

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* FOCKLER, et al.,

Relators,

V.

CASE NO. 2016-1863

**ORIGINAL ACTION
IN MANDAMUS**

HUSTED,

Respondent.

**RELATORS' SUPREME COURT PRACTICE RULE 12.02(B)(1)
ACCOMPANYING MEMORANDUM IN SUPPORT OF THE WRIT**

Mark R. Brown
Bar No. 81941
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu

Counsel of Record for Relators

Halli Watson
Associate Attorney General
Ohio Attorney General's Office
30 E. Broad Street, 16th Floor
Columbus, OH 43215
(614) 644-7649
(614) 728-7592 (fax)
Halli.Watson@OhioAttorneyGeneral.gov

Attorney for Respondent

Supreme Court Rule of Practice 12.02(B)(1) states that Complaints in Original actions "may be accompanied by a memorandum in support of the writ." Relators respectfully file this accompanying Memorandum in Support of their right to an emergency Writ of Mandamus.

FACTS AND PROCEDURE

Relators are five electors who nominated Gary Johnson and William Weld for President and Vice-President, respectively. Relators accordingly allege in their Verified Complaint that they constitute a requisite "group of voters" within the meaning of R.C. § 3517.01(A)(1). Respondent, Jon Husted, is the Ohio Secretary of State who pursuant to R.C. § 3501.04 is the chief elections officer in Ohio charged with administering Ohio's Election Law.

On August 10, 2016, Relators properly nominated two "place holders," Charles Earl and Kenneth Moellman for President and Vice-President, respectively, with the intention of substituting Gary Johnson and William Weld as candidates for President and Vice-President, respectively, under R.C. §§ 3513.257 and 3513.261. On August 15, 2016, Relators properly substituted Gary Johnson and William Weld as their candidates for President and Vice-President, respectively, by filing with Respondent substitution papers in full compliance with R.C. § 3513.31.

Respondent on August 22, 2016 recognized Gary Johnson and William Weld as Relators' candidates for President and Vice-President, respectively. Respondent placed the names of Gary Johnson and William Weld for President and Vice-President, respectively, on all of Ohio's November 8, 2016 general election ballots, including all absentee, provisional and overseas-voter ballots. Gary Johnson and William Weld were Relators' nominated candidates for President and Vice-President, respectively, in 2016.

Gary Johnson and William Weld won 3.17 percent of the total votes cast in Ohio in 2016 for President and Vice-President, respectively. Respondent on November 29, 2016 certified that Johnson and Weld had won 3.17 percent of the total vote for President and Vice-President, respectively, in Ohio.

Relators on December 2, 2016 requested, in writing, that Respondent recognize them as a proper "group of voters" who had established a political party in Ohio under R.C. § 3517.01(A)(1)(a) because of their candidates' (Johnson and Weld) having won more than 3 percent of the total votes cast for President and Vice-President, respectively. Relators (through their attorney) on December 9, 2016 delivered to Respondent (through his attorney) Relators' legal authority supporting their request.

Respondent (through his attorney) on December 16, 2016 delivered to Relators' attorney Respondent's refusal to recognize Relators as a proper "group of voters" under R.C. § 3517.01(A)(1)(a) and rejected their claim to political party status under R.C. § 3517.01(A)(1)(a).

In his response dated December 16, 2016, Respondent cited no legal authority for his rejection of Relators' request under R.C. § 3517.01(A)(1)(a). Respondent offered two non-legal justifications for rejecting Relators' request to be certified as a political party under R.C. § 3517.01(A)(1)(a): (1) his press release dated August 15, 2016 that accompanied his formal recognition of Johnson and Weld as Relators' properly nominated candidates; and (2) an alleged agreement by Relators' attorney that Relators' are not entitled to be recognized as a political party under R.C. § 3517.01(A)(1)(a).

Respondent's press release referred to a new and different statute, Senate Bill (S.B.) 193, which in November of 2013 stripped the Libertarian Party of Ohio of its status as a recognized political party and stated:

The presence of independent joint-candidates for president and vice-president, even when endorsed by, or affiliated with, a national political party or that of another state, is not sufficient under Senate Bill 193 to create a minor political party.

See Exhibit D attached to Verified Complaint (quoting press release issued by Respondent on August 15, 2016).

Respondent's claim that Relators had somehow agreed with his rejection of their request under R.C. § 3517.01(A)(1) referred to language included in an application for emergency relief filed by the Libertarian Party of Ohio on August 23, 2016 in *Libertarian Party of Ohio v. Husted*, 831 F.3d 582 (6th Cir.), *cert. pending*, U.S. No. 16-580 (2016), with the Supreme Court of the United States three months before Respondent announced his interpretation of R.C. § 3517.01(A)(1)(a) and rejected Relators' request. The language in the application for emergency relief filed on behalf of the Libertarian Party of Ohio in *Libertarian Party of Ohio v. Husted*, 831 F.3d 582 (6th Cir.), *cert. pending*, U.S. No. 16-580 (2016), stated :

Assuming Johnson/Weld were to be certified as an independent ticket and survive official protests, it (unlike the established parties' presidential tickets) will still not represent LPO as a political party, will not be listed as the 'Libertarian' ticket on Ohio's ballot, and cannot meet Ohio's 3% vote test on behalf of LPO in order to win for it qualified political party status in Ohio's future elections.

See Exhibit D attached to Verified Complaint (quoting application of Libertarian Party of Ohio in *Libertarian Party of Ohio v. Husted*, 831 F.3d 582 (6th Cir.), *cert. pending*, U.S. No. 16-580 (2016)) (emphasis added).

The Supreme Court on August 29, 2016 denied the Libertarian Party of Ohio's request for emergency relief in *Libertarian Party of Ohio v. Husted*, 831 F.3d 582 (6th Cir.), *cert. pending*, U.S. No. 16-580 (2016), Johnson and Weld were forced by

Respondent to run as the independent nominees of a "group of voters," that is, Relators, and the Libertarian Party of Ohio was thereafter unable to use R.C. § 3501.01(F) to remain a qualified political party.

Relators filed their Verified Complaint with this Court seeking emergency mandamus relief on December 19, 2016. On December 21, 2016 the Court directed that Relators' Original Action for Writ of Mandamus proceed under Supreme Court Practice Rule 12.04. That same day, Relators filed a Motion to Expedite Consideration of their Original Action for Writ of Mandamus so that the case might be resolved before the filing deadline, which falls on or about February 1, 2017, for partisan primary candidates.

ARGUMENT

I. Respondent's Refusal to Recognize Relators as a Political Party is in Clear Violation of Law.

Section 3517.01(A)(1) of the Revised Code controls the present case. It states in plain language:

A political party within the meaning of Title XXXV of the Revised Code is any group of voters that meets either of the following requirements:

(a) Except as otherwise provided in this division, at the most recent regular state election, the group polled for its candidate for governor in the state or nominees for presidential electors at least three per cent of the entire vote cast for that office. A group that meets the requirements of this division remains a political party for a period of four years after meeting those requirements.

(Emphasis added). "

Under its plain terms, "any group of voters" may under R.C. § 3517.01(A)(1)(a) become a "political party" in Ohio by polling for their candidate for presidential electors 3% of the entire vote cast for that office.

"Any group of voters" may alternatively under R.C. § 3517.01(A)(1)(b) become a political party by filing with Respondent a party formation petition

supported by a sufficient number of signatures as defined by R.C. § 3517.01(A)(1)(b). This Court recognized in *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 58, 2012-Ohio-69, 960 N.E.2d 452, 455 (2012), that the "group of voters" language used in R.C. 3517.01(A)(1) refers to both the "group of voters" that may become a political party by filing a party formation petition and the "group of voters" whose candidate polls the requisite percentage of votes at the preceding presidential or gubernatorial election.

Section 3501.01(F) of the Revised Code specifically provides that established political parties (which the Libertarian Party of Ohio claims to be in *Libertarian Party of Ohio v. Husted*, 831 F.3d 582 (6th Cir.), *cert. pending*, U.S. No. 16-580 (2016)), remain recognized political parties in Ohio when their gubernatorial or presidential candidates win at least 3% of the total vote for that office. Specifically, R.C. § 3501.01(F) states:

"Political party" means any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party.

(1) "Major political party" means any political party organized under the laws of this state whose candidate for governor or nominees for presidential electors received not less than twenty per cent of the total vote cast for such office at the most recent regular state election.

(2) "Minor political party" means any political party organized under the laws of this state that meets either of the following requirements:

(a) Except as otherwise provided in this division, the political party's candidate for governor or nominees for presidential electors received less than twenty per cent but not less than three per cent of the total vote cast for such office at the most recent regular state election. A political party that meets the requirements of this division remains a political party for a period of four years after meeting those requirements.

(Emphasis added).

Because the Libertarian Party of Ohio was stripped of its status as a recognized political party by the legislation (S.B. 193) at issue in *Libertarian Party of*

Ohio v. Husted, 831 F.3d 582 (6th Cir.), *cert. pending*, U.S. No. 16-580 (2016), and because Respondent refused to allow the Libertarian Party of Ohio to nominate Gary Johnson and William Weld for President and Vice-President, respectively, the Libertarian Party of Ohio was unable to use R.C. § 3501.01(F) to remain an established political party in Ohio.

Johnson and Weld were Relators' candidates for President and Vice-President, respectively. Relators are now entitled as the "group of voters" nominating Johnson and Weld under R.C. § 3517.01(A)(1)(a) to form a political party.

In sum, Ohio law provides three alternative mechanisms for "groups of voters" and established "political parties" to become or remain qualified political parties:

- (1) Section 3501.01(F) provides that established political parties remain so when they meet Ohio's 3% vote test for governor or president;
- (2) Section 3517.01(A)(1)(a) provides that "any group of voters" may establish a political party by having its gubernatorial or presidential candidate at the preceding general election win 3% of the total vote cast for that office; and
- (3) "any group of voters" may create a party by filing a proper party formation petition supported by sufficient signatures with Respondent under § 3517.01(A)(1)(b).

Relators are a proper "group of voters" who lawfully nominated Gary Johnson and William Weld for President and Vice-President, respectively, within the meaning of § 3517.01(A)(1)(a).

II. History Supports Relators' Interpretation of R.C. § 3517.01(A)(1)(a).

Section 3517.01(A)(1)(a) has been on Ohio's books in one form or another for one hundred years. *See* Affidavit of Richard Winger¹ (attached as Exhibit 1 to this Memorandum). It first appeared in Ohio following the Ohio's Constitutional Convention's adoption of a primary requirement for political parties, found in Article

¹ Winger is a recognized expert on the history of ballot access laws in the United States and has been used by Respondent as an expert witness.

V, § 7, in 1912. Winger Affidavit at ¶ 3. This constitutional provision took effect on January 1, 1913. *See* Winger Affidavit at ¶ 3.

Following the adoption of Article V, § 7, Ohio's legislature on May 3, 1913 passed legislation (the "Primary Act") implementing the terms of Article V, § 7. *See* Winger Affidavit at ¶ 4. This legislation, known as the Primary Act, took effect in 1914. *See* Winger Affidavit at ¶ 4. Under § 4949 of the 1914 Primary Act, the political parties in Ohio that were required to conduct primaries were defined as "all voluntary political parties or associations in this state which at the next preceding general election polled for its candidate for governor in the state or in any district, county or subdivision thereof, or municipality, at least ten percent of the entire vote cast therein for governor" Winger Affidavit at ¶ 5 (quoting Ohio Laws, vol. 103 at 476, § 4949). "Article V, § 7's and the 1914 Primary Act's requirements that qualified political parties nominate their candidates by primaries was immediately applied to all voluntary political associations." Winger Affidavit at ¶ 10.

Section 4949, cited by Winger, was the grandfather of modern-day R.C. § 3517.01(A)(1)(a) and has been in continuous existence in one form or another for all of the past one hundred years. Under this statute, the "Progressive Party in 1912 was a voluntary political association that won more than 10% of the vote in Ohio for Governor," Winger Affidavit at ¶ 11, and that consequently was recognized "[u]nder the Primary Act of 1914 ... as a political party in Ohio and was required to hold primaries in 1914 to nominate its candidates." Winger Affidavit at ¶ 11. "The Progressive Party's candidate for Governor in 1914 won only 5.4 % of Ohio's vote for governor and the Progressive Party was no longer recognized as a political party." Winger Affidavit at ¶ 11.

Ohio both before the Primary Act of 1914 took effect and until 1929 had no mechanism for voluntary political associations to petition to become recognized political parties and thereby hold primaries. *See* Winger Affidavit at ¶ 6. "Between 1908 and 1929," according to Winger, "there was no way a group could become a qualified political party capable of running candidates, holding primaries until that group polled 10% for Governor at a general election." Winger Affidavit at ¶ 6. "The 1914 Primary Act," meanwhile, "preserved the right of a candidate to run independently of a qualified political party by submitting a nomination petition supported by voters signatures." Winger Affidavit at ¶ 7 (citing Ohio Laws, vol. 103 at 476, § 4950).

Political parties in Ohio up until 1929 could only be created by independent candidates running for Governor who won 10% of the vote. *See* Winger Affidavit at ¶¶ 5 and 12. These candidates were allowed to include on the ballot a short statement of "the party or political principle which he represents, expressed in not more than three words," Winger Affidavit at ¶ 9 (quoting 1930 OAG 1855 at 744 (May 12, 1930)), or otherwise briefly "designate instead of a party or political principle any name or title which the signers may select." Winger Affidavit at ¶ 9. 12.

"From 1914 until 1929, the only mechanism for groups of voters and political associations in Ohio to become recognized political parties that were entitled to name candidates for public office and include them in the columns on ballots provided for candidates of political parties was for those groups of voters and political associations to have a candidate, nominated by petition, win 10% of the vote for Governor in the previous election." Winger Affidavit at ¶ 12. "Between 1914 and 1929, assuming a nominee of an unqualified political association won 10% of the vote for Governor, that political association would until the next gubernatorial election be treated as a

recognized political party that was required to conduct primaries in Ohio." Winger Affidavit at ¶ 15.

In 1929, Ohio added to its definition of "qualified political party" in § 4785-61 of the General Code (the immediate predecessor to O.R.C. § 3517.01) "those political associations that presented nominating petitions supported by signatures from voters equal in number to 15% of the total vote for Governor in the preceding election." Winger Affidavit at ¶ 17 (citing 1932 OAG 4587 (Sep. 1, 1932), at 1003 (which quoted § 4785-61, General Code)). For the first time in Ohio, "[p]olitical associations that submitted nominating petitions and a sufficient number of signatures under § 4785-61 "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 ¶ 18.

Ohio law following this 1929 change to the Election Code, specifically § 4785-61 of the Code, stated that "political parties could either be formed by 'any group of voters' presenting a petition supported by signatures equal in number to 15% of the total vote cast for Governor in the preceding election or by 'any group of voters' running a candidate for Governor who won more than 10% of the gubernatorial vote." Winger Affidavit at ¶ 20. Winger explains, however, that "[b]ecause of the difficulty of gathering signatures equal in number to 15% of the total vote cast for Governor in the previous election, political associations and groups of voters following this addition to the Election Code in 1929 continued to run independent candidates for office ... and continued to identify these candidates with a 'party or principle' as they had done since 1914." Winger Affidavit at ¶ 19.

In 1947 Ohio for the first time "prohibited candidates who used the independent candidate petition procedure from identifying themselves with a 'party or

principle.'" Winger Affidavit at ¶ 21. Notwithstanding this change, however, "Ohio law continued to state in § 4785-61 that 'any group of voters' whose candidate for Governor won more than 10% of the vote could become a recognized political party." Winger Affidavit at ¶ 22.

From 1915 until 1967, Winger reports, "the Democratic and Republican Parties were the only political parties and/or 'group of voters' in Ohio whose candidates won 10% of the vote for Governor and thus [these two parties] were the only recognized political parties guaranteed ballot access space in the general election and enjoyed the right to identify their candidates by political party labels." Winger Affidavit at ¶ 23.

In 1968, § 3517.01, "which was derived from § 4785-61, continued to allow 'any group of voters' to establish a political party by having their candidate (who was nominated by petition with supporting signatures) win 10% of the total vote for Governor." Winger Affidavit at ¶ 25 (citing *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 986 n.1 (S.D. Ohio 1968) (which quoted R.C. § 3517.01)). In 1969, following the Supreme Court's ruling in *William v. Rhodes*, 393 U.S. 23 (1968), "Ohio amended § 3517.01 to reduce the vote test for 'any group of voters' to become a political party to 7% and to also include the vote total for President as well as Governor." Winger Affidavit ¶ 26 (citing *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1264, 1269 n.11 (S.D. Ohio 1970) (which described R.C. § 3517.01 and noted the legislative changes reducing the vote-test to 7% and including President as well as Governor)). In 1971, Ohio's vote test for "any group of voters" to become a recognized political party was reduced again to 5% of the total vote for Governor or President. *See* Winger Affidavit at ¶ 27.

Between 1970 and 1980, no "group of voters" who had nominated independent candidates by petition for Governor or President met Ohio's 5% vote test for Governor and/or President. *See* Winger Affidavit at ¶ 28. "In 1980, John Anderson was ordered onto Ohio's ballot as an independent candidate by the United States District Court. *See Anderson v. Celebrezze*, 499 F. Supp. 121 (S.D. Ohio 1980), *rev'd*, 664 F.2d 554 (6th Cir. 1981), *rev'd*, 460 U.S. 780 (1983). No group of voters who supported Anderson had timely and successfully circulated a nominating petition on his behalf." Winger Affidavit at ¶ 29. Consequently, although John Anderson won more than 5% of Ohio's vote for President in 1980, "there is no record of whether he or any group of voters thereafter attempted to have the Secretary of State recognize any voters who supported him as a political party in Ohio." Winger Affidavit at ¶ 30.

Winger reports that "Ross Perot ran as an independent candidate for President in Ohio in 1992 and won more than 5% of Ohio's vote." Winger Affidavit at ¶ 31. However, because Perot "expressed no interest at that time in forming a political party ... [t]here is no record of whether he or his group of supporters sought to exercise their right to be a political party in Ohio following the 1992 election." Winger Affidavit at ¶ 31. In November 1995, meanwhile, "the Reform Party in Ohio submitted a party petition in order to be recognized as a political party during the 1996 election." Winger Affidavit at ¶ 32. "Shortly after receiving this party petition and accompanying signatures, Secretary Taft concluded that the petition was deficient because it lacked the requisite number of supporting signatures. Secretary Taft agreed, however, to allow the Reform Party to collect additional signatures in order to run its candidate, Ross Perot (along with a running mate), for President." Winger Affidavit at ¶ 32. "On April 16, 2014, Secretary Taft certified the Reform Party to run

a single candidate, Ross Perot (along with his running mate), for President." Winger Affidavit at ¶ 33.

Proceeding under Secretary Taft's unique agreement (which apparently did not recognize the Reform Party as political party within Ohio's definition of that term), "Perot won more than 5% of the vote for President and the Reform Party became a recognized political party in Ohio for the 1998 election." Winger Affidavit at ¶ 34. "In 1998 it ran a candidate, John Mitchel, for Governor. Mitchel was identified on Ohio's official ballots in 1998 as the Reform Party candidate for Governor. Mitchel did not succeed in winning 5% of the vote for Governor." Winger Affidavit at ¶ 34. "No other non-party candidates for Governor or President after 1980 and until the 2016 general election won enough votes in Ohio to meet 3517.01's vote test for 'any group of voters'." Winger Affidavit at ¶ 35.

Summarizing this history, Winger reports that until now "[t]here is no evidence that Ohio officials, including Ohio's Secretary of State, have ever rejected a request by a 'group of voters' to be recognized as a political party following their gubernatorial or presidential candidate's winning enough votes to meet § 3517.01's vote test." Winger Affidavit at ¶ 36. Both the Progressive Party in 1914 and the Reform Party in 1998 were recognized by Ohio election officials as political parties because of the success of their prior gubernatorial and/or presidential candidates -- success that was achieved while neither the Progressive Party nor the Reform Party were recognized as political parties.

This history demonstrates that Ohio has continuously since 1914 recognized that "voluntary political associations" and "groups of voters" could legally establish political parties by running non-party candidates for Governor and/or President and having those candidates win a sufficient number of votes. That law, R.C. §

3517.01(A)(1)(a) remains in place today. Ohio since 1914 has never rejected a request by a "group of voters" whose gubernatorial or presidential candidate won a sufficient number of votes to establish a political party. Respondent's rejection of Relators' request is historically unprecedented.

CONCLUSION

For the foregoing reasons, Mandamus should be **GRANTED**.

Respectfully submitted,

/s Mark R. Brown

Mark R. Brown (#81941)
303 East Broad Street
Columbus, Ohio 43215
Tel: (614) 236-6590
Fax: (614) 236-6956
E-mail: mbrown@law.capital.edu

Counsel for Relators

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by electronic mail and United States Mail on the date of filing to Halli Watson, Associate Attorney General, Counsel for Respondent, at halli.watson@ohioattorneygeneral.gov, 30 E. Broad Street, 16th Floor, Columbus, OH 43215.

/s/ Mark R. Brown
Mark R. Brown

EXHIBIT 1

IN THE SUPREME COURT OF OHIO

STATE <i>ex rel.</i> JOHN FOCKLER, et al.,)	Case No. _____
)	
Relators,)	Original Action in Mandamus
)	
vs.)	
)	
JON HUSTED)	
)	
Respondent.)	

AFFIDAVIT OF RICHARD WINGER

STATE OF CALIFORNIA)	
)	<i>ss</i>
COUNTY OF SAN FRANCISCO)	

Now comes the Affiant, RICHARD WINGER, being first duly sworn according to law and says:

1. My name is Richard Winger and I am 73 years old, of sound mind, a United States citizen, and resident of San Francisco, California.

2. I am editor of Ballot Access News and testified as an expert witness on minor party ballot access matters in a number of federal and state cases, including *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Circ. 2006), which invalidated Ohio's ballot access law for new and minor political parties in 2006. Most recently, I testified as an expert witness in *Green Party of Georgia v. Kemp*, 2016 WL 1057022 (N.D. Ga., March 17, 2016). My Vita describing my qualifications as an expert witness is attached.

3. Ohio's Constitutional Convention adopted a primary requirement for political parties, found in Article V, § 7, in 1912. It took effect on January 1, 1913. See *Fitzgerald v. City of Cleveland*, 103 N.E. 512, 516 (Ohio 1913).

4. Ohio's legislature on May 3, 1913 passed legislation (the "Primary Act") implementing the terms of Article V, § 7. See Ohio Laws, vol. 103 at 476. This legislation "approved May 3,

1913 (103 Ohio Laws, p. 476), 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*, 103 N.E. 512, 516 (Ohio 1913). It took effect on January 1, 1914. *Id.*

5. Under § 4949 of the 1914 Primary Act, the political parties in Ohio that were required to conduct primaries were defined as "all voluntary political parties or associations in this state which at the next preceding general election polled for its candidate for governor in the state or in any district, county or subdivision thereof, or municipality, at least ten percent of the entire vote cast therein for governor" *See* Ohio Laws, vol. 103 at 476, § 4949.

6. Ohio between 1908, before the Primary Act of 1914 took effect, and until 1929 had no mechanism for voluntary political associations to petition to become recognized political parties and thereby hold primaries. Between 1908 and 1929 there was no way a group could become a qualified political party capable of running candidates, holding primaries until that group polled 10% for Governor at a general election.

7. The 1914 Primary Act preserved the right of a candidate to run independently of a qualified political party by submitting a nomination petition supported by voters signatures. *See* Ohio Laws, vol. 103 at 476, § 4950.

8. Prior to the adoption of Article V, § 7 and the 1914 Primary Act, independent candidates obtained ballot access by petitioning, which included collecting signatures. They needed 500 signatures in 1891 for statewide office, but then in 1892 that number was raised to 1% of the last vote cast. This totaled 7,957 signatures in 1892.

9. A candidate who used the independent petition procedure following the adoption of Article V, § 7 and the 1914 Primary Act was allowed to include on the ballot "the party or

political principle which he represents, expressed in not more than three words," *see* 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. *Id.* at 745.

10. Article V, § 7's and the 1914 Primary Act's requirements that qualified political parties nominate their candidates by primaries was immediately applied to all voluntary political associations.

11. The Progressive Party in 1912 was a voluntary political association that won more than 10% of the vote in Ohio for Governor. Under the Primary Act of 1914 the Progressive Party was therefore recognized as a political party in Ohio and was required to hold primaries in 1914 to nominate its candidates. *See State ex rel Murphy v Graves*, 109 N.E. 590 (Ohio 1914). The Progressive Party's candidate for Governor in 1914 won only 5.4 % of Ohio's vote for governor and the Progressive Party was no longer recognized as a political party.

12. From 1914 until 1929, the only mechanism for groups of voters and political associations in Ohio to become recognized political parties that were entitled to name candidates for public office and include them in the columns on ballots provided for candidates of political parties was for those groups of voters and political associations to have a candidate, nominated by petition, win 10% of the vote for Governor in the previous election.

13. From 1914 until 1929, no qualified political parties in Ohio, including new and minor parties, nominated their candidates by petitions; rather, qualified political parties nominated their candidates by primaries.

14. From 1914 until 1929, the nominees of unqualified political parties (who could list their "party or principle" on the ballot) qualified for Ohio's November general election ballots by the independent nominating petition requirements defined by Ohio law.

15. Between 1914 and 1929, assuming a nominee of an unqualified political association won 10% of the vote for Governor, that political association would until the next gubernatorial election be treated as a recognized political party that was required to conduct primaries in Ohio.

16. Between 1914 and 1929 the only mechanism in Ohio for the creation of new political parties was for an association or group of voters to run a candidate for Governor and have that candidate win at least 10% of Ohio's total vote.

17. In 1929, Ohio added to its definition of "qualified political party" in § 4785-61 of the General Code (the predecessor to O.R.C. § 3517.01) those political associations that presented nominating petitions supported by signatures from voters equal in number to 15% of the total vote for Governor in the preceding election. *See* 1932 OAG 4587 (Sep. 1, 1932), at 1003 (quoting § 4785-61, General Code).

18. Political associations that submitted nominating petitions and a sufficient number of signatures under § 4785-61 "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." 1932 OAG 4587 (Sep. 1, 1932) at page 1003.

19. Because of the difficulty of gathering signatures equal in number to 15% of the total vote cast for Governor in the previous election, political associations and groups of voters following this addition to the Election Code in 1929 continued to run independent candidates for office by presenting nominating petitions supported by signatures totaling at least 1% of the number of

total votes cast for Governor at the preceding election and continued to identify these candidates with a "party or principle" as they had done since 1914.

20. Ohio law following this 1929 change to the Election Code, specifically § 4785-61 of the Code, see 1929 Ohio Laws 113, stated that political parties could either be formed by "any group of voters" presenting a petition supported by signatures equal in number to 15% of the total vote cast for Governor in the preceding election or by "any group of voters" running a candidate for Governor who won more than 10% of the gubernatorial vote. *See* 1932 OAG 4587 (Sep. 1, 1932), at 1003 (quoting § 4785-61, General Code).

21. In 1947 Ohio prohibited candidates who used the independent candidate petition procedure from identifying themselves with a "party or principle." *See* SB 3 substitute, page 325, 1947 State Session Laws.

22. Notwithstanding the new 1947 prohibition on "party or principle" designations, Ohio law continued to state in § 4785-61 that "any group of voters" whose candidate for Governor won more than 10% of the vote could become a recognized political party.

23. From 1915 until 1967, the Democratic and Republican Parties were the only political parties and/or "group of voters" in Ohio whose candidates won 10% of the vote for Governor and thus were the only recognized political parties guaranteed ballot access space in the general election and enjoyed the right to identify their candidates by political party labels.

24. From 1929 until 1967, no "group of voters" successfully petitioned to become a political party in Ohio using Ohio's alternative nomination procedure created in 1947.

25. In 1968, § 3517.01, which was derived from § 4785-61, continued to allow "any group of voters" to establish a political party by having their candidate (who was nominated by petition

with supporting signatures) win 10% of the total vote for Governor. *See Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 986 n.1 (S.D. Ohio 1968) (quoting O.R.C. 3517.01).

26. In 1969, following the Supreme Court's ruling in *William v. Rhodes*, 393 U.S. 23 (1968), which invalidated Ohio's ballot access scheme and directed that the American Independent Party be added to Ohio's presidential ballot, Ohio amended § 3517.01 to reduce the vote test for "any group of voters" to become a political party to 7% and to also include the vote total for President as well as Governor. *See Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1264, 1269 n.11 (S.D. Ohio 1970) (describing 3517.01 and noting the legislative changes reducing the vote-test to 7% and including President as well as Governor).

27. In 1971, Ohio's vote test for "any group of voters" to become a recognized political party was reduced to 5% of the total vote for Governor or President. *See* 1971 S. 460.

28. Between 1970 and 1980, no "group of voters" who had nominated their candidates by petition supported by signatures of voters totaling at least 1% of the total vote for Governor or President at the prior election met Ohio's 5% vote test for Governor and/or President.

29. In 1980, John Anderson was ordered onto Ohio's ballot as an independent candidate by the United States District Court. *See Anderson v. Celebrezze*, 499 F. Supp. 121 (S.D. Ohio 1980), *rev'd*, 664 F.2d 554 (6th Cir. 1981), *rev'd*, 460 U.S. 780 (1983). No group of voters who supported Anderson had timely and successfully circulated a nominating petition on his behalf.

30. Although Anderson won more than 5% of Ohio's vote for President in 1980, there is no record of whether he or any group of voters thereafter attempted to have the Secretary of State recognize any voters who supported him as a political party in Ohio.

31. Ross Perot ran as an independent candidate for President in Ohio in 1992 and won more than 5% of Ohio's vote. He expressed no interest at that time in forming a political party. There

is no record of whether he or his group of supporters sought to exercise their right to be a political party in Ohio following the 1992 election.

32. In November 1995, the Reform Party in Ohio submitted a party petition in order to be recognized as a political party during the 1996 election. Shortly after receiving this party petition and accompanying signatures, Secretary Taft concluded that the petition was deficient because it lacked the requisite number of supporting signatures. Secretary Taft agreed, however, to allow the Reform Party to collect additional signatures in order to run its candidate, Ross Perot (along with a running mate), for President.

33. On April 16, 2014, Secretary Taft certified the Reform Party to run a single candidate, Ross Perot (along with his running mate), for President.

34. Proceeding under Secretary Taft's agreement, Perot won more than 5 % of the vote for President and the Reform Party became a recognized political party in Ohio for the 1998 election. In 1998 it ran a candidate, John Mitchel, for Governor. Mitchel was identified on Ohio's official ballots in 1998 as the Reform Party candidate for Governor. Mitchel did not succeed in winning 5% of the vote for Governor.

35. No other non-party candidates for Governor or President after 1980 and until the 2016 general election won enough votes in Ohio to meet 3517.01's vote test for "any group of voters."

36. There is no evidence that Ohio officials, including Ohio's Secretary of State, have ever rejected a request by a "group of voters" to be recognized as a political party following their gubernatorial or presidential candidate's winning enough votes to meet § 3517.01's vote test.

37. In 2006, the United States Court of Appeals for the Sixth Circuit invalidated Ohio's ballot access law for minor parties. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

38. In 2008, the Libertarian Party of Ohio and Socialist Party USA won lawsuits forcing Ohio to recognize them as qualified political parties and place their candidates' names on the 2008 general election ballot. *See, e.g., Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008). Because the litigation concluded following Ohio's primary, these parties' candidates were added directly to the 2008 general election ballot. Ohio also chose to recognize the Green Party and the Constitution Party as qualified political parties at this same time.

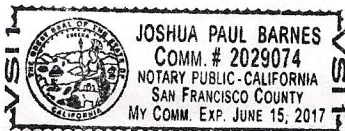
39. In 2010, 2012, and 2014, as a result of its continuing successful litigation against the Secretary of State, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sep. 7, 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012); and *Libertarian Party of Ohio v. Husted*, No. 13-953 (S.D. Ohio, Jan. 7, 2014), the Libertarian Party of Ohio remained a qualified political party in Ohio and held primaries. The Green Party, Socialist Party and Constitution Party also remained qualified political parties in 2010, 2012, and 2014 because of this successful litigation. Americans Elect was also recognized by Ohio as a qualified party late in 2011 because of this litigation, but thereafter disbanded without holding a primary in 2012 or thereafter.

40. Senate Bill 193, passed in November 2013, lowered the vote test found in § 3517.01 for "any group of voters" for elections following the 2014 general election to 3% of the total votes cast for Governor or President.

Further Affiant sayeth naught.

Richard Winger
RICHARD WINGER

Sworn to and subscribed in my presence by Richard Winger on this 14th day of
December 2016 .



Joshua Paul Barnes
Notary Public
Expiration: June 15, 2017

Richard Winger Curriculae Vitae
3201 Baker Street
San Francisco, California 94123
Updated March 23, 2016

EDUCATION

BA, Political Science, University of California, Berkeley, 1966
Graduate study, Political Science, UCLA, 1966-67

EMPLOYMENT

Ballot Access News, Editor 1985-Present

Editor of newsletter covering legal, legislative and political developments of interest to minor parties and independent candidates. Researcher of ballot access laws of all 50 states from years 1888-present; well versed in how ballot access laws of each state work historically and how they compare to each other. Responsible for reading all statutes, regulations, legal opinions, and state attorney general opinions on rights of political parties and the publications of minor parties.

On the Editorial Board of *Election Law Journal*, published by Mary Ann Liebert, Inc., Larchmont, N.Y., since 2001.

PUBLICATIONS

Wrote a chapter or two in each of these books:

America Votes! A Guide to Modern Election Law and Voting Rights, 2nd edition, 2012, published by the American Bar Association's Section of State and Local Government Law, editor Benjamin E. Griffith.

Others, Vol. 2, Third Parties During The Populist Period, by Darcy G. Richardson (2007: iUniverse, Inc., New York). Wrote the book's Appendix, "Early Ballot Access Laws for New and Minor Parties."

Democracy's Moment

edited by Ronald Hayduk and Kevin Mattson (2002: Rowman & Littlefield, Lanham, Md.)

The Encyclopedia of Third Parties in America

edited by Immanuel Ness and James Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.)

Multiparty Politics in America

edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.)

The New Populist Reader

edited by Karl Trautman (1997: Praeger, Westport, Ct.)

Additional articles published in these periodicals:

University of Arkansas Little Rock Law Review

Wall Street Journal

American Review of Politics

The Long Term View
University of Mass. Law Review
California Journal
Election Law Journal (two articles)
Cleveland State Law Review
Chronicles Magazine
Price Costco Connection
Fordham Urban Law Journal
The Hill

Also, I have written “Election Law Decisions” in each issue of the newsletter of the American Political Science Association’s Section on Representation and Electoral Systems, which appears twice a year, starting with the 2005 issues.

NATIONAL INTERVIEWS on Minor Parties, Independents, Ballots and Ballot Access

<i>NBC</i>	<i>National Public Radio</i>
<i>ABC</i>	<i>Pacifica Radio</i>
<i>CNN</i>	<i>MSNBC</i>

CASES: TESTIMONY or AFFIDAVITS (political party or candidate prevailing, or case pending)

Alaska: Libertarian Party v Coghill, state superior court, 3rd dist., 3AN-92-08181, 1992

Court issued injunction enjoining enforcement of petition deadline for minor parties

Arizona (3 cases): Campbell v Hull, 73 F Supp 2d 1081 (1999); Az. Libt. Party v Hull, superior ct., Maricopa Co. 96-13996, 1996. Nader v Brewer, 531 F 3d 1028 (9th cir., 2008)

Arkansas (3 cases): Citizens to Establish a Reform Party v Priest, 970 F Supp 690 (E.D. Ark. 1996); Green Party of Ark. v Priest, 159 F.Supp.2d (E.D. Ark. 2001); Green Party of Ark. v Daniels, U.S. District Court, 448 F.Supp 2d 1056 (E.D.Ark. 2006).

California: California Democratic Party v Jones, 530 US 567 (2000); California Justice Committee v Bowen, 2012 WL 5057625 (C.D.Cal.).

Colorado: Ptak v Meyer, 94-N-2250, U.S. Dist. Ct., 1994. Court ordered Secretary of State to place Libertarian legislative candidate on ballot.

Florida (2 cases): Libt. Party of Fla. v Mortham, 4:96cv258-RH, U.S. Dist. Ct., N.D., 1996. Court ordered Secretary of State to place Libertarian vice-presidential candidate on ballot. Reform Party v Black, 885 So.2d 303 (Fla. 2004).

Georgia (2 cases): Bergland v Harris, 767 F 2d 1551 (11th cir., 1985). U.S. Court of Appeals. Green Party of Georgia v Kemp, n.d., 2016 WL 1057022.

remanded case back to U.S. District Court. Before U.S. District Court acted, legislature substantially eased law, so case became moot.

Hawaii: Libt. Party of Hi. v Waihee, cv 86-439, U.S. Dist. Ct., 1986. Court ordered Lieutenant Governor to extend petition deadline for new parties.

Illinois: (4 cases): Nader v Ill. State Bd. of Elections, 00-cv-4401, U.S. Dist. Ct., N.D., 2000. Court ordered State Board of Elections to place candidate on ballot. Lee v Ill. State Bd. of Elections, 463 F.3d 763 (7th cir. 2006). Jones v McGuffage, 921 F Supp 2d 888 (N.D. Il, 2013). Libertarian Party of Illinois v Illinois State Board of Elections, n.d., 1:12cv-2511. Court struck down law requiring new parties to nominate a full slate of candidates.

Iowa: Oviatt v Baxter, 4:92-10513, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put Grassroots Party candidate ₂for Congress on ballot.

Kansas: Merritt v Graves, 87-4264-R, U.S. Dist. Ct., 1988. State did not defend three election laws and signed consent decree on independent petition deadline, requirement that independent petitions not be circulated outside of circulator's home precinct, and requirement that voters could only register in qualified parties. This case should not be confused with another by the same name decided in December, 1988.

Kentucky: Libt. Pty. of Ky. v Ehrler, 776 F Supp 1200 (E.D. 1991)

Maryland (2 cases): Dixon v Md. State Adm. Bd. of Elec. Laws, 878 F 2d 776 (1989, 4th cir.); Green Party v Bd. of Elections, 832 A 2d 214 (Md. 2003).

Montana: Kelly v Johnson, U.S. Dist. Ct. 08-25 (2012).

Nevada (2 cases): Libt Pty. of Nev. v Swackhamer, 638 F Supp 565 (1986); Fulani v Lau, cv-N-92-535, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put various minor parties on ballot.

New Jersey (2 cases): Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998); Council of Alternative Political Parties v State Div. of Elections, 781 A 2d 1041 (N.J.Super. A.D. 2001).

New York (3 cases): Molinari v Powers, 82 F Supp 57 (E.D.N.Y. 2000); Schulz w Williams, 44 F 3d 48 (2nd cir., 1994); Green Party of N.Y. v N.Y. State Bd. of Elections, 389 F.3d 411 (2nd cir., 2004).

North Carolina: Obie v N.C. Bd. of Elections, 762 F Supp 119 (E.D. 1991); DeLaney v Bartlett, 370 F.Supp.2d 373 (M.D. 2004).

Ohio: Libertarian Party of Ohio v Blackwell, 462 F.3d 579 (6th cir. 2006); Libertarian Party of Ohio v Husted, U.S. Dist. Ct., middle district, 2:13cv-935 (2014).

Oklahoma: Atherton v Ward, 22 F Supp 2d 1265 (W.D. Ok. 1998).

Pennsylvania: Patriot Party of Pa. v Mitchell, 826 F Supp 926 (E.D. 1993).

South Dakota: Nader v Hazeltine, 110 F Supp 2d 1201 (2000).

Tennessee: Libt Party v Thompson, U.S. Dist. Ct., 793 F Supp 1064 (M.D. 2010); Green Party of Tennessee v Hargett, 882 F Supp 2d 959 (M.D..Tn. 2012).

Texas: Pilcher v Rains, 853 F 2d 334 (5th cir., 1988).

Virginia: Libt. Pty of Va. v Quinn, 3:01-cv-468, U.S. Dist. Ct., E.D. (2001). Court ordered State Board of Elections to print "Libertarian" party label on ballot next to name of Libertarian candidates.

Washington: Washington State Democratic Central Committee v Washington State Grange, pending in U.S. Supreme Court, 11-1263.

West Virginia (3 cases): State ex rel Browne v Hechler, 476 SE 2d 559 (Supreme Court 1996); Nader v Hechler, 112 F.Supp.2d 575 (S.D.W.V., 2000); McClure v Manchin, 301 F Supp 2d 564 (2003).

CASES: TESTIMONY or AFFIDAVITS (political party or candidate not prevailing)

Alabama: Swanson v Bennett, 490 F.3d 894 (11th cit. 2007).

Arizona: (2 cases) Indp. Amer. Party v Hull, civ 96-1240, U.S. Dist. Ct., 1996; Browne v Bayless, 46 P 3d 416 (2002).

Arkansas (2 cases): Langguth v McKuen, LR-C-92-466, U.S. Dist. Ct., E.D., 1992; Christian Populist Party v Sec. of State, 650 F Supp 1205 (E.D. 1987).

California: Socialist Workers Party v Eu, 591 F 2d 1252 (9th cir., 1978).

Florida (2 cases): Fulani v Smith, 92-4629, Leon Co. Circuit Court, 1992; Libertarian Party of Fla. v State of Fla., 710 F 2d 790 (11th cir., 1983).

Georgia (2 cases): Libertarian 3Party of Ga. v Cleland, 1:94-cv-1503-CC, U.S.

Dist. Ct., N.D. (1994); *Esco v Secretary of State*, E-53493, Fulton Co. Superior Court, 1998.
Idaho: *Nader v Cenarrusa*, cv 00-503, U.S. Dist. Ct., 2000.
Illinois: *Libt Party v Rednour*, 108 F 3d 768 (7th cir., 1997).
Kansas: *Hagelin for President Committee v Graves*, 804 F Supp 1377 (1992).
Maine (2 cases): *Maine Green Party v Diamond*, 95-318, U.S. Dist. Ct., 1995; *Maine Green Party v Secretary of State*, 96-cv-261, U.S. Dist. Ct., 1996.
Maryland (2 cases): *Ahmad v Raynor*, R-88-869, U.S. Dist. Ct., 1988; *Creager v State Adm. Bd. of Election Laws*, AW-96-2612, U.S. Dist. Ct., 1996.
Missouri: *Manifold v Blunt*, 863 F 2d 1368 (8th cir. 1988).
New Hampshire: *Werme v Gov. of N.H.*, 84 F 3d 479 (1st cir., 1996).
North Carolina: *Nader v Bartlett*, 00-2040, 4th cir., 2000.
Ohio: *Schrader v Blackwell*, 241 F 2d 783 (6th cir., 2001).
Oklahoma (3 cases): *Rainbow Coalition v Okla. State Elec. Bd.*, 844 F 2d 740 (1988); *Nader v Ward*, 00-1340, U.S. Dist. Ct., 1996; *Clingman v Beaver*, __US__ (May 2005).
Oregon: *Libt Party v Roberts*, 737 P 2d 137 (Ore. Ct. of Appeals, 1987).
Texas (2 cases): *Texas Indp. Party v Kirk*, 84 F 3d 178 (5th cir., 1996); *Nat. Comm. of U.S. Taxpayers Party v Garza*, 924 F Supp 71 (W.D. 1996).
Virginia: *Wood v Meadows*, 207 F 3d 708 (4th cir., 2000).
West Virginia: *Fishbeck v Hechler*, 85 F 3d 162 (4th cir., 1996).
Wyoming: *Spiegel v State of Wyoming*, 96-cv-1028, U.S. Dist. Ct., 1996.

QUALIFIED EXPERT WITNESS

Fishbeck v Hechler, 85 F 3d 162 (4th cir. 1996, West Virginia case)
Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998, N.J.)
Citizens to Establish Reform Party v Priest, 970 F Supp 690 (E.D. Ark, 1996)
Atherton v Ward, 22 F Supp 2d 1265 (W.D.Ok. 1998)
Calif. Democratic Party v Jones, 530 US 567 (2000)
Swanson v Bennett, not reported, U.S. Dist. Ct., m.d.Ala. (02-T-644-N)
Beaver v Clingman, 363 F 3d 1048 (10th cir., 2004, Okla. case)
Green Pty v N.Y. Bd. Elec., 267 F Supp 2d 342 (EDNY 2003), 389 F.3d 411 (2nd 2004)
Lawrence v Blackwell, 430 F.3d 368 (6th cir. 2005)

In all cases in which I was presented as an expert, the opposition accepted that designation, except in the Green Party of New York case. The U.S. District Court ruled that I qualify as an expert. See headnote #1 at page 342, and footnote nine on page 350. The 2nd circuit agreed, 389 F.3d 411 (2004), at 421.

SPEAKING ENGAGEMENTS: Colleges and Scholarly Meetings

Panel of New York City Bar Association, 1994. Ballot access.
Amer. Political Science Assn., nat. conventions of August 1995 and August 1996. Papers.
Capital University School, law school class, Columbus, Ohio, 1996. Guest lecturer.
Cal. State U., course in political science, Hayward, 1993 and 1996. Guest lecturer.
San Francisco City College, course in political science, 1996 and 1997. Guest lecturer.
Providence College, R.I., Oct. 1997, seminar on ballot access.
Harvard U., JFK School of Gov't, Oct. 18, 1995, guest lecturer, ballot access.
Voting Integrity Project national conference, Apr. 1, 2000, speaker on ballot access.
Center for Voting & Democracy nat. conference, Nov. 30, 2003, speaker on ballot access.

Robert Dole Institute of Politics, U. of Kansas, one of 5 panel members, Oct. 25, 2007.