access expert Richard Winger testified by affidavit that Ohio's Constitutional Convention adopted Article V, § 7 in 1912. *See* Doc. #86 (OC976-81). It took effect on January 1, 1913, *id.* at ¶ 3, and its relevant language has not changed since. *Id.* at ¶ 5.

Ohio's legislature on May 3, 1913 first passed legislation (the "Primary Act") implementing the terms of Article V, § 7. *Id.* at ¶ 6 (citing Ohio Laws, vol. 103 at 476). This legislation "provid[ed] for

nominations by primary election or by petition, of all state, district, county, and municipal officers excepting in municipalities of less than 2,000 population.” *Fitzgerald v. City of Cleveland*, 88 Ohio St. 338, 103 N.E. 512, 516 (1913). It took effect on January 1, 1914. Winger Affidavit at ¶ 6. Under the 1914 Primary Act, qualified political parties in Ohio were defined as those parties whose candidates for Governor at the preceding election received “at least ten per cent. of the entire vote cast” *See* Ohio Laws, vol. 103 at 476, § 4949.

All qualified political parties were required by the 1914 Primary Act to nominate candidates using primaries. Winger Affidavit at ¶ 8 (citing Ohio Laws, vol. 103 at 477, § 4952). Still, the 1914 Primary Act preserved the right of a candidate to run independently of a qualified political party. Winger Affidavit at ¶ 9 (citing Ohio Laws, vol. 103 at 476, § 4950). Prior to the adoption of Article V, § 7 and the 1914 Primary Act, independent candidates in Ohio had obtained ballot access by filing nominating petitions that included signatures. Winger Affidavit at ¶ 10. This process was preserved by the Primary Act.

Candidates who used the independent petition procedure following the adoption of Article V, § 7 and the 1914 Primary Act were allowed to include on the ballot "the party or political principle which he represents, expressed in not more than three words," Winger Affidavit at ¶ 11 (citing 1930 OAG 1855 at 744 (May 12, 1930)), or otherwise "designate instead of a party or political principle any name or title which the signers may select." *Id.* This "party or principle" practice was recognized no later than the 1916 general election. Winger Affidavit at ¶ 11.

Article V, § 7's and the 1914 Primary Act's requirements that qualified political parties nominate their candidates by direct primary was immediately applied to qualified parties other than the Democratic and Republican Parties (which were also subject to the terms of Article V, § 7 and the 1914 Primary Act). The Progressive Party, which won 21.0% of the vote for Governor in 1912, for example, held its first primary in Ohio in 1914. Winger Affidavit at ¶ 12 (citing *State ex rel. Murphy v. Graves*, 91 Ohio St. 36, 109 N.E. 590 (Ohio 1914)).

From 1914 until 1929, Ohio did not authorize any qualified political party, including minor parties, to nominate their candidates for

the general election ballot by petitions. Winger Affidavit at ¶ 13. From 1914 until 1929, no qualified political party in Ohio, including new and minor parties, nominated its candidates for the general election ballot by petition. *Id.* at ¶ 14. From 1914 until 1929, only "independent" candidates (who listed no "party or principle") and the nominees of unqualified political parties (who would list their unqualified political party affiliation) qualified for Ohio's November general election ballots by using nominating petitions. *Id.* at ¶ 15.

In 1929, Ohio for the first time added to its definition of "qualified political party" those political parties that presented signatures from voters equal in number to 15% of the total vote for Governor in the preceding election. *Id.* at ¶ 16 (citing 1932 OAG 4587 (Sep. 1, 1932), at 1003). Political parties that submitted a sufficient number of signatures "a sufficient length of time before any primary election," according to Ohio's Attorney General, became "entitled to all privileges with respect to such primary election as are accorded under the law to political parties." Winger Affidavit at ¶ 17 (citing 1932 OAG 4587 (Sep. 1, 1932) at page 1003). Candidates who used the independent nominating petition

procedure, meanwhile, continued to identify themselves on the ballot with a "party or principle" as they had done since 1914. Winger Affidavit at ¶ 18.

In 1947 Ohio prohibited candidates who used the independent candidate petition procedure from identifying themselves with a "party or principle." *Id.* at ¶ 19 (citing SB 3 substitute, page 325, 1947 State Session Laws). From 1915 until 1967, the Democratic and Republican Parties were the only qualified political parties in Ohio and only they conducted primaries. Winger Affidavit at ¶ 20. Until 1947, minor party candidates would periodically appear on Ohio's ballots, but they were actually independent candidates who had used nominating petitions and identified themselves with a party or principle.

The American Independent Party in 1968 became the first minor party since 1915 to qualify in Ohio. Winger Affidavit at ¶ 21. It also qualified in 1970, 1972, and 1976. *Id.* It did not have a primary in 1968 because it won ballot access through litigation following Ohio's primary. *Id.* The same was true in 1976, where a court ordered its addition to

Ohio's ballot following Ohio's primary. *Id.* It conducted primaries in Ohio in 1970 and 1972. *Id.*

The Socialist Labor Party qualified as a political party in Ohio in 1970 and 1972. It did not have a primary in 1970 because it won ballot access through litigation after Ohio's primary. It conducted a primary in 1972 before falling off the ballot. *Id.* at ¶ 22.

The Reform Party successfully petitioned in 1996 for party status, but the state did not acknowledge that it had enough valid signatures until after the primary. *Id.* at ¶ 24. The state then agreed as a result of litigation to allow the Reform Party to run its candidate for President. *Id.* The Reform Party remained qualified in 1998 and had its own primary that year. *Id.* The Natural Law Party successfully petitioned for party status in 1996 and 2000 and had a primaries in both election cycles. *Id.* at ¶ 25.

LPO successfully petitioned for party status in 1982 and 2000 and held primaries in both election cycles. *Id.* at ¶ 23. Following LPO's successful effort to invalidate Ohio's draconian ballot access law in 2006, see *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir.

2006), the Secretary began issuing Directives placing it and several other minor parties on Ohio's ballot. *See Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008). Because the litigation concluded in *Brunner* following Ohio's primary, these minor parties' candidates were added directly to the 2008 general election ballot. Winger Affidavit at ¶ 27.

In 2010, 2012, and 2014, as a result of its continuing successful litigation against the Secretary of State, LPO remained a qualified political party in Ohio and held primaries. *Id.* at ¶ 28. The Green Party, Socialist Party and Constitution Party also remained qualified political parties in 2010, 2012, and 2014 because of this successful litigation and held primaries. *Id.* Americans Elect was also recognized by Ohio as a qualified party late in 2011 because of the LPO litigation, but thereafter disbanded without holding a primary in 2012 or thereafter. *Id.*

Winger's testimony establishes that from 1914, when Article V, § 7 was first implemented, until 2006, when Ohio's ballot access law for new and minor parties was ruled invalid by the Sixth Circuit in *Blackwell*, no qualified political party was required or authorized by

Ohio law to qualify any of its nominees for federal, state or local office for Ohio's general election ballot by nominating petition. Winger Affidavit at ¶ 30. All qualified political parties in Ohio during this time frame, including new and minor political parties, were required to hold primaries in order to qualify candidates for federal, state and local office for Ohio's general election ballots. *Id.* at ¶ 31. During this period, no qualified political party in Ohio, including new and minor political parties, was authorized or required to have its nominees for federal, state and local office use nominating petitions for access to any general election ballot. *Id.* at ¶ 33.

Senate Bill 193, according to Winger, marks the first occasion since Article V, § 7 of Ohio's Constitution was adopted and implemented that Ohio law has had any procedure for any qualified political parties to nominate candidates for federal, state and local office without primaries. *Id.* at ¶ 35. Ohio's election laws from 1914 when Article V, § 7 was first implemented until Senate Bill 193 took effect in 2015 have always distinguished between independent candidates and candidates of qualified political parties, including new and minor

qualified political parties. *Id.* at ¶ 36. The latter have always been required to hold primaries, while the former have always been required to use nominating petitions. *Id.* at ¶ 37.

As the Supreme Court stated in *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) a “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.” (Citations omitted). “[T]he longstanding ‘practice of the government’ can inform our determination of ‘what the law is’.” *Id.* at 2560 (citation omitted). This principle has been extended across the constitutional spectrum. *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (an “‘unbroken practice’ followed ‘openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside’”) (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 678 (1970)).

Here, Ohio has for one hundred years followed the same practice. It has never deviated from this practice -- until now. This “long settled and established practice” is entitled to great weight. It supports not only

the Ohio Supreme Court's refusal to use Article V, § 7 to support Ohio's substitution law in *Sulligan*, but also the Sixth Circuit's conclusion in *Blackwell*. The evidence is overwhelming that Article V, § 7 was intended to guarantee primaries to all political parties, including those that are new or minor.

II. Article V, § 7 is Justiciable.

The Court of Common Pleas concluded that because Article V, § 7 is not self-executing, it is not judicially enforceable. *See* Doc. # 102 (0D086-F20 at F27). The Court plainly erred. Constitutional provisions that are not self-executing have long been held to be enforceable once legislation is enacted under the constitutional provision's terms. As one authority has explained:

Non-self-executing provisions are political questions until a political branch has rendered legislation or a policy decision on the provision. Once a political branch has legislated or made a policy decision, the Court can review it for consistency with the Constitution.

Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61, 80 (2006) (footnotes omitted).

For instance, the federal Commerce Clause is not self-executing. *See* U.S. Const., art. I, § 8, cl. 3 ("[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Until Congress acts, there is nothing to enforce. One cannot credibly argue that the Commerce Clause by itself regulates guns near schools or violence against women. But once Congress passes legislation, the legislation most certainly can be measured by the Commerce Clause. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (holding that federal prohibition on guns near schools violates Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that federal prohibition on domestic violence violates Commerce Clause). No one would ever seriously claim that because the Commerce Clause is not self-executing it presents a non-justiciable political question.

Similarly, Section 4 of Article XVIII of Ohio's Constitution, the Utility Clause, is not self-executing. Rather, it merely empowers local government to exercise the power of eminent domain for certain purposes. Still, it is subject to judicial construction and is judicially

enforceable relative to a local government's action. A local government's seizure of property can be judicially tested against the Utility Clause. *See City of Northwood v. Wood County Regional Water and Sewer District*, 86 Ohio St.2d 92, 1999-Ohio-350, 94, 711 N.E.2d 1003, 1005.

Perhaps the best-known illustration in Ohio is Article VI, § 2, which empowers the state legislature to "make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State" This provision is not self-executing, yet the Supreme Court in *DeRolph v. State*, 78 Ohio St. 3d 193, 198, 1997-Ohio-84, 677 N.E.2d 733, 737, interpreted and enforced it. The Court stated: "Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional." *Id.* at 198, 677 N.E.2d at 737.

Notwithstanding a law's presumed constitutionality, moreover, the Court observed, that it would

not dodge [its] responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We

refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly.

Id.

Last but not least, no authority in Ohio supports the Common Pleas Court's conclusion that Article V, § 7 is not justiciable and therefore unenforceable. To the contrary, the Ohio Supreme Court interpreted and enforced Article V, § 7 in *Sulligan* when it ruled that Article V, § 7 did not support Ohio's party substitution law. Judge Frye of the Franklin County Court of Common Pleas interpreted and enforced Article V, § 7 when he ruled this year that Article V, § 7 authorized Ohio's legislature to include 17-year-olds in the group of electors who may vote for delegates to national presidential conventions. *See State ex rel. Schwerdtfeger v. Husted*, No. 16CV2346 (March 14, 2016) (Doc. # 80 (OC953-M65)). If the Court below is correct, he should have ruled that it presented a political question.

Given the lack of authority holding that Article V, § 7 presents a non-justiciable political question, the Court of Common Pleas turned to *State v. Jackson*, 88 Ohio St. 3d 380, 2004-Ohio-3206, 711 N.E.2d 68,

for support. In *Jackson*, a criminal defendant who had tampered with election ballots claimed that the introduction of those ballots as evidence violated Ohio's secret ballot requirement found in Article V, § 2 and therefore required that the evidence of his tampering had to be suppressed at his criminal trial. The Court correctly concluded that Article V, § 2 was not self-executing and therefore did not itself create an exclusionary rule. The case had nothing to do with Article V, § 7, and nowhere did the Court say that Article V, § 2 otherwise presented a non-justiciable political question.

III. Ohio's Equal Protection Guarantee is Not Limited by the Fourteenth Amendment and Federal Precedents.

Even assuming that Article V, § 7 were not justiciable, Article I, § 2 of Ohio's Bill of Rights (guaranteeing equal protection of the law) certainly is. LPO argued below that S.B. 193 violated this guarantee of equal protection by providing some political parties primaries and denying primaries to others. To support its argument, LPO pointed to Article V, § 7, which LPO argued guaranteed primaries to political primaries. Notably, LPO did not argue a federal Equal Protection Clause

violation. Nor did LPO argue that either the federal freedom of association or any Ohio constitutional analog was at stake.

The Court below ruled that LPO's Ohio equal protection claim was necessarily governed by federal law: "The two provisions are functionally equivalent and, therefore, require the same analysis." Doc. # 102 (0D086-F20 at F34). Because the federal court had already rejected LPO's federal Equal Protection Clause claim, the Court below rejected it also: "the Court notes that takes much guidance from the thorough analysis previously done regarding identical alleged burdens in the Southern District of Ohio case." *Id.* at F38.

The Court of Common Pleas erred for several reasons. First and foremost, LPO's equal protection claim under Article I, § 2 of Ohio's Constitution was not identical to the federal Equal Protection Clause claim under the Fourteenth Amendment LPO had pursued in federal court. LPO's state-law claim is that S.B. 193 violates Ohio's equal protection guarantee by selectively awarding primaries to some, but not all, political parties. This pure state-law claim uses Article V, § 7 as the underlying right. In contrast, LPO's federal Equal Protection Clause

claim used the First Amendment's freedom of association as the underlying right. LPO has not claimed in the present state-court case any analogous associational freedom under Ohio's Constitution beyond Article V, § 7's right to direct primaries.

Second, and perhaps more importantly, Ohio's guarantee of equal protection is not limited by the reach of the federal Equal Protection Clause. Ohio's Constitution creates different and more civil liberties and rights than does the federal Constitution. *See Arnold v. City of Cleveland*,⁶⁷ Ohio St. 3d 35, 42, 616 N.E.2d 163, 169 (Ohio 1993) ("state courts are unrestricted in according greater civil liberties and protections to individuals and groups"). The Common Pleas Court's use of the federal *Anderson/Burdick* test -- which applies to Equal Protection Clause claims predicated on the First Amendment's freedom of association, *see Anderson v. Celebrezze*, 460 U.S. 790, 793-94 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) -- to dispose of LPO's state equal protection claim was erroneous. LPO's equal protection claim was predicated on the Ohio Constitution and did not rely on freedom of association.

State v. Mole, __ Ohio St. 3d __, 2016-Ohio-5124, __ N.E.2d __, 2016 WL 4009975 * 4, ¶ 22 (July 28, 2016), makes this point clear:

We once again reaffirm that this court, the ultimate arbiter of the meaning of the Ohio Constitution, can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers. We also reaffirm that we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states' constitutions.

It accordingly concluded "that the guarantees of equal protection in the Ohio Constitution independently forbid the disparate treatment of peace officers through a legislative scheme that criminalizes their sexual conduct while removing virtually all of their due-process protections" *Id.* at *5, ¶23.

Under Article I, § 2, "when classifications affect a fundamental constitutional right ... [courts] will conduct a strict-scrutiny inquiry." *State v. Thompson*, 95 Ohio St.3d 264, 267, 2002-Ohio-2124, 767 N.E.2d 251, 255. To the extent Article V, § 7 reflects a fundamental right to a primary, strict scrutiny is thus required. But even if it is not

fundamental, the Ohio Supreme Court in *Mole* identified Ohio's more-protective equal protection guarantee for non-suspect classes and non-fundamental rights: at bare minimum "equal protection requires ... that reasonable grounds exist for making a distinction between those within and those without a designated class." *Id.* at *15, ¶61. In conducting this balancing test, moreover, the Court observed that the legislature's objective and motive, *see id.* at *16, ¶ 63 (assessing whether the law was "meant to ease the prosecutorial burden of proof" and whether "that motive did in fact figure in the removal of that element"), must be weighed against the "constitutional protections afforded our citizens." *Id.* at *17, ¶ 68.

The Court of Common Pleas erred by forcing the less-protective federal *Anderson/Burdick* analysis onto LPO's equal protection claim under Ohio's Constitution. The proper analysis is either strict scrutiny under *Thompson* or the "reasonable grounds" formula stated in *Mole*. Reversal is required so that the proper, more-protective constitutional analysis can be applied.

IV. Reversal is Required Under *Anderson/Burdick*.

Federal Equal Protection Clause precedents can still play a useful role in analyzing potential violations of Ohio's equal protection guarantee. The Ohio Supreme Court in *Mole*, for instance, borrowed federal precedents and found that Ohio's disparate treatment of police officers violated the federal Equal Protection Clause as well as Ohio's equal protection guarantee.

Federal Equal Protection Clause precedents establish a floor for Ohio's constitutional equal protection guarantee. Laws that would violate the federal Equal Protection Clause necessarily violate Ohio's guarantee of equal protection. Laws that do not run afoul of the federal Equal Protection Clause, meanwhile, may still violate Ohio's more-protective guarantee of equal protection, as made clear by the Ohio Supreme Court in *Mole*.

Had the Court of Common Pleas correctly applied the *Anderson/Burdick* analysis to S.B. 193, it would have discovered that S.B. 193 violates the Fourteenth Amendment. It therefore also violates Article U, § 2 of Ohio's Constitution. A majority of federal courts and

the Supreme Court of the United States have ruled that laws (like S.B. 193) that discriminate against new and minor parties in terms of official membership are unconstitutional.

The United States District Court for the Southern District of Ohio's decision, which was relied on heavily by the Court of Common Pleas, is not binding on this Court. Nor is the Sixth Circuit's recent decision affirming the District Court's decision. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382 (6th Cir. 2016). Neither is binding, *see, e.g., State v. Nguyen*, 157 Ohio App.3d 482, 499, 2004-Ohio-2879, 811 N.E.2d 1180, 1193 (6th Dist.), and neither is correct. Both erroneously concluded that selectively denying official membership to new and minor parties places only a minor burden on those parties First and Fourteenth Amendment rights. No other court agrees with this conclusion.

A majority of federal courts -- including the Supreme Court of the United States -- have concluded that a state's disparate treatment of minor political parties in terms of recognized membership and the lists official membership creates runs afoul of the federal Constitution.

Senate Bill 193 not only denies LPO a primary, it also denies LPO recognized membership and the resulting official membership lists that are provided to the established political parties. A proper application of these federal precedents, including those handed down under the *Anderson/Burdick* formula, directs that S.B. 193 violates equal protection.

The District Court's and Sixth Circuit's conclusions to the contrary conflicts with a summary affirmance handed down by the Supreme Court of the United States in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984, 995 (S.D.N.Y.), *summarily aff'd*, 400 U.S. 806 (1970).³ There, a three-judge District Court invalidated New York's free supply of membership lists to established political parties (which had won more than 50,000 votes for governor) but not to other recognized political parties. 314 F. Supp. at 995. Those other recognized political parties had to pay for the State's lists. The District Court invalidated the

³ "[S]ummary affirmances are binding on the lower courts until the Supreme Court informs us that they are not." *Beverlin v. Board of Police Commissioners of Kansas City*, 722 F.2d 395, 396-97 (8th Cir. 1983) (citing *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975)).

measure, stating: "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 and emphasis added). The Supreme Court summarily affirmed, thereby recognizing that a free state-created membership list provides a "significant subsidy" when selectively awarded. It must be tested by strict scrutiny.

The Second Circuit reached this same result a generation later in *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), after New York re-passed essentially the same law. The Second Circuit concluded 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).

The Second Circuit in *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), applied these precedents to enjoin enforcement of another New York party-membership law that discriminated against small political parties. According to the law, only political parties which won 50,000 votes in

the last gubernatorial election could register official members. Like Ohio here, New York argued that it relied on voter registration merely to conduct its closed primaries. Small political organizations that ran candidates in general elections did not hold primaries, New York argued, and therefore did not need to officially register members.

While it recognized that New York's scheme facilitated closed primaries, the Second Circuit disagreed that it did nothing else: "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.* at 416. The Second Circuit explained that "access to minimal information about political party affiliation is the key to successful political organization and campaigning." *Id.* at 421 (citation omitted). Consequently, the Second Circuit concluded that "the burdens imposed on plaintiffs' associational rights are severe," *id.* at 420, and "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." *Id.* at 421.

The Tenth Circuit reached this same result in *Baer v. Meyer*, 728 F.2d 471, 475 (10th Cir. 1984), which invalidated under *Anderson's* balancing test a Colorado law that "prevented persons other than those affiliated with the two major political parties from obtaining and using [membership] information in a manner similar to that of the major parties." This discrimination flowed from Colorado's refusal to allow otherwise qualified minor political parties to officially register their members: "The electors of the Democrats and Republicans can designate their party affiliation by name on the voter registration form. Plaintiffs [voters and members of minor parties] are required to register as 'unaffiliated.'" *Id.* Although the Tenth Circuit did not expressly state that the burden was severe, it ruled that "the refusal to permit such designation unnecessarily burdens the opportunity of the citizen and his party to promote their minority interests." *Id.*

Baer's result was explained and ratified by the Tenth Circuit in *Constitution Party of Kansas v. Kobach*, 695 F.3d 1140 (10th Cir. 2012).

There, the Tenth Circuit ruled that *Baer* applied only to those political organizations that are recognized as proper parties under state law: "Because the plaintiffs in *Baer* met [Colorado's statutory party requirements] ..., we held that the Secretary could not refuse to permit [membership] registration with them." *Id.* at 1147. Once political parties are recognized, like new parties in Ohio, they cannot be denied equal access to official membership. *Cf. Iowa Socialist Party v. Nelson*, 909 F.2d 1175 (8th Cir. 1990) (refusing to extend *Baer* to groups that are not recognized as parties).

Senate Bill 193 not only denies new parties direct primaries, it also denies them official party membership. It prevents new parties from registering members. Ohio's membership preference for established parties is no different from New York's and Colorado's, both of which were invalidated in *Green Party* and *Baer*, respectively. Consequently, even if LPO's state-law equal protection claim must be judged under federal standards, S.B. 193 still cannot survive. Its burden is too severe to survive the *Anderson/Burdick* test.

V. The Court of Common Pleas Erred By Denying Discovery.

The Court of Common Pleas refused to allow discovery even though LPO expressly requested it: "This case is unique. ... Parties conducted extensive discovery during the pendency of the federal matter. Therefore, undue delay would result from the granting of a Civ. R. 56(F) continuance." Doc. # 96 (0D006-Q80 at Q81-82). The Court also rejected LPO's supporting affidavit, complaining that the affidavit failed to explain "why it [LPO] cannot present affidavits" to support its case. *Id.* at Q-83.

By denying even minimal discovery, the Court of Common Pleas anticipated its erroneous conclusion that LPO's state-law equal protection claim necessarily mirrored the federal Equal Protection Clause claim LPO had made in federal court. The Court anticipated its strict adherence to the federal District Court's application of federal law. The Court accordingly -- and erroneously -- concluded that LPO had an adequate opportunity to conduct discovery in the federal proceeding regarding that state-law equal protection claim (which it did not make in

federal court) and was bound to lose on the merits anyway. Discovery would simply delay the inevitable.

The Court's logic fails on several levels. First, it assumes that discovery was freely available in the federal District Court on all of LPO's claims. This was not true at all. No general discovery order in the federal District Court was ever put in place. The Secretary refused to cooperate in any form of discovery. When LPO attempted discovery the Secretary immediately refused and claimed that discovery of any sort was not "appropriate." *See Libertarian Party of Ohio v. Husted*, 33 F. Supp. 3d 914, 918 (S.D. Ohio 2014) (stating that the Secretary "argues that ... it is not appropriate to go forward now with either this discovery or any discovery.").

LPO was forced to obtain court orders in piecemeal fashion in order to conduct any discovery at all in its federal proceeding. In the end, LPO obtained no less than a half-dozen court orders over an 18-month period allowing it to conduct basic discovery on its federal selective enforcement claim against the Secretary and the Intervenor (Gregory Felsoci) in that case. *See Libertarian Party of Ohio v. Husted*,

2014 WL 3928293 at *4 (S.D. Ohio 2014); *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 475 (S.D. Ohio 2014); *Libertarian Party of Ohio v. Husted*, 2015 WL 5766518 at *3 (S.D. Ohio 2015); *Libertarian Party of Ohio v. Husted*, 2016 WL 447566 at *4 (S.D. Ohio 2016). The discovery that was allowed had nothing to do with LPO's challenge to S.B. 193. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 393 (6th Cir. 2016) ("The district court permitted discovery to continue with regards to the Libertarian Party's selective-enforcement claim").

The Court of Common Pleas, moreover, cited no authority for the proposition that a plaintiff's having had a prior opportunity to conduct discovery in an earlier proceeding on a different claim in a different court in a different jurisdiction justifies barring discovery. None exists. There was no need to rush to final judgment in this case. Undue delay was not a problem. LPO had not asked for expedited consideration of the matter beyond seeking preliminary relief; nor had the Secretary. LPO's motion for preliminary injunction could have been denied without necessitating a rush to final judgment.

LPO was entitled to discover why S.B. 193 was passed. LPO was entitled to discover facts that proved the Secretary's many denials were wrong. LPO was entitled to contest the genuine issues raised by the Secretary's answer. All of the information surrounding S.B. 193 and the Secretary's many denials was under the control of the Secretary. "Allowing" LPO to submit affidavits was hardly an adequate substitute for proper discovery in this important case. Indeed, if undue delay were truly a concern the Court could have limited the focus of discovery and require that it be conducted in short order.

"When a party opposing a summary judgment motion needs further evidence to sustain its case, the proper remedy is to move the trial court to delay judgment pursuant to Civ. R. 56(F)." *Drake Construction Co. v. Kemper House Mentor, Inc.*, 170 Ohio App.3d 19, 24, 2007-Ohio-120, 865 N.E.2d 938, 942 (11th Dist.). "Under Civ. R. 56(F), '[a] party who seeks a continuance for further discovery is not required to specify what facts he hopes to discover, especially where the facts are in the control of the party moving for summary judgment'." *Id.* at 24, 865 N.E.2d at 943 (citation omitted). "Generally, ... the trial court should

exercise its discretion in favor of a party seeking further time for discovery under Civ. R. 56(F)." *Id.* (citation omitted).

The Court of Common Pleas erred by denying LPO the discovery it requested and rushing to summary judgment. The Secretary's answer denied practically every allegation in LPO's complaint. LPO does not and cannot know why S.B. 193 was passed. It does not and cannot know S.B. 193's objective or what motivated its passage. LPO believes that S.B. 193 was a partisan measure designed to benefit the Republican Party at the expense of LPO, but LPO needs discovery to explore that theory. Discovery is required.

CONCLUSION

For the foregoing reasons, the Court of Common Pleas' summary judgment should be **REVERSED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Brief was filed using the Court's E-Flex electronic transmission service and will be served on counsel of all parties of record. This Brief is also being electronically mailed pursuant to Local Rule 2(E) to Halli Brownfield Watson, Associate Assistant Attorney General, Constitutional Offices, Ohio Attorney General, at Halli.Watson@ohioattorneygeneral.gov, Jordan Berman, Ohio Attorney General's Office, at jordan.berman@ohioattorneygeneral.gov, and Sarah Pierce, Ohio Attorney General's Office, at sarah.pierce@ohioattorneygeneral.gov, this 21st day of October, 2016.

s/ Mark R. Brown
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