

**IN THE TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO**

LIBERTARIAN PARTY OF OHIO,	:
	:
	: Case No. 16APE-07-496
Appellant,	:
	: Regular Calendar
v.	:
	: On Appeal from Franklin
OHIO SECRETARY OF STATE,	: County Common Pleas Court
et al.,	: Case No. 16-cv-554
	:
Appellees.	:

**BRIEF OF APPELLEES
OHIO SECRETARY OF STATE JON HUSTED AND OHIO
ATTORNEY GENERAL MIKE DEWINE**

Respectfully submitted,

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APPELLANT'S ASSIGNMENTS OF ERROR

Appellant Libertarian Party of Ohio, through the following six assignments of error, contends that the trial court erred in granting summary judgment against it and by denying its motion for a Civil Rule 56(F) continuance of Defendants/Appellees' summary judgment motion.

1. The Court of Common Pleas erred by concluding that S.B. 193, Ohio's new ballot access law denying to new political parties their previous right to hold primaries, does not violate Article V, § 7 of Ohio's Constitution. (R. 102, Decision and Entry at p. 11-13).

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. (R. 102, Decision and Entry at p. 8-11).

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.

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.

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.

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.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly granted summary judgment to Appellees when S.B. 193 imposes minimal burdens that are amply justified by legitimate state interests as a matter of law.

2. Whether the trial court correctly denied the Libertarian Party of Ohio's motion to continue Appellees' summary judgment motion when it failed to meet its burden of establishing why it could not present sufficient facts to oppose summary judgment.

STATEMENT OF THE CASE

On January 19, 2016, Plaintiff/Appellant Libertarian Party of Ohio (“LPO”) filed its complaint and a motion for temporary restraining order and preliminary injunction against Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine. (R. 5, Compl.; R. 6, Mot. for TRO and Prelim. Inj.). The Complaint alleges two claims challenging the validity of S.B. 193, Ohio’s minor party ballot access law, under Ohio’s Constitution. The first cause of action alleges that S.B. 193 “contradicts and violates the primary requirement found in Article V, § 7 of Ohio’s Constitution.” (R. 5, Compl. at p. 11). The Second alleges that S.B. 193 “violates the equal protection guarantee in Article I, § 2 of Ohio’s Constitution.” (*Id.*).

The LPO’s motion for temporary restraining order and preliminary injunction sought to enjoin the Secretary and Attorney General (hereinafter “Appellees”) from enforcing S.B. 193. (R. 6, Mot. for TRO and Prelim. Inj. at p. 1). The Appellees opposed that motion. (R. 30, Memo. in Opp.). The trial court denied the requested temporary

restraining order on February 2, 2016 and set a hearing on the preliminary injunction motion. (R. 58, Entry).

Appellees answered the complaint and filed a summary judgment motion on February 19, 2016. (R. 66, Answer; R. 62, MSJ). The LPO opposed Appellees' summary judgment motion and also filed a motion seeking a Civ. R. 56(F) continuance. (R. 74, Mtn. for Continuance; R. 76, Resp. to MSJ). Appellees opposed the request for a Rule 56(F) continuance and also filed a reply in support of their summary judgment motion. (R. 77, Reply in Support; R. 78, Memo. Contra Continuance). The preliminary injunction hearing proceeded on April 5, 2016. (R. 94, Court Reporter Cert; R. 58, Entry). The trial court subsequently denied the motion for a Rule 56(F) continuance. (R. 96, Entry Denying Mot.).

On June 7, 2016, the trial court granted Appellees' summary judgment motion. (R. 102, Decision and Entry). The same day, the LPO filed a motion for a new trial and to stay judgment. (R. 109, Motion for New Trial and to Stay Judgment). Appellees opposed that motion. (R. 110, Memo. Opp.). The LPO subsequently filed a notice of appeal and the trial court stayed any ruling on the post-judgment motion

pending the outcome of the LPO's appeal. (R. 115, Notice; R. 120, Order to Stay). Upon remand by this Court of this matter for the purpose of resolving the LPO's motion for a new trial, the trial court denied it on September 1, 2016. (R. 127, Court of Appeals Entry; R. 136, Decision & Entry). This Court subsequently lifted the stay on this appeal. (9/7/16 Entry, OA237).

STATEMENT OF FACTS

A. Introduction.

S.B. 193 was passed on November 6, 2013. The LPO filed suit in 2013 challenging that Bill in the United States District Court for the Southern District of Ohio. (R. 31, Ex. 1 to Def.'s Memo. Opp. Mot. for TRO, First. Am. Compl. Southern Dist. Case No. 2:13-CV-00953). It won an injunction preventing S.B. 193's enforcement during the 2014 election cycle. (R. 32, Ex. 2 to Def.'s Memo. Opp. Mot. for TRO, Opinion and Order from Southern Dist. Case No. 2:13-CV-00953 at p. 1, 27-28). That injunction has expired and S.B. 193 has been in full force and effect since the November 2014 general election.

Under S.B. 193, the LPO was no longer a recognized minor party in Ohio after the 2014 general election because it did not have a candidate for the office of Governor. If the LPO had a gubernatorial candidate on the 2014 general election ballot, it could have retained minor party status if that candidate received at least two percent of the total vote cast for that office. *See* Ohio Am. Sub. S.B. 193 § 4(B), 130th G.A. (2013). While the LPO's 2014 LPO gubernatorial candidate, Charlie Earl, filed petitions to appear on the 2014 ballot, he was disqualified after his candidacy was protested. *See generally* *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014). The protest was upheld because two of Earl's petition circulators, in contravention of state law, did not disclose on their petition paperwork that they were paid. *Id.* Aside from providing background as to why the LPO is no longer a recognized minor party in Ohio, Earl's disqualification is not relevant to the present appeal. That disqualification has been extensively litigated in federal court. *Id.*, *application for stay and injunctive relief denied, Libertarian Party of Ohio v. Husted*, 134 S. Ct. 2164, 188 L. Ed. 2d 1121 (2014). *See also*

Libertarian Party of Ohio v. Husted, 831 F.3d 382 (6th Cir. July 29, 2016), *application for stay and injunctive relief denied*, --- S. Ct. ---, 2016 WL 4507900 (Aug. 29, 2016).

B. S.B. 193's structure for minor party ballot access.

Effective in 2014, S.B. 193 reformed Ohio's system for determining political party status and establishing new political parties. As relevant here, the Bill voided previous Secretary of State directives (issued pursuant to court order) recognizing minor parties as qualified for primary and general elections. These directives were issued after *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), struck down Ohio's previous minor-party ballot-access law.¹ S.B. 193 repealed those directives providing minor party status to the LPO and others, and instead created two methods by which a political group could obtain minor-party recognition and qualify for the ballot: by receiving three percent of the total vote in a gubernatorial election or presidential

¹ For a more detailed account of minor party ballot access in Ohio since the *Blackwell* decision see *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 387-388 (6th Cir. July 29, 2016).

election, *see* R.C. 3501.01(F)(2)(a), or by filing a formation petition, *see id.* 3501.01(F)(2)(b).²

Formation by petition requires signatures equal in number to one percent of the total vote for Governor or President at the State's most recent election. R.C. 3513.05; 3517.01(A)(1)(b)(i). The signatures must include 500 qualified electors from each of at least half of the congressional districts in Ohio. *Id.* 3517.01(A)(1)(b)(ii). This petition must be submitted no later than 126 days before the November general election. *Id.* 3517.01(A)(1)(b)(iii).

A minor party that files a successful formation petition will earn recognized party status for at least twelve months, and will henceforth retain party status by passing the three percent vote threshold at the first election for governor or president that occurs at least twelve months

² In 2014, a minor political party only had to obtain two percent of the vote for governor to retain party status for the next four years. Ohio Am. Sub. S.B. 193 §4(B), 130th G.A. (2013). As the Green Party's gubernatorial candidate received two percent of the vote in 2014, the Green Party is a recognized minor political party. *See* Secretary of State's Website, 2014 Election results, <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2014Results.aspx> (last visited November 7, 2016).

after it forms. *Id.* 3501.01(F)(2)(b). If a minor party obtains at least three percent of the vote for either governor or president, the minor party retains minor-party status and ballot access for four years. R.C. 3501.01(F)(2)(a).

Minor parties who achieve status by the vote-counting method may hold primary elections to nominate their candidates to appear on the general election ballot. *Id.* 3501.01(F)(2)(a). On the other hand, minor parties that achieve status by petition determine their general election candidates through nominating petitions. *Id.* 3517.012(A)(1). A new party's candidate for statewide office must submit a petition signed by at least 50 qualified electors. *Id.* 3517.012(B)(2)(a). A new party's candidate for local office need only submit a petition signed by five qualified electors. *Id.* 3517.012(B)(2)(b).

In contrast, major parties select their general election candidates solely via primary. R.C. 3513.05. To be a "major political party," the party's candidate for governor or nominees for presidential electors must receive "not less than twenty percent of the total vote cast for such office at the most recent regular state election." *Id.* 3501.01(F)(1). Thus, a

major political party must pass the applicable vote test every *two* years. *Id.* 3501.01(C). A person wishing to become a candidate for major party nomination at a primary must file a declaration of candidacy and petition. *Id.* 3513.05. Major-party candidates must obtain 1,000 signatures for statewide office and fifty for local office. *Id.* 3513.05. They may obtain those signatures only from those who are members of the same political party. *Id.*

Ohio law does not govern party membership in general. For purposes of eligibility to vote in a primary and to sign party candidate petitions, Ohioans may affiliate with a party by casting that party's ballot at a primary election. R.C. 3513.05; 3513.19; 3513.20. Section 3513.19 sets forth the process to challenge whether a person is legally entitled to vote in a primary. One of the bases upon which a person may be challenged is that "the person is not affiliated with or is not a member of the political party whose ballot the person desires to vote." *Id.* 3513.19(A)(3). A person is considered affiliated with a party if he or she voted in that party's primary or did not vote in any primary during the last two years. *Id.* 3513.05. If a person's right to vote in a party

primary is challenged based on the grounds that the person is not a member of that party, “membership in or political affiliation with a political party shall be determined by the person’s statement, made under penalty of election falsification, that the person desires to be affiliated with” the “party whose primary ballot the person desires to vote.” *Id.* 3513.19(B). Section 3513.19, however, does not apply to new-party voters. Section 3517.016 provides that “any qualified elector who desires to vote the new party primary ballot is not subject to section 3513.19 of the Revised Code and shall be allowed to vote the new party primary ballot regardless of prior political party affiliation.”

C. Related litigation challenging S.B. 193 in federal court.

After S.B. 193 was enacted in 2013, the LPO and others challenged it in federal court. The LPO’s federal constitutional challenges raised the same issues and arguments as the LPO’s current equal protection challenge under the Ohio Constitution. On March 16, 2015, the Southern District ruled on cross-motions for summary judgment and upheld S.B. 193 against facial challenges based on the First and Fourteenth Amendment to the United States Constitution

brought by other minor parties. (R. 36, Ex. 6 to Def.'s Memo. Opp. Mot. for TRO, Opinion and Order from Southern District Case No. 2:13-CV-00953). On October 14, 2015, the Southern District again upheld S.B. 193 against the LPO's federal constitutional challenges finding them to be indistinct from the other minor parties' previously rejected claims. (R. 35, Ex. 5 to Def.'s Memo. Opp. Mot. for TRO, Opinion and Order from Southern District Case No. 2:13-CV-00953 at p. 12). On July 29, 2016, the Sixth Circuit affirmed the district court's conclusion that neither S.B. 193 nor Earl's disqualification from the 2014 general election ballot are unconstitutional. *Libertarian Party of Ohio v. Husted*, 831 F.3d 382 (6th Cir. July 29, 2016). Following the Sixth Circuit's decision, the LPO sought and was denied emergency relief in the United States Supreme Court. *Libertarian Party of Ohio v. Husted*, --- S.Ct. ---, 2016 WL 4507900 (U.S. Aug. 29, 2016).

The Southern District's October 14, 2015 decision also examined the LPO's identical Art. V, § 7 claim, ultimately dismissing it for lack of subject matter jurisdiction, finding that Eleventh Amendment immunity barred federal court jurisdiction over it. (R. 35, Ex. 5 to Def.'s Memo.

Opp. Mot. for TRO, Opinion and Order from Southern District Case No. 2:13-CV-00953 at p. 14-19). The Sixth Circuit affirmed without addressing the Eleventh Amendment immunity issues, finding the Common Pleas Court's decision rejecting that claim on the merits precluded the LPO from pursuing it in federal court. *Libertarian Party of Ohio*, 931 F.3d at 405-406.

On October 26, 2016, the LPO submitted its petition for a writ of certiorari with the United States Supreme Court seeking review of its federal constitutional challenge to S.B. 193, its constitutional challenge to Earl's exclusion from the 2014 ballot, and the dismissal of its Art. V, § 7 claim.

ARGUMENT

I. Standards of review, the presumption of constitutionality, and waiver of arguments not presented below.

Standards of review. The LPO's assignments of error implicate two standards of review. The first five assignments of error take issue with the trial court's summary judgment decision dismissing its claims. Summary judgment decisions are reviewed *de novo*. *MacDonald v. Authentic Invests., LLC*, 10th Dist. Franklin No. 15AP-801, 2016-Ohio-4640, ¶ 22

(June 28, 2016). Thus, the issues raised in the first five assignments of error are evaluated *de novo*. That decision must be affirmed if “if any grounds the movant raised in the trial court support it.” *Id.*

The LPO’s sixth and final assignment of error contends that the trial court erred in denying its motion for a Civil Rule 56(F) continuance. The trial court’s decision on that motion is subject to an abuse of discretion standard of review. *Perpetual Federal Savings Bank v. TDS2 Property Mgmt., LLC*, 10th Dist. Franklin No. 09AP-285, 2009-Ohio-6774, ¶ 11 (Dec. 22, 2009). An abuse of discretion “connotes more than an error of law or judgment.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 214 450 N.E.2d 1140 (1983) (quotation omitted). It implies that the court’s exercise of discretion was “unreasonable, arbitrary, or unconscionable.” *Id.* (quotation omitted).

Applying these standards, the trial court correctly granted Appellees’ motion for summary judgment and denied the LPO’s motion for a Rule 56(F) continuance.

Presumption of Constitutionality. S.B. 193 is presumed constitutional and must be given deference. “To overcome the

presumption, one must prove beyond a reasonable doubt that the statute is unconstitutional.” *State v. Williams*, 126 Ohio St.3d 65, 930 N.E.2d 770, 2010-Ohio-2453, ¶ 20. *See also State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 31 N.E.3d 596, 2014-Ohio-4022, ¶ 21 (2014) (“It is not sufficient for relators to cast doubt on the constitutionality of this statute, nor is it the attorney general’s burden to prove the statute constitutional; rather, relators must show beyond a reasonable doubt that [the statute] is unconstitutional.”). The LPO bears such a heavy burden because “the ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases.” *Id.* (internal quotation omitted).

There is no genuine issue of material fact that the LPO has failed to meet its burden to show that S.B. 193 is unconstitutional as a matter of law.

Waiver. The LPO repeatedly makes arguments to this Court that it did not raise below. Those arguments should not be considered. While appellate court review of summary judgment decisions is *de novo*, “the parties are not given a second chance to raise arguments that they should have raised below.” *Aubin v. Metzger*, 3rd Dist. Allen No. 1-03-08,

2003-Ohio-5130, ¶ 10 (Sept. 29, 2003) (quotation omitted). It is “deeply embedded” in our judicial system that the rules “do not permit a party to sit idly by until he or she loses on one ground only to avail himself of another on appeal.” *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706, 1997-Ohio-71. As this Court has explained: “An appellate court generally will decline to hear arguments for the first time on appeal, particularly when these arguments could have easily been raised and addressed by the trial court in the first instance.” *McDonald v. Authentic Invests., LLC*, No. 15AP-901, 2016-Ohio-4640, ¶27 (June 28, 2016). The arguments raised by the LPO for the first time on appeal that will be more fully identified below should be deemed waived and should not be considered by this Court.

II. Appellant’s Second Assignment of Error: The trial court correctly concluded that Art. V, § 7 is not self-executing.

The Court of Common Pleas properly dismissed the LPO’s claim based on Art. V, § 7 of the Ohio Constitution (“nomination clause”), because that clause is not a self-executing source of independent protection and cannot serve as the basis for a claim. The pertinent

provision of this section provides: “All nominations for elective state, district, county, and municipal offices shall be made at direct primary elections or by petition *as provided by law*. . . .” (emphasis added). By its own language, this provision contemplates the enactment of laws to provide for the nomination of candidates by either primary or petition. It has no independent force and cannot serve as the basis for LPO’s claim.

“A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation.” *State v. Williams*, 88 Ohio St.3d 513, 521, 728 N.E.2d 342, 2000-Ohio-428 (2000). On the other hand, a constitutional provision is not a self-executing independent source of protections if its language “cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment.” *Id.* at 521. “Stated more succinctly, the words of a constitutional provision must be sufficiently precise in order to provide clear guidance to courts with respect to their application if the provision is deemed to be self-executing.” *Id.* The nomination clause is not such a provision. Rather than identify the

process for nominating a candidate, the nomination clause expressly contemplates enabling legislation that will do so.

The LPO completely fails to address the trial court's reliance on the concurring opinion in *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913). Judge Wannamaker's concurrence explained:

The layman reading this language would at once say that either one or two methods for making nomination of municipal officers was here authorized when so provided by law, the one direct primaries, the other, by nominating petitions; but that it was for a law duly enacted after the passage of this amendment to determine which method should be adopted and the necessary legislation regulations therfor. *Manifestly this provision of the constitutional amendment is not self-executing. Legislation in some form is needed.*

Id. at 372 (emphasis added).

In addition to Judge Wannamaker's on-point analysis, the nomination clause is analogous to another constitutional provision the Ohio Supreme Court has directly concluded is not self-executing. *See State v. Jackson*, 102 Ohio St.3d 380, 811 N.E.2d 68, 2004-Ohio-3206 (2004). In *Jackson*, the Court held that Art. V, § 2, which provides that “[a]ll elections shall be by secret ballot,” is vague “in the scope of the

privacy to which it aspires” and fails to provide specifics such that a court could determine whether its requirements were violated. *Id.* at ¶ 23. Thus, the Court held that Art. V, § 2 is not self-executing. *Id.* at ¶ 24. The nomination clause similarly lacks specifics to determine whether party nominations satisfy its requirements. It instead relies upon election statutes in the Ohio Revised Code to become operative.

The cases the LPO relies on do nothing to support its claim that the nomination clause is self-executing. *State ex rel. Schwerdtfeger v. Husted*, Franklin C.P. No. 16CV2346 (March 14, 2016) (R. 280), does not interpret the portion of the nomination clause upon which the LPO relies and does not analyze whether it is self-executing. The LPO’s claims to the contrary are inaccurate. (*See* Appellant’s Br. at 32). *Schwerdtfeger* involved the issue of whether seventeen-year-olds can vote in a presidential primary. That decision referenced a completely different part of Art. V., §7, namely the part that states “[a]ll delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors in a manner provided by law. . . .”

Schwerdtfeger at 6. One of the issues was defining the term “electors.” *Schwerdtfeger* has nothing to do with any issue in this case.

State ex rel. Gottlieb v. Sulligan, 175 Ohio St. 238, 193 N.E. 2d 270 (1963), is likewise inapplicable. The trial court properly rejected the “LPO’s argument that the Ohio Supreme Court made a holding as to whether Art. V, § 7 was self-executing in *Sulligan*” as “not persuasive.” (R. 102, Decision and Entry at p. 11). *Sulligan* addressed the following issue: “whether a person selected as a party candidate for an office in a primary election who withdraws his candidacy for that office is eligible for selection as a party candidate by the party committee to fill a vacancy in the nomination for another office created by the withdrawal of the candidate originally nominated.” *Id.* at 239. The resolution of that issue hinged on *statutory* language. *Id.* *Sulligan* never held that the nomination clause requires that all party nominations occur through a primary election, but affirmed the General Assembly’s power to “provide necessary election machinery and reasonable regulations for the exercise of the elective franchise.” *Id.* at 273 (quotation and citation omitted). As the trial court reasoned, *Sulligan* “used supplemental

statutes in order to evaluate whether the action before it was appropriate under Art. V., § 7” and its “specific notation that a void existed under Art. V, § 7” supports the conclusion “that supplemental legislation is necessary to make it operative.” (R. 102, Decision and Entry at p. 10).

The LPO’s argument that a non-self-executing constitutional provision somehow becomes the source of an actionable right once enabling legislation is enacted is contrary to the case law. (Appellant’s Br. at 29-32). Under Ohio law, “a constitutional provision alone has no force unless it is self-executing.” *Jackson* at ¶22. That a statute was passed to carry out such a provision does not suddenly vest it with independent force. *Jackson* concluded that Art. V, § 2’s provision that “[a]ll elections shall be by ballot” aspired to ballot secrecy, but was not self-executing and had no independent force. *Id.* at ¶¶ 21-24. *Jackson* then went on to examine “statutory law. . . that implements the constitutional aspiration of ballot secrecy.” *Id.* at ¶25. That there was enabling legislation enacted did not transform an otherwise non-self-executing constitutional provision into a self-executing one.

The LPO also misguidedly relies on inapposite case law to argue that the enactment of enabling legislation makes the nomination clause actionable. *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), have nothing to do with whether a constitutional provision is self-executing. Those cases dealt with the issue of whether Congress exceeded the authority granted to it by the United States Constitution’s Commerce Clause in enacting the legislation challenged in each case. Neither case involved an issue of whether the Commerce Clause bestowed a substantive right that became actionable after enabling legislation was enacted. *City of Northwood v. Wood County Regional Water and Sewer Dist.*, 86 Ohio St.3d 92, 711 N.E.2d 1003, 1999-Ohio-350, and *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733, 1997-Ohio-84, also did not address whether a constitutional provision was self-executing. In *Northwood*, the issue was whether a local government exceeded its constitutional authority to exercise eminent domain. In *DeRolph*, the issue was whether the General Assembly complied with the constitutional *requirement* that it enact a “thorough and efficient system of common schools.” The operative

“thorough and efficient” language had been previously construed and provided a workable standard. None of these cases have any bearing on any issue in this appeal.

III. Appellant’s First Assignment of Error: The trial court correctly concluded that S.B. 193 complies with Art. V, § 7.

Assuming *arguendo* that the nomination clause is self-executing, S.B. 193 fully complies with it. Again, this section 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....*” Art. V §7 (emphasis added). It does not, as Plaintiffs argue, restrict nominations exclusively to primaries. S.B. 193 comports with its requirements. It provides a mechanism *by law* through which a candidate can be nominated by petition or by direct primary election.

The Ohio Supreme Court in *Fitzgerald* long ago interpreted Art. V, § 7 as contemplating nomination by either primary or petition. The issue in *Fitzgerald* was whether a provision of Cleveland’s charter that permitted nominations by petition only was valid. The issue implicated the nomination clause as well as other provisions of Ohio’s Constitution,

including the Home Rule Amendment. As for the issue of the nomination clause, *Fitzgerald* concluded that, if it applied to offices in cities with charters, “a charter which provides for such nomination by petition” complies with it. *Id.* at 355. In other words, the nomination clause has no primary requirement. *See also id.* at 387-88 (“[t]he simple common-sense meaning of” Art. V, § 7 “is that nominations shall be restricted to these two modes [primary or petition] and the law may provide for one or the other”) (J. Wilkin, concurring).

The LPO misreads *Sulligan* to urge a different conclusion. *Gottlieb* did not hold—or even suggest—that the nomination clause mandates that all nominations must occur through a primary election. As explained above, it resolved an issue hinging on the interpretation of Ohio’s sore lower statute.

The LPO’s reliance on *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), is equally misplaced. The Sixth Circuit’s *Blackwell* decision did not address any issue involving the interpretation of the nomination clause. It could not have because the Eleventh Amendment precludes federal court jurisdiction over claimed violations

of a state constitution. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 116 (1984). “[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment. . . .”). *Blackwell* involved a federal constitutional challenge to Ohio’s previous minor-party ballot access law. The LPO relies heavily on a statement from *Blackwell* that was merely background information to provide context for the analysis of the claims actually presented. At the time of the *Blackwell* decision, Ohio’s ballot-access statute did not contain a mechanism for parties to reach the general-election ballot solely by petition. Thus, at the time of that decision, it was a correct statement of then-existing law that parties could only nominate candidates by primary. Notably, one of the forms of relief the LPO asked for in *Blackwell* was the opposite of its request here: for the court to “invalidate Ohio’s requirement that the LPO nominate its candidates by primary and permit it to nominate through party caucus or convention.” *Id.* at 583. Through S.B. 193, the General Assembly provides that option. Rather than comply with the scheme it previously requested, the LPO now claims it is unconstitutional.

Without any analysis, the LPO asserts that Appellees are “precluded from denying that Article V, §7 requires primaries for all parties” because they defended *Blackwell*. (Appellants’ Br. at 15-16.) The LPO, however, made no such argument in the trial court and is barred from doing so here. Regardless, whether the nomination clause requires primaries was not litigated or decided in *Blackwell* and, therefore, *Blackwell* has no preclusive effect. *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 201, 443 N.E.2d 978 (1983) (“an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action”).

The LPO devotes a significant portion of its argument that the nomination clause requires primaries to the affidavit of Richard Winger. But, the LPO did not rely upon this affidavit in opposing summary judgment and has, therefore, waived its right to rely on it on appeal. Mr. Winger’s affidavit was not even filed until well after summary judgment briefing concluded and was filed “in connection with the Preliminary

Injunction evidentiary hearing of April 5, 2016.” (R. 86, Notice of Filing of Winger Aff.). The standards governing preliminary injunctions and summary judgment motions are different. For example, evidence that may be considered on a preliminary injunction motion may not necessarily be appropriately considered on summary judgment. *Schisler v. Clausing*, 4th Dist. Scioto No. 1301, 1980 WL 351086, *5 (Sept. 17, 1980) (“[I]t is implied in the Ohio rule that evidence may be considered in the hearing for a preliminary injunction that would not be admissible at trial on the merits.”); *Havely v. Franklin Cty.*, 10th Dist. Franklin No. 07AP-1077, 2008-Ohio-4889, ¶24 (Sept. 25, 2008) (“When ruling upon a motion for summary judgment, a trial court only considers admissible evidence.”) (quotation omitted).³ Relying on an affidavit to support a

³ One of the many problems with relying upon this affidavit for purposes of summary judgment for the first time on appeal is that Appellees were not provided an opportunity to object to its consideration under the applicable summary judgment standards. Some of the statements in this “affidavit are nothing more than legal conclusions” that “are insufficient to meet the requirements of Civ. R. 56(E).” *Tolson v. Triangle Real Estate*, 10th Dist. No. 03AP-715, 2004-Ohio-2640 (10th Dist. May 25, 2004).

request for a preliminary injunction does not preserve a party's ability to rely on it on appeal from the denial of a different motion.

Even if not waived, the LPO's reliance upon any alleged history of nominating party candidates by primary is irrelevant. The cases relied upon by Mr. Winger in his affidavit actually undercut the LPO's position that a primary is required. *State ex rel. Conner v. Noctor*, 106 Ohio St. 516, 518, 140 N.E. 878 (1922) ("The Constitution makers delegated to the Legislature the authority, therefore, for making nominations by petition. . . ."); *Fitzgerald, supra* at p. 21-22. That the General Assembly may have previously declined to enact legislation allowing minor parties to nominate candidates by petition does not mean it is unable to do so.

The case law the LPO relies upon to argue to the contrary is not relevant. *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550, 2559 (2014), addressed the propriety of certain recess appointments made by the President. There, the Court explained that "[t]he longstanding practice of government can inform this Court's determination of what the law is *in a separation-of-powers case*" and

that the Court “must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves has reached.” *Id.* at syllabus 1(a) (emphasis added and quotation omitted). This is not a separation of powers case and there is no risk of upsetting any compromise or arrangement reached between any of Ohio’s co-equal branches of government. The LPO’s other case, *Evenwel v. Abbott*, 136 S.Ct. 1120, 1132 (2016), concluded that the method used by “countless jurisdictions. . . for decades, even centuries” to draw legislative districts did not violate Equal Protection. That case again does not stand for the proposition that a prior practice creates a constitutional requirement.

IV. Appellant’s Third Assignment of Error: The trial court correctly applied *Anderson-Burdick* to the LPO’s equal protection claim.

The Ohio Supreme Court has “held that the equal protection provisions of the Ohio and federal Constitutions are functionally equivalent and require the same analysis.” *See, e.g., Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 59, 2009-

Ohio-1970, ¶ 11; *Pickaway Cnty. Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, ¶17.

Federal courts apply the analysis set forth by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1983), to federal equal protection challenges to state election laws. *Libertarian Party of Ohio*, 831 F.3d at 399; *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015) (“While the Supreme Court has not yet applied this test to ballot-access challenges on pure equal-protection grounds, our cases hold that the *Anderson-Burdick* test serves as a single standard for evaluating challenges to voting restrictions.”) (quotation omitted).

Ohio courts likewise use *Anderson-Burdick* to evaluate constitutional challenges to election regulations. In *Brown*, the relator sought a writ of mandamus alleging a statute violated the equal

protection clauses of both the United States and Ohio Constitutions.⁴ *Id.* at ¶ 14. *Brown* explained that *Anderson-Burdick* applies “[t]o assess the constitutionality of a state election law.” *Id.* *Brown* explained that “[t]he standards articulated by the Supreme court in *Anderson* and *Burdick* that apply in civil litigation challenging the constitutionality of ballot restrictions inform our analysis, but those cases are not writ actions and do not involve the unique burdens that control the adjudication of original actions in this court.” *Id.* at ¶22. Thus, the *Brown* decision implicitly recognized that *Anderson-Burdick* applies in regular civil cases like the one here. The concurrence also expressly acknowledged that “where a plaintiff alleges that the state has burdened voting rights through disparate treatment, the *Anderson/Burdick* balancing test is applicable.” *Id.* at ¶35 (O’Connor, C.J., concurring in judgment only). The trial court properly concluded that this concurrence

⁴ Demonstrating the indistinct nature of Ohio and federal equal protection challenges, the *Brown* decision does not identify which Constitution the relator’s claims were premised upon. But, the complaint brings claims under the equal protection clause of both constitutions. The complaint is available on the Supreme Court’s website at <https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2014/1405> (last visited November 2, 2016).

“was informative on the issue and aided [it] in finding that the *Anderson-Burdick* test is properly applied in the instant matter.” (R. 102, Decision and Entry at p. 17).

Anderson-Burdick establishes a modified balancing test that S.B. 193 easily satisfies. The Supreme Court has recognized that election regulations “will invariably impose some burden upon individual voters.” *Burdick*, 504 U.S. at 433. But subjecting every such regulation to strict scrutiny is impractical, because doing so “would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* And the fact that a State’s system “creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel close scrutiny.” *Id.* (quotation and citation omitted).

Instead, a “more flexible standard” applies to state election laws. *Id.* at 434. This standard requires that the court “weigh ‘the character and the magnitude of the asserted injury to the rights protected by the First and the Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as

justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Id.* quoting *Anderson*, 460 U.S. at 789.

Applying this sliding scale analysis, “if the state law imposes reasonable and nondiscriminatory burdens, the statute will be subject to rational basis review.” *Libertarian Party of Ohio*, 831 F.3d at 400 (quotation omitted), citing *Green Part of Tenn. v. Hargett*, 791 F.3d 684, 693 (6th Cir. 2015). But, if the state law “imposes severe burdens on the plaintiff’s constitutional rights, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Id.* (quotation omitted). “If the burden lies somewhere in between, courts will weigh the burden on the plaintiffs against the state’s asserted interest and chosen means of pursuing it.” *Id.* (quotation omitted).

The trial court properly applied the *Anderson-Burdick* analysis to the LPO’s claims. The LPO seeks to distance itself from its federal court loss by arguing that here it does not “argue that either the federal freedom of association or any Ohio constitutional analog was at stake” but in federal court it “used the First Amendment’s freedom of

association as the underlying right.” (Appellants’ Br. at 34-35). But, this is an attempt to manufacture differences between the two claims where none exist.

While the LPO’s Complaint does not explicitly make First Amendment claims, it complains of an unequal opportunity to exercise associational rights. *See* Appellants’ Br. at 10-11 (“party members. . . are ‘wedded’ to their parties for two years. . . mean[ing] that one who votes in a primary cannot sign a new-party candidate’s nominating petition”); at 11 (“[n]ew parties are denied both official members and official membership lists by S.B. 193” that “facilitate party-building, party-planning, and fund-raising”). “Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association.” *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 224 (1989) (citation and quotation omitted). The very burdens the LPO argues S.B. 193 imposes implicate these associational rights. Its claim is governed by *Anderson-Burdick*. *Hargett*, 791 F.3d at 693 (“[T]he plaintiffs argue that the

ballot-retention statute denies them an equal opportunity to exercise their rights to association and political expression. Once again, we apply the *Anderson-Burdick* test.”). As the trial court correctly observed: “It seems that LPO attempts to argue that *Anderson-Burdick* test does not apply in order to avoid the same fate their claim suffered in the Southern District of Ohio case. However, LPO alleges the same injuries in both cases, which naturally draw on First Amendment rights of association and political expression.” (R. 102, Decision and Entry at p. 16).

Having failed to articulate what test it contends is the appropriate test below, the LPO has waived its ability to do so here. Below, the LPO “argue[d] that the *Anderson-Burdick* test is not the appropriate test,” but “fail[ed] to state what test it believes applies in its stead.” (R. 102, Decision and Entry at p. 13). The LPO’s summary judgment opposition did not argue that strict-scrutiny or the “reasonable grounds” standard applies to its claims. (R. 76, Pltf.’s Resp. to MSJ at p. 3-7). And, it does not even argue that it is entitled to prevail under those standards. Rather, it claims “[r]eversal is required so that the proper, more-protective constitutional analysis can be applied.” (Appellants’ Br. at 37). As

explained more fully below, the “reasonable grounds” test it contends applies is the rational basis test that the trial court used given the minimal burden S.B. 193 imposes. *See* R. 102, Decision and Entry at p. 24 (“S.B. 193 passes rational-basis scrutiny. S.B. 193 is minimally burdensome and passes constitutional muster because the State can identify ‘important regulatory interests’ that it furthers.”). The LPO is not entitled to remand for the trial court to apply a standard it never advocated in the first instance that is no different than what the trial court used.

Putting aside the issue of waiver, the other tests the LPO advocates do not apply. Strict scrutiny is not the appropriate standard. The very case the LPO relies on, *State v. Thompson*, 95 Ohio St.3d 264, 267, 767 N.E.2d 251, 2002-Ohio-2124, contradicts the LPO’s argument. That case involved an equal protection challenge based on both the United States and Ohio Constitutions to a criminal statute. *Thompson* explained that the equal protection clauses of the United States and Ohio Constitutions are “functionally equivalent, necessitating the same analysis.” *Id.* at 266 (quotation omitted). Thus, following *Thompson*, the *Anderson-Burdick* analysis that indisputably governs the LPO’s

federal equal protection claim applies to its functionally equivalent state constitutional claim. Because the statute at issue in *Thompson* involved a fundamental right, strict scrutiny applied. *Id.* at 269. The LPO argues “[t]o the extent Article V, § 7 reflects a fundamental right to a primary, strict scrutiny is thus required.” (Appellant’s Br. at 36). But, as explained more fully above, Article V, § 7 does not create any right to a primary. Moreover, *American Party of Texas v. White*, 415 U.S. 767 (1974), forecloses the notion that any right to a primary arises from the federal constitution. Thus, there is no fundamental right to a primary. Strict scrutiny cannot and does not apply.

The LPO also erroneously relies on *State v. Mole*, --- Ohio St.3d --, 2016-Ohio-5124 (July 28, 2016), to argue that something other than *Anderson-Burdick* applies. While *Mole* began by explaining that the Ohio Constitution *can* afford greater rights than the federal constitution, it also noted that “well-reasoned and persuasive precedent from other states and federal courts” can and should be followed. *Id.* at ¶ 22. The Ohio Supreme Court has explained that it generally will not depart from U.S. Supreme Court precedent absent “compelling reasons.” *State v.*

Wogenstahl, 75 Ohio St.3d 344, 363, 662 N.E.2d 311 (1996). That the LPO lost using the federal standard is not a compelling reason to abandon it here. Moreover, *Mole* applied the same standard to the state and federal equal protection challenges at issue. It found that the statute violated both. *Id.* at ¶24. It did not apply any more “protective” standard to the Ohio constitutional claim.

The LPO’s citation to *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993), also provides no basis for departing from *Anderson-Burdick*. That case restated the principle that “state courts . . . are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal constitution.” *Id.* at 41. That case involved a challenge to a city ordinance banning the possession and sale of assault weapons. *Arnold*, however, noted that the federal constitution’s Second Amendment “has not been held to be applicable to the states” and relied upon Ohio precedent to uphold the ordinance. *Id.* It did not involve any comparison of the interpretations of comparable federal and state constitutional provisions.

In short, all the LPO has done to advocate for some more protective standard is point to the general principle that state courts *may* interpret state constitutions as affording more protections than their federal counterparts. But, it fails to acknowledge the long line of Ohio case law applying the federal equal protection analysis to Ohio equal protection claims. Its primary authority, *Mole*, did just that. It has not identified a single Ohio authority where an Ohio court has interpreted the Ohio equal protection clause as affording greater protections than the federal one.

The LPO also argues that the “reasonable grounds” test enunciated in *Mole* should be applied. But, *Mole* applied the well-known rational basis test. That test “involves a two-step analysis” that starts with “identify[ing] a valid state interest” and then “determin[ing] whether the method or means by which the state has chosen to advance that interest is rational.” *Id.* at ¶27, quoting *McRone v. Bank One Corp.*, 107 Ohio St.3d 272, 839 N.E.2d 1, 2005-Ohio-6505, ¶9. Under this standard, “a state has no obligation to produce evidence to sustain the rationality of a statutory classification.” *Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 936 N.E.2d 919, 2010-Ohio-4414, ¶34. It is the challenger’s burden to

negate “every conceivable basis that might support the legislation.” *Id.* “Under federal [and] state rational-basis analysis, a classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Thompson*, at ¶ 26 (quotation omitted).

In light of the LPO’s failure to demonstrate that S.B. 193 imposes anything more than minimal burdens, the rational basis and *Anderson-Burdick* analyses are the same. *Libertarian Party of Ohio*, 831 F.3d at 400 (“if the state law imposes reasonable and nondiscriminatory burdens, the statute will be subject to rational basis review”) (quotation and punctuation omitted); R. 102, Decision and Entry at p. 24 (“S.B. 193 passes rational-basis scrutiny. S.B. 193 is minimally burdensome. . . “). There is no reason to remand for the application of the same standard of review.

V. Appellant’s Fourth Assignment of Error: The trial court correctly found that S.B. 193 satisfies *Anderson-Burdick* scrutiny.

Just like the Southern District of Ohio and the Sixth Circuit Court of Appeals, the trial court correctly concluded that S.B. 193 satisfies the applicable *Anderson-Burdick* scrutiny.

The LPO's second cause of action alleges that S.B. 193 denies it of the fundamental right under the Ohio Constitution to nominate its candidates by primary and violates the Ohio Constitution's equal protection clause found in Art. I § 2. As explained above, the Ohio Constitution does not afford the right to nominate candidates by primary. The case law also soundly rejects the notion that S.B. 193 violates Ohio's equal protection clause. Here, the LPO has recycled its failed federal equal protection claims. The LPO again complains of its present inability to have a primary when major parties continue to hold primaries based on the misguided assertion that parties may only "register" members at primaries. (R. 5, Compl. at ¶¶ 15, 16, 43-47). The LPO claims S.B. 193 prohibits it from "registering party members" and interferes with its ability to "disseminate its views." (*Id.* at ¶ 47, 52-53.) There is no genuine issue of material fact that these claims all fail.

As set forth more fully below, S.B. 193 is a reasonable, nondiscriminatory law that does not severely burden the LPO and is more than amply justified by legitimate state interests. In fact, it is less onerous than other state laws that have been upheld against

constitutional challenges. *Green Party of Arkansas v. Martin*, 649 F.3d 675, 677-78 (8th Cir. 2011) (Arkansas law defined “political party” as a group with at least 3% of vote in most recent gubernatorial election or allowed minor party ballot access via petition with 10,000 signatures collected over 90 days); *Rogers v. Corbett*, 468 F.3d 188, 190-91 (3d Cir. 2006) (Pennsylvania statute requiring minor party candidate to gather signatures of at least 2% of the vote total of the candidate who obtained highest number of votes for statewide office over a five month period of time paired with condition that one of the minor party’s candidates polled 2% of vote total of highest-polling candidate in previous election); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 747 (10th Cir. 1988) (Oklahoma law requiring a new political party to submit a petition containing the signatures of at least 5% of the total votes cast in the last general election for either Governor or President and requiring that the petitions be filed no later than May 31 of an even numbered year).

1. The LPO cannot demonstrate a severe burden.

The LPO's complaints of a severe burden are the exact same arguments rejected in federal court. Here, the LPO alleges that the law deprives them of the right hold primaries and "register members" while the major parties are still able to do so. (R. 5, Compl. at ¶ 15-16, 44-47).

These statements mirror the LPO's federal allegations:

[S.B. 193] leaves parties that are not recognized by Ohio, including Plaintiff-LPO after the November 2014 election, with no mechanism by which they can register party members for future general elections until at least 2017. After the passage of S.B. 193, only the two major parties will have registered party members for future general elections.

(R. 63, Ex. 15 to MSJ, Pltfs' Memo. in Support of MSJ filed in Southern Dist. No. 2:13-cv-00953, at p. 6; *see generally* pages 6-10 (demonstrating same claims presented in federal litigation)).

This claim was rejected for multiple reasons by the Southern District and the Sixth Circuit. As the Sixth Circuit explained, "[t]he Libertarian Party misstates Ohio law" when it argues that "Ohio officially registers voters' political affiliations through primaries and, in the absence of a primary, individuals cannot affiliate with the Libertarian

Party and the party is deprived of political advantages of party membership that primary-participating parties enjoy.” *Libertarian Party of Ohio*, 831 F.3d at 401. Ohio law does not govern party registration or affiliation in general, but references “party affiliation” for the specific purpose of who may vote in a partisan primary. *Id.* at 401-402; *see also supra* at p. 8-9. Just as in the federal litigation, the LPO has “not explained how Ohio’s definition of ‘member of a political party’ for the limited purposes discussed above, *see* Ohio Rev. Code § 3513.05, restricts the Party’s ability to have members that perform . . . core political activities.” *Id.* at 402. It fails to explain “how this framework burdens its ability to recruit members, access the general-election ballot, or engage in other modes of political affiliation and expression, nor has [it] explained how this places minor parties at a disadvantage relative to major parties.” *Id.*

In addition, as the Southern District correctly concluded, there is “no merit in [the minor parties’] assertion that the denial of access to primaries deprives them of the ability to reach potential supporters.” (R. 36, Ex. 6 to Memo. Opp. TRO, Opinion and Order from Case No. 2:13-

cv-00953 at p. 16). The Southern District noted the multitude of other methods available to minor parties to recruit members including the internet and social media platforms, commercials, signs, speeches, debates, town-hall meetings, endorsements, canvassing, newsletters, bumper stickers, handshaking, baby-kissing, robodialing, leafleting, and “good-old fashioned stumping.” (*Id.* at p. 16-17, citing *Stein v. Alabama Secretary of State*, 774 F.3d 689, 695 n. 7 (11th Cir. 2014)). For the same reasons, there is no genuine issue of fact that the LPO is minimally and not severely burdened by S.B. 193.

The LPO’s argument that “party members (which new parties no longer have) are ‘wedded’ to their parties for two years” also does not establish a severe burden. Under S.B. 193, any registered Ohio voter who requests an “issues-only” primary ballot (i.e., a ballot without Republican or Democratic partisan candidates) or who does not vote in the 2014-2016 primaries, is eligible to sign a minor-party candidate’s nominating petition. R.C. 3517.012(B)(2)(a)-(b). For the 2012 primary election, Ohio had over 7.7 million registered voters. Of those, approximately 1.9 million people voted in that primary election. (R. 64,

Ex. 16-3 to MSJ, Certified Records.) For the 2014 primary, Ohio again had over 7.7 million registered voters and 1.3 million of them, 16.95%, voted. (*Id.*) Even assuming that every single one of those individuals that voted cast a partisan primary ballot (as opposed to requesting an issues-only ballot), that would have left *over 5.8 million* Ohioans in 2012 and *6.4 million* in 2014, approximately *75% and 83% of all registered voters respectively*, able to sign petitions for LPO candidates. This is hardly a small pool. Moreover, considering that minor-party statewide candidates need only **50** signatures and that district-wide candidates need only **5** signatures to qualify for the ballot as designated minor-party candidates, it is hard to fathom how the LPO would suffer any disadvantage. R.C. 3517.012(B)(2)(a)-(b). And, “once a minor party becomes qualified to participate in primary elections by obtaining the requisite number of votes for its gubernatorial or presidential candidates, S.B. 193 makes it relatively easy for voters to affiliate with a minor party at a primary because the law permits them to do so ‘regardless of prior party affiliation.’” (R. 36, Ex. 6 to Memo. Opp. TRO, Opinion and Order from Case No. 2:13-cv-00953 at p. 18).

The clear lack of burden or discriminatory treatment is especially evident considering that major party candidates can get signatures only from individuals who voted in their party primary (a far smaller pool of voters than the minor parties may draw from) and that major-party statewide candidates need 1,000 signatures (far more than the minor parties need). R.C. 3513.05. The LPO both needs far fewer signatures (only 5% of what the major party candidates need) and can get those signatures from a larger universe of registered voters. Any argument that S.B. 193 politically disadvantages or discriminates against minor parties has no basis.

Importantly, S.B. 193 does not *forever bar* the LPO from participating in a primary. Once a new party successfully petitions for access to Ohio's ballot, it may run candidates in a primary election at the next general election.

2. Primary access itself imposes burdens.

The District Court properly observed that “to the extent lack of primary access imposes some burden, that burden should be viewed with the understanding that providing primary access also poses potential

downsides for minor parties.” (R. 36, Ex. 6 to Memo. Opp. TRO, Opinion and Order from Case No. 2:13-cv-00953 at p. 19). “[P]rimary participation, mandated or otherwise, imposes an inherent disadvantage to minor parties given their limited resources.” (*Id.* at p. 22). The ballot-access law in *Blackwell* was struck down in part because minor parties had to file their party-formation petitions so far in advance of the election, at a point when the public was not yet politically engaged. “[T]he disadvantage to minor parties identified in *Blackwell* would exist to some if not to the same degree regardless of how close a petition deadline is to the primary election.” (*Id.* at p. 21-22, citing *Stein*, 774 F.3d at 696-98 (minor party formation by petition after the primary is less burdensome than requiring primary participation)). Because the purpose of a primary is for a party to select its candidate for a general election, it does not make sense to impose any of the burdens inherent in primary participation on minor parties whose primaries are rarely contested. *See infra* at 48-50.

3. Rational basis review applies and is easily satisfied.

Given the minimal burden imposed by S.B. 193 and its non-discriminatory nature, the trial court correctly applied rational basis review. (R. 102, Decision and Entry at p. 24 (“S.B. 193 passes rational-basis scrutiny.”)). The state has more than ample justification for S.B. 193 that easily passes rational basis scrutiny and that would also satisfy strict scrutiny. As the United States Supreme Court recognized long ago, “[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Jenness v. Fortson*, 403 U.S. 431, 441 (1971). Other important state interests also justify S.B. 193.

Even the LPO’s own expert finds Ohio’s policy choice rational. As Mr. Winger recognizes, it is a waste of resources for minor parties to have primaries. Mr. Winger agreed that it is not unusual for a state to make a policy choice that newly-qualified political parties do not get to

participate in a state-run primary, and he testified that he does not believe it is good public policy to require minor party primary participation. (R. 68, Winger Depo. at p. 59, lns. 14-18). He explained why:

Q. In your mind, why would a state make that kind of policy choice?

A. Well, I have communicated with Ohio government officials for many years to make them aware that the nation's leading election administration expert wrote in 1951- Dr. Joseph P. Harris- and he wrote a model direct primary system for the National Civil League, which back then was called the national Municipal League, and he said *states should not provide primaries to small parties. It's a waste of money. They seldom have primary contest. And that's one reason. Another reason is it makes it very difficult for states to have a reasonable qualifying deadline if it's going to insist that new parties nominate by primary.*

Q. Any other reasons?

A. When there is a contested minor party primary, frequently the voters in that primary are not well informed.

(*Id.* 59-60) (emphasis added). He testified “as a policy matter, I favor convention nomination for small parties.” (*Id.* p. 61, lns. 2-4.)⁵

Ohio’s experience with minor party participation in primary elections underscores Mr. Winger’s testimony that Ohio’s system is a good and rational public policy. In 2014, Ohio had 7,715,103 registered voters and, of those, 1,307,351, approximately 17%, cast a primary ballot. (R. 64, Ex. 16-3 to MSJ, Certified Records.) Turnout for the minor parties in the 2012 election was similar. For the 2012 primary, Ohio had 7,722,180 individuals who were registered to vote. (*Id.*) Total turnout for the 2012 primary election was 1,970,753, or just over 25% of the registered voters. (*Id.*) In 2010, Ohio had 8,013,558 registered voters. (*Id.*) Only 1,814,244 of those, or approximately 22%, cast a ballot in the May primary. (*Id.*) During the 2012 Primary election, the Libertarian Party had only 337 individuals across the entire state cast a ballot for its Senatorial candidate. (R. 64, Ex. 16-6 to 16-8 to MSJ, Certified Records.) In 2010, 5,476 individuals requested a

⁵ Mr. Winger provided the same testimony in *Green Party of Tennessee v. Hargett*, No. 3:110-cv-00692, 2013 WL 3010697 (M.D. Tenn. June 18, 2013).

Libertarian Party primary ballot. (R. 64, Ex. 16-13 to MSJ, Certified Records). In four counties no one requested a Libertarian Party primary ballot and in 32 counties no more than ten individuals requested one. (R. 64, Ex. 16-9 to 16-13 to MSJ, Certified Records). And, a small number of minor party candidates have appeared on the general election ballot. In the 2010 general election, the Libertarian Party only ran Ohio Senate candidates in 3 of Ohio's 33 districts, and Ohio House candidates in 24 of Ohio's 99 districts. (R. 64, Ex. 16-14 to 16-15 to MSJ, Certified Records). In 2012, the Libertarian Party fielded one State Senate candidate and only 6 candidates for the Ohio Statehouse. (R. 64, Ex. 16-41 to Ex. 16-55 to MSJ, Certified Records). This was during a time when the LPO was granted automatic ballot access by then-Secretary Brunner's Directive. *See* Directive Nos. 2009-21 and 2011-01.

Such low minor-party turnout and candidate participation demonstrates that it is unnecessary for such parties to actually participate in a primary. Low-turnout primaries come at considerable cost to the counties. At a primary election, every precinct has to have a primary ballot prepared for every party running a candidate statewide. The

expenditure of such resources in the face of such low minor-party turnout substantiates the view of Mr. Winger that it is “wasteful” to demand minor-party participation in primary elections. (R. 68, Winger Tr. 59-60). The interest of “[d]epraving election costs” has been approved by the Supreme Court as “worthy of advancement.” *Green v. Morthan*, 989 F.Supp. 1451, 1458 (M.D. Fla. 1998).

4. The LPO’s cases are inapposite.

Despite on point Sixth Circuit precedent rejecting the same claims, the LPO seeks to rely upon federal case law addressing dissimilar statutes. In *Baer v. Meyer*, 577 F. Supp. 838, 843 (D. Colo. 1984), the challenged law provided that voters register party affiliation on voter registration forms that provided boxes only for “Democratic,” “Republican,” and “Unaffiliated.” Voters could only affiliate with other parties on a portion of the form labeled “Remarks” and were frequently misinformed that they could not affiliate with other parties.

Green Party of New York State v. New York State Board of Elections, 389 F.3d 411 (2d Cir. 2004), similarly involved a challenge to New York voter registration law where voters enrolled as party members

when registering. New York law does not use the terms “major party” and “minor party.” Rather, in New York, a political organization is either a “party” or an “independent body” depending on whether the organization’s gubernatorial candidate received at least 50,000 votes during the last election. Those who achieved 50,000 votes were “parties” and those who did not were “independent bodies.” *Id.* at 415. Upon registration, New York voters could only enroll as a member of a “party” and not an “independent body.” *Id.* at 416.

Unlike in *Baer* and *Green Party of New York State*, Ohio voters do not declare a party upon registering to vote and they may affiliate with any recognized party at a partisan primary election. As the Sixth Circuit found, Ohio’s statutes “do not govern party registration or affiliation *in general*, but rather refer only to ‘party affiliation’ for a specific purpose: establishing who may vote in a partisan primary.” *Libertarian Party of Ohio v. Husted*, 831 F.3d at 402 (quotation omitted). These cases do not support the LPO’s claim.

Constitution Party of Kansas v. Kobach, 695 F.3d 1140 (10th Cir. 2012), a case relied on by the LPO, actually supports the

constitutionality of S.B. 193. There, the Tenth Circuit affirmed the district court's conclusion that the Kansas Secretary of State had no obligation to track voters affiliated with the Constitution Party, a party not recognized under Kansas law.

Socialists Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y. 1970), *summarily aff'd*, 400 U.S. 806 (1970), is inapposite. The Party relies upon the portion of that case invalidating a New York law that called for providing free lists of registered voters to county chairmen of certain political parties but required minor parties to pay for such lists. The Court explained the effect of the provisions “is to deny independent or minority parties . . . an equal opportunity to win the votes of the electorate” and that there was “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* at 995. The Party's final case, *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), involved essentially the same law struck down in *Rockefeller*.

Rockefeller and *Schulz* have no bearing here as S.B. 193 does not deny minor parties any benefit available to major parties and, to the

extent it imposes any burden, those burdens are justified by State interests.

VI. Appellant's Sixth Assignment of Error: The trial court correctly denied the LPO's motion for a Rule 56(F) continuance.

Civ. R. 56(F) provides:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

“The party seeking the Civ. R. 56(F) continuance bears the burden of establishing why the party cannot present sufficient facts to justify its opposition to a motion for summary judgment without a continuance.”

Fields v. Buehrer, 10th Dist. 13AP-724, 2014-Ohio-1382, ¶12 (quotation omitted). “The moving party cannot meet this burden with mere allegations; rather, the moving party must aver in an affidavit a particularized factual basis that explains why further discovery is necessary.” *Id.* (quotation omitted). Merely asking for a continuance to conduct discovery is not sufficient. *Id.*

The trial court correctly concluded that “Plaintiff. . . failed to meet its burden under Civ. R. 56(F)” because it failed to provide “[a] particularized factual basis that explains why discovery is necessary.” (R. 95, Entry Denying Mot. at p. 3). The LPO’s 56(F) motion generally argued that discovery had not yet commenced and claimed that, if the *Anderson-Burdick* balancing test applies, “Senate Bill 193 lacks any legitimate justification” and “discovery will likely be required.” (R. 74, Pltf.’s Mot. for Continuance at p. 6.) The LPO also argued that “[t]here is evidence in the record that S.B. 193 was passed for partisan political reasons” and “was designed to remove [it] from the ballot,” reasons the LPO asserts are not legitimate under *Anderson-Burdick*. (*Id.*) These arguments address the alleged need for discovery on their equal protection challenge to S.B. 193, not the Art. V § 7 claim. The LPO never explained why discovery was needed on the Art. V., § 7 claim.

As for the need to conduct discovery on why S.B. 193 was passed, the legislative history for S.B. 193 is readily available to the public online. See Ohio General Assembly Archives at http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_193 (last

visited November 2, 2016). And, regardless of what it believes the *actual* reason was for the enactment of S.B. 193, its own expert concedes that there are legitimate and rational reasons for not affording minor parties a primary. It is not the *actual* reason that is evaluated, the question is whether there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Thompson*, at ¶26. It is axiomatic that a party opposing summary judgment must identify a *material* issue of fact. Pointing to some factual issue that is legally irrelevant is insufficient. *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 42 (Dec. 30, 2011) (“Civ. R. 56(F) requires “an affidavit stating sufficient reasons why the party cannot present facts *essential to justify the party’s opposition to the summary judgment motion.*”) (emphasis added).

The LPO never explained why it could not present sufficient facts to oppose the summary judgment motion and given the years of federal court litigation involving the very same issues, it is difficult to imagine how it could. As the trial court noted, “[t]he federal case was initiated in November 2013” where the “[p]arties conducted extensive discovery.”

(R. 95, Decision and Entry at p. 1). The LPO protests that it had to obtain orders to compel discovery on its federal selective enforcement claim challenging Earl's disqualification from the 2014 ballot. (Appellants' Br. at p. 46.) But, that claim is not at issue here and this only demonstrates that the LPO pursued any discovery it deemed necessary to the prosecution of its claims in federal court.

The trial court did not abuse its discretion in denying the LPO's motion for a 56(F) continuance. The LPO failed to meet its burden in seeking such an extension.

CONCLUSION

The trial court properly granted summary judgment to Appellees. There is no genuine issue of material fact that S.B. 193 does not violate either the nomination clause or the equal protection clause of the Ohio Constitution. And, the trial court did not abuse its discretion in denying the LPO a continuance to conduct discovery to oppose Appellees' summary judgment motion when it failed to meet its burden in seeking such a continuance. The trial court's decisions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, a true and correct copy of the foregoing was electronically filed using the Court's eFlex filing system. In conjunction with filing, it is also being served by electronic mail to:

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