

**IN THE SUPREME COURT OF OHIO**

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

**Relators,**

**V.**

**CASE NO. 2016-1863**

**ORIGINAL ACTION  
IN MANDAMUS**

**HUSTED,**

**Respondent.**

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**RELATORS' MERIT BRIEF**

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## **STATEMENT OF FACTS AND PROCEDURE**

Relators are five electors who properly nominated Gary Johnson and William Weld for President and Vice-President, respectively. *See* Relators' Verified Complaint at ¶ 11. 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. *See* Verified Complaint at ¶ 6.

On August 10, 2016, Relators timely nominated two "place holders," Charles Earl and Kenneth Moellman, as independent candidates for President and Vice-President, respectively. *See* Verified Complaint at ¶ 10 and Exhibit A attached thereto. Relators on August 15, 2015 properly substituted Gary Johnson and William Weld as candidates for President and Vice-President, respectively, under Ohio law. *See* Verified Complaint at ¶ 11. Place holders were used on the initial nomination papers because the collection of the required signatures to support an independent presidential ticket had to commence several months before Johnson and Weld were settled on as Relators' independent candidates.

Respondent on August 22, 2016 recognized Gary Johnson and William Weld as Relators' candidates for President and Vice-President, respectively. *See* Verified Complaint at ¶ 12. 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. *See* Verified Complaint at ¶ 13. Respondent recognized that Gary Johnson and William Weld were Relators' properly nominated independent candidates for President and Vice-President, respectively, in Ohio's 2016 general election. *See* Verified Complaint at ¶ 14.

Gary Johnson and William Weld won 3.17 % of the total votes cast in Ohio in 2016 for President and Vice-President, respectively. *See* Verified Complaint at ¶ 15; OHIO SECRETARY OF STATE, 2016 OFFICIAL ELECTIONS RESULTS, GENERAL ELECTION: NOVEMBER 8, 2016.<sup>1</sup> Respondent thereafter on or about 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. *See* Verified Complaint at ¶ 16.

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. *See* Verified Complaint at ¶ 17 and Exhibit B attached thereto. Relators' written request was joined by a letter from the Libertarian Party of Ohio (LPO) supporting Relators' right to form a political party and consenting to Relators' use of the term "Libertarian."<sup>2</sup> *See* Verified Complaint at ¶ 17 and Exhibit B attached thereto. Relators (through their attorney) on December 9, 2016 also delivered to Respondent (through his attorney) Relators' legal authority supporting their request. *See* Verified Complaint at ¶ 18 and Exhibit C attached thereto.

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<https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2016Results.aspx> (last visited Dec. 31, 2016).

<sup>2</sup> The letter from LPO was included out of an abundance of caution to obviate any concern that Relators' use of the label "Libertarian" might raise under R.C. § 3517.01(A)(2) ("No such group of electors shall assume a name or designation that is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election."). In the event, Respondent did not cite R.C. § 3517.01(A)(2) nor indicate any objection to Relators' political party being labeled "Libertarian" when he rejected their request to be recognized as a political party.

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). *See* Verified Complaint at ¶ 19 and Exhibit D attached thereto. 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). Instead, 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). *See* Verified Complaint at ¶ 19 and Exhibit D attached thereto.

Respondent's press release cited in his December 16, 2016 rejection referred to an omnibus statute, Ohio Sub. S.B. 193, 130th Gen. Ass. (2013) (hereinafter "S.B. 193"),<sup>3</sup> which when signed into law on November 6, 2013, *inter alia*, purported to strip LPO of its status as a recognized political party in Ohio.<sup>4</sup> Respondent's press release 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.

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<sup>3</sup> [http://archives.legislature.state.oh.us/bills.cfm?ID=130\\_SB\\_193](http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_193) (last visited Dec. 30, 2016).

<sup>4</sup> Section 3 of S.B. 193 states: "Directives 2009-21, 2011-01, 2011-38, and 2013-02 issued by the Secretary of State are hereafter void and shall not be enforced or have effect on or after the effective date of this act." Those four Directives were put in place because of the ruling in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), discussed *infra* at 21, which ruled unconstitutional Ohio's ballot access law and ordered that LPO be recognized on Ohio's ballots until constitutional legislation was passed.



See Verified Complaint at ¶ 23 and Exhibit D attached thereto.

Respondent's claim that Relators had somehow agreed with his rejection of their request under R.C. § 3517.01(A)(1)(a), meanwhile, referred to language included in a footnote to an application for emergency relief filed by LPO 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) (hereinafter "*LPO v. Husted* (2016)"), with Justice Kagan of the Supreme Court of the United States. See Verified Complaint at ¶ 27 and Exhibit D attached thereto. That language quoted by Respondent from that application for emergency relief was drawn from a footnote and 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.

Application for Stay and Emergency Relief Addressed to Justice Kagan, No. 16A181, filed Aug. 23, 2016, at 27 n.7;<sup>5</sup> Verified Complaint at ¶ 30 and Exhibit D attached thereto.

Respondent's stated position was that this language somehow resolved Relators' request. See Verified Complaint at ¶ 29 and Exhibit D attached thereto. Respondent's logic appears to be that LPO, through this statement in its emergency application filed with Justice Kagan, somehow agreed that R.C. § 3517.01(A)(1)(a) did not entitle Relators to become a recognized political party. This alleged

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LPO-SCOTUSapplication082316.pdf> (last visited Dec.30, 2016). The pleadings and orders entered in *LPO v. Husted* (2016) may be accessed on the Ohio State University Moritz Election Law web page. Citations that follow in this Brief to documents filed in *LPO v. Husted* (2016) are to the documents posted on the Ohio State University Moritz Election Law web page.

agreement, moreover, somehow forever binds groups of voters, including Relators, to this agreement. Regardless of established law, Respondent argues, Libertarian voters cannot use R.C. § 3517.01(A)(1)(a) to create a political party.

Justice Kagan called for a response from Respondent and referred the matter to the full Supreme Court, which on August 29, 2016 denied LPO's request for emergency relief. *See Libertarian Party of Ohio v. Husted*, 137 S. Ct. 27 (2016). Johnson and Weld therefore ran as independent nominees of Relators without a party designation, LPO was unable to use Ohio's vote test, *see* R.C. § 3501.01(F), to remain a qualified political party, and LPO remained unrecognized as a political party because of § 3 of S.B. 193. *See* Verified Complaint at ¶ 31. LPO thereafter perfected its petition for writ of certiorari with the United States Supreme Court and its constitutional challenge to S.B. 193, as well as its removal from Ohio's ballot, discussed *infra* at 21, remain pending before the United States Supreme Court. *See* SUPREME COURT OF THE UNITED STATES DOCKET.<sup>6</sup>

Relators filed their Verified Complaint with attached Exhibits A through D 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. Because political parties' primary candidates' declarations of candidacies are due by 4 PM on February 1, 2017, *see* OHIO SECRETARY OF STATE ELECTIONS CALENDAR,<sup>7</sup> Relators filed a motion to expedite with this Court so that the case might be resolved before the

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<sup>6</sup> <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-580.htm> (last visited Dec. 31, 2016).

<sup>7</sup>

[https://www.sos.state.oh.us/sos/upload/publications/election/2017ElectionCalendar\\_12x18.pdf](https://www.sos.state.oh.us/sos/upload/publications/election/2017ElectionCalendar_12x18.pdf) (last visited Dec. 31, 2016).

February 1, 2017 filing deadline. Although Ohio's 2017 primaries are scheduled for May 2, 2017, *id.*, Relators argued that they could possibly be foreclosed from holding a primary if their political party was not recognized before candidates' February 1, 2017 filings were due.

The Court on December 22, 2016 directed Respondent to respond to Relators' motion to expedite. *See 12/22/2016 Case Announcements #2*, 2016-Ohio-8331. Respondent did so on December 27, 2016. On December 28, 2016, this Court granted an alternative writ directing the parties to brief the merits of the case on an expedited basis, with Relators' brief due on January 3, 2017, Respondent's brief due by January 6, 2017, and any reply due before January 11, 2017. *See 12/28/2016 Case Announcements #3*, 2016-Ohio-8459.

## **ARGUMENT**

### **I. Respondent's Refusal to Recognize Relators As A Political Party Is In Clear Violation Of Ohio Law.**

Section 3517.01(A)(1) of Ohio's 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.

(b) The group filed with the secretary of state, subsequent to its failure to meet the requirements of division (A)(1)(a) of this section, a party formation petition that meets all of the following requirements:

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

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

this state. If an odd number of congressional districts exists in this state, the number of districts that results from dividing the number of congressional districts by two shall be rounded up to the next whole number.

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

(iv) The petition designates a committee of not less than three nor more than five individuals of the petitioners, who shall represent the petitioners in all matters relating to the petition. Notice of all matters or proceedings pertaining to the petition may be served on the committee, or any of them, either personally or by registered mail, or by leaving such notice at the usual place of residence of each of them.

(Emphasis added). Under R.C. § 3517.01(A)(1)(a)'s clear terms, "any group of voters" is a "political party" in Ohio when the group's candidates for President and Vice-President poll 3% of the entire vote cast for that office. Alternatively, this same "group of voters" may become a political party by filing a nominating petition satisfying the terms of R.C. § 3517.01(A)(1)(b).

Relators are a "group of voters" that has satisfied the terms of R.C. § 3517.01(A)(1)(a). They are therefore a political party. They are entitled to establish their designation so long as that designation is not "similar ... to that of an existing political party as to confuse or mislead the voters at an election" R.C. § 3517.01(A)(2). LPO, in its accompanying letter to Respondent, has supported Relators' rights to form a political party and to identify their new political party "Libertarian." *See* Verified Complaint at ¶ 17 and Exhibit B attached thereto. LPO has consented to Relators' political party's use of the designation "Libertarian." *Id.* Because Respondent does not recognize LPO as a political party, Respondent cannot (and did not) object that Relators' designation is too similar to that of an existing political party that it would confuse or mislead voters at an upcoming election.

That the "any group of voters" language contained in R.C. § 3517.01(A)(1) applies to both party formation petitions (which Respondent does not dispute) in subsection (b) and Ohio's vote test in subsection (a) was recognized in *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 58, 2012-Ohio-69, 960 N.E.2d 452, 455. There the Court observed that R.C. § 3517.01(A)(1) "permits a group of voters who failed to meet" Ohio's vote test to qualify using the alternative nominating petition:

The definition of "political party" in R.C. 3517.01(A)(1) does not automatically exclude a group of voters from its definition simply because at the most recent regular state election, its gubernatorial candidate or nominees for presidential election failed to poll at least 5 percent of the entire vote for that office. R.C. 3517.01(A)(1) permits a group of voters who failed to meet the applicable 5 percent threshold to nevertheless qualify as a political party for the succeeding primary election ballot if it files with the secretary of state a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing.

131 Ohio St.3d at 58, 2012-Ohio-69, 960 N.E.2d at 455 (emphasis added).

Section 3501.01(F) of the Revised Code's definition of "political party" dovetails with R.C. § 3517.01(A)(1). Section 3501.01(F) specifically provides that established political parties (which LPO sought to be once again in *LPO v. Husted* (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.

(b) The political party has filed with the secretary of state, subsequent to its failure to meet the requirements of division (F)(2)(a) of this section, a petition that meets the requirements of section 3517.01 of the Revised Code.

A newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.

(Emphasis added).

Because LPO was stripped of its status as a recognized political party by the legislation (S.B. 193) at issue in *LPO v. Husted* (2016), and because Respondent refused to recognize LPO's nomination of Gary Johnson and William Weld for President and Vice-President, respectively, LPO was unable to satisfy the definition found in R.C. § 3501.01(F)(2)(a) and remain an established political party. Johnson and Weld, after all, were not LPO's candidates and were not identified as "Libertarians" on Ohio's ballot.

LPO's failure, however, cannot mean that the group of voters who properly nominated Johnson and Weld as independent candidates must be denied their rights under R.C. § 3517.01(A)(1)(a). No authority supports such a proposition. Even if Respondent's press release were creatively described as some kind of formal Directive, Respondent does not have the authority to "effectively amend[] Ohio election law by Directive," especially where a presidential election is at stake.

*Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006, 1012 & n.2 (S.D. Ohio 2008). Only Ohio's legislature can do that.

Relators' independent candidates for President and Vice-President, respectively, were Johnson and Weld. They won more than 3% of Ohio's presidential vote. Relators are therefore entitled as the "group of voters" nominating Johnson and Weld under R.C. § 3517.01(A)(1)(a) to be recognized as a political party and select its designation.

There exists no contradiction or uncertainty in Ohio's Election Code. Section 3517.01(A)(1) and § 3501.01(F) of the Revised Code certainly do not contradict one another. They create no ambiguity. They are in complete harmony. Even if there were an ambiguity, this Court in *State ex rel. Mirlisena v. Hamilton County Board of Elections*, (1993) 67 Ohio St.3d 597, 599, 622 N.E.2d 329, 330, stated that "[i]t is the duty of any court, when construing a statute, to give effect to all of the pronouncements of the statute and to render the statute compatible (to harmonize) with other and related enactments whenever and wherever possible." "Further, in interpreting related and co-existing statutes, [the Court] must harmonize and accord full application to each of these statutes unless they are irreconcilable and in hopeless conflict." *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622, 1999-Ohio-213, 716 N.E.2d 204, 207 (citation omitted).

Ohio's Election Code, particularly §§ 3517.01(A)(1)(a) and 3501.01(F), are far from "irreconcilable and in hopeless conflict." Quite to the contrary. Ohio law is clear and understandable. Sections 3517.01(A)(1) and 3501.01(F) establish that both political parties that run candidates for Governor and President at the top of party tickets (and poll 3% of the total vote) and groups of voters whose independent candidates for Governor and President poll 3% of the total vote test remain political

parties for four years. No hopeless conflict exists. The two statutes are in lock-step. Rather than ignore the plain language of R.C. § 3517.01(A)(1)(a), Respondent's lawful duty is to give it a "full application." Indeed, as explained below, *see infra* at 24, Respondent recognized that non-parties may form political parties using Ohio's vote test in previous litigation with LPO. The only reason to abandon this position now is to deny groups of voters, like Relators, their rights to form political parties.

Read together in harmony, §§ 3517.01(A)(1) and 3501.01(F) of the Election Code establish three alternative mechanisms for "groups of voters" and "political parties" to become and remain qualified political parties:

(1) Section 3501.01(F) makes clear that established "political parties" remain so for four years when they meet Ohio's 3% vote test for Governor or President;

(2) Section 3517.01(A)(1)(a) provides that a "group of voters" may establish a political party and remain so for four years by polling for its (the group's) gubernatorial or presidential candidate 3% of the total vote cast for that office; and

(3) Section 3517.01(A)(1)(b) establishes that "any group of voters" that has not met Ohio's 3% vote test may create a party by filing a timely party formation petition supported by sufficient signatures as defined by Ohio law.

Relators are a proper "group of voters" within the meaning of R.C. § 3517.01(A)(1)(a) which lawfully nominated Gary Johnson and William Weld for President and Vice-President, respectively. Those joint candidates polled more than 3% of the vote. Respondent does not deny that Relators are a "group of voters" who could seek to file a party nominating petition under R.C. § 3517.01(A)(1)(b). The same "group of voters" language applies to both party formation petitions under R.C. § 3517.01(A)(1)(b) and Ohio's vote test under R.C. § 3517.01(A)(1)(a). *See State ex rel. Waters*, 131 Ohio St.3d 55, 58, 2012-Ohio-69, 960 N.E.2d 452, 455. Respondent has previously recognized, moreover, that "political groups" may use Ohio's vote test. *See infra* at 24.



Relators have met Ohio's vote test and should be recognized by Respondent as a political party. There is absolutely no justification for denying Relators' this right. Mandamus should be issued directing Respondent to fulfill his duty and comply with Ohio law.

## **II. History Supports Giving R.C. § 3517.01(A)(1)(a) A "Full Application."**

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 Winger<sup>8</sup> (attached as Exhibit 1 to Relators' Supreme Court Practice Rule 12.02(B)(1) Accompanying Memorandum in Support of the Writ, filed Dec. 21, 2016) (hereinafter "Winger Affidavit"). It first appeared in Ohio following the Ohio's Constitutional Convention's adoption in 1912 of a primary requirement for political parties. *See* OHIO CONST., ART. V, § 7; 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 "1914 Primary Act") implementing the terms of that constitutional provision. *See* Winger Affidavit at ¶ 4. The Primary Act took effect in 1914. *See* Winger Affidavit at ¶ 4. Under § 4949 of the 1914 Primary Act, political parties in Ohio were both required to conduct primaries and 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

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<sup>8</sup> Winger is a recognized expert on ballot access laws in the United States and was even relied upon by Ohio as an expert witness in the lower court proceedings in *LPO v. Husted* (2016). *See* Intervenor-Defendant the State of Ohio's Memorandum Contra Intervenor-Plaintiffs' Motion for Summary Judgment On Their Facial Federal Constitutional Challenge to S.B. 193 and Cross-Motion for Summary Judgment on Intervenor-Plaintiffs' Facial Federal Constitutional Challenge to S.B. 193, *LPO v. Husted* (S.D. Ohio), filed Sept. 8, 2014, at 15-16 (<http://moritzlaw.osu.edu/electionlaw/litigation/documents/Libertarian2111.pdf>) (last visited Dec. 31, 2016).

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) (emphasis added). "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, is the great-grandfather of modern-day R.C. § 3517.01(A)(1)(a). Its vote-test option for voluntary political associations and groups of voters has been in continuous existence in one form or another for the past one hundred years. Under the 1914 Primary Act, the Progressive Party, which in 1912 "was a voluntary political association that won more than 10% of the vote in Ohio for Governor," Winger Affidavit at ¶ 11, 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. It never regained ballot access as a recognized political party.

Ohio both before the enactment of the 1914 Primary Act and thereafter until 1929 had no mechanism for voluntary political associations and groups of voters to petition to become recognized political parties. *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 [and] 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).

Winger makes clear that political parties in Ohio until 1929 could only be created by political associations and groups of voters joining together to run independent candidates for Governor; if an independent candidate polled 10% of the gubernatorial vote the association or group became a political party. *See* Winger Affidavit at ¶¶ 5 and 12. These independent candidates, meanwhile, 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.

These designations, however, did not mean the independent candidates were running for recognized political parties. An independent candidate, after all, was not selected at a political party primary, and the association or group that sponsored the independent candidate did not enjoy political-party rights. Independent candidates, for example, were not entitled to use the columns on ballots provided to political parties.

In sum, Winger states:

[f]rom 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 (emphasis original). "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 finally added to the definition of "qualified political party" found in § 4785-61 of the General Code (the immediate predecessor to O.R.C. § 3517.01) a nominating procedure for new political parties. This added language stated that "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 at 10003 (Sep. 1, 1932) (which quoted § 4785-61, General Code)), were qualified political parties. 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. As today, Ohio used the same "group of voters" language to describe who could use the party nominating petition procedure and who could use Ohio's vote test. For both it was a "group of voters."

Notwithstanding this additional party-creation mechanism, Winger explains 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 made it even more difficult for independent candidates to poll votes for Governor (or any other office) by "prohibit[ing] candidates who used the independent candidate petition procedure from identifying themselves with a 'party or principle.'" Winger Affidavit at ¶ 21. Still, "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. No independent candidate after 1947, however, ever met this stringent 10% vote test.

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, R.C. § 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 watershed election ruling in *William v. Rhodes*, 393 U.S. 23 (1968) (chastising Ohio for its restrictive ballot access laws), "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 again reduced to 5% of the total vote for Governor or President. See Winger Affidavit at ¶ 27.

Section 3517.01's reduced 5% vote test remained a formidable obstacle to ballot access for all but the two major parties. 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 the years following Perot's 1992 independent presidential campaign, a group of voters in Ohio coalesced around Perot and attempted to form a new political party called the Reform Party. 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." 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." Winger Affidavit at ¶ 32. "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 unusual arrangement (which apparently did not recognize the Reform Party as a "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 gubernatorial and/or presidential candidates -- success that was achieved while neither the Progressive Party nor the Reform Party were recognized as true political parties under Ohio law.

This history demonstrates that Ohio has continuously since 1914 recognized that "voluntary political associations" and "groups of voters" can legally establish political parties by running non-party candidates for Governor and/or President and having those candidates poll a sufficient number of votes. Although the percentages have changed, Ohio's vote-test for groups of voters remains today in R.C. § 3517.01(A)(1)(a). This same "group of voters" language has always applied to both Ohio's party-petition alternative and its vote test. Further, Ohio since 1914 has never rejected a request by a "group of voters" or political association whose gubernatorial or presidential candidate won a sufficient number of votes to establish a political party. Respondent's rejection of Relators' request is unprecedented, both legally and historically.

**III. Canons of Statutory Construction Direct That R.C. § 3517.01(A)(1)(a) Be Liberally Construed In Favor Of Free And Competitive Elections.**

In addition to the canon of construction requiring that laws be read in harmony and given their "full application," discussed *supra* at 11, another canon of statutory construction teaches that election laws should be liberally construed in favor of voters and in favor of free and competitive elections. This Court in *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 122, 2008-Ohio-5041, 896 N.E.2d 979, 992, stated that there is a "duty to liberally construe election laws in favor of the right to vote." (citing *Wilson v. Kennedy*, (1949), 151 Ohio St. 485, 493, 39 O.O. 301, 86 N.E.2d 722; *State*



*ex rel. Beck v. Hummel*, (1948), 150 Ohio St. 127, 139, 37 O.O. 435, 80 N.E.2d 899). In *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 332, 2008-Ohio-5097, 899 N.E.2d 120, 124, the Court further stated that one “must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.” (Citing *State ex rel. Ruehlmann v. Luken*, (1992), 65 Ohio St. 3d 1, 3, 598 N.E.2d 1149; *Stern v. Cuyohoga County Board of Elections*, (1968), 14 Ohio St. 2d 175, 180, 43 O.O.2d 286, 237 N.E.2d 313).

Respondent violates both canons. His argument, as far as Relators can tell given his December 16, 2016 rejection of their request, is that they cannot be a political party under R.C. § 3517.01(A)(1)(a) because LPO is not a political party under S.B. 193 (or some other unidentified statute). Respondent in his December 16, 2016 rejection ignored the language of R.C. § 3517.01(A)(1)(a) and did not even attempt an explanation as to why Relators do not satisfy its terms. Respondent's current position, moreover, contradicts his previous position in *LPO v. Husted* (2016). *See infra* at 25. His present position is a far cry from satisfying his duty to liberally construe this election statute in favor of free and competitive elections. Even assuming that R.C. § 3517.01(A)(1)(a) were unclear or ambiguous -- which it is not -- Respondent was still under an obligation to interpret it liberally in favor of free and competitive elections. Respondent's summary rejection of Relators' request runs afoul of this plain duty.

**IV. Neither Relators Nor LPO Agreed That Relators Could Not Exercise Their Rights Under R.C. § 3517.01(A)(1)(a).**

Respondent's principal defense in his December 16, 2016 letter was that LPO had somehow agreed that Relators cannot qualify as a political party. Respondent made this argument again in his response to Relators' motion to expedite proceedings in this Court. Together with his citation to his own press release, this was the only

justification he offered supporting his rejection of Relators' request. *See* Verified Complaint at ¶ 19 and Exhibit D attached thereto.

It is not Relators' objective here to re-litigate the LPO's legal theories and arguments in *LPO v. Husted* (2016). Nor do Relators attempt here to fully describe the many intricacies of that case. Still, because Respondent relies so heavily on a single statement made by LPO in a footnote to a motion for emergency relief in that case to support his rejection of Relators' request, a succinct explanation of LPO's arguments and Respondent's defenses in that litigation may be useful.

*LPO v. Husted* (2016) originated in September of 2013 as a result of newly passed legislation altering the language of R.C. § 3503.06 to require that circulators of political parties' candidates' part-petitions be Ohio residents. LPO challenged that legislation in *LPO v. Husted* (2016) and won a preliminary injunction on November 13, 2013. *See LPO v. Husted*, No. 13-953 (S.D. Ohio, Nov. 13, 2013).<sup>9</sup>

On November 6, 2013, just before the preliminary injunction was entered against enforcement of R.C. § 3503.06, Ohio passed S.B. 193, an omnibus election measure that changed several aspects of Ohio's ballot access law for minor political parties. Most importantly, S.B. 193: (1) stripped LPO of its status as a recognized political party in Ohio, *see* S.B. 193, § 3<sup>10</sup> -- a status LPO had enjoyed for five years since winning *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008); (2) changed Ohio law to deny any to political party other than the Democrats and Republicans party primaries and official party membership recognition, *see* S.B.

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LPOOpinionORderPrelimInj.pdf> (last visited Dec. 30, 2016).

<sup>10</sup> [http://archives.legislature.state.oh.us/bills.cfm?ID=130\\_SB\\_193](http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_193) (last visited Dec. 30, 2016).

193, §§ 1 & 2; and (3) imposed new party nomination procedures on new political parties, including the requirement that a new party seeking to gain recognized status by filing nominating papers under R.C. §§ 3517.01(A) and 3517.012(A) supported by tens of thousands of voters' signatures. *See* S.B. 193, §§ 1 & 2.

LPO immediately amended its complaint in *LPO v. Husted* (2016) to challenge S.B. 193's changes to Ohio's election laws on several grounds, including: (1) S.B. 193's immediate application to the 2014 election cycle violated the First and Fourteenth Amendments to the Constitution of the United States; (2) S.B. 193's denial of a political party primary to LPO violated the Equal Protection Clause of the Fourteenth Amendment to Constitution of the United States; and (3) S.B. 193's denial of a political party primary to LPO violated Article V, § 7 of Ohio's Constitution.<sup>11</sup>

The federal district court on January 7, 2014 preliminarily enjoined enforcement of S.B. 193 and barred its application to the 2014 election. *See LPO v. Husted*, No. 13-953 (S.D. Ohio, Jan. 7, 2014).<sup>12</sup> The district court, however, did not enjoin S.B. 193 beyond the 2014 election. Consequently, LPO remained a recognized political party in Ohio during the 2014 election but was forced to continue to litigate

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<sup>11</sup> LPO's claim under the Ohio Constitution was dismissed by the federal district court on October 14, 2015 because Respondent insisted that the federal court lacked subject matter jurisdiction because of the Eleventh Amendment. *See* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/OPINIONandORDERgrantinginpartanddenyinginpartDefendantandPlaintiffsMotionsforSummaryJudgment.pdf> (last visited Dec. 30, 2016). This dismissal resulted in LPO's turning to state court to litigate that challenge. That challenge under Ohio's Constitution is now pending before the Tenth District Court of Appeals. *See Libertarian Party of Ohio v. Husted*, No. 16APE-07-496. Whether the federal district court's decision that it lacked subject matter jurisdiction was proper is one of the issues pending before the United States Supreme Court in *LPO v. Husted* (2016).

<sup>12</sup> <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Plorder.pdf> (last visited Dec. 30, 2016).

the prospective validity of S.B. 193 (and its continuing status as a recognized political party) beyond the 2014 election cycle.

LPO's premier argument in *LPO v. Husted* (2016), which is presently pending before the Supreme Court of the United States, is that it (LPO) remained a recognized political party in Ohio (just as it has been since 2008). LPO remained a political party, it argued, because S.B. 193 violates the federal Constitution and in the absence of a constitutional ballot access law the federal court's order in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), requires that LPO be recognized as a political party.

Following the federal district court's final judgment upholding S.B. 193 beyond the 2014 election in *LPO v. Husted* (2016), *see LPO v. Husted*, No. 13-953 (S.D. Ohio, May 20, 2016),<sup>13</sup> LPO immediately appealed to the United States Court of Appeals for the Sixth Circuit. LPO sought emergency relief restoring it to Ohio's ballot as a recognized political party and asked for expedited review. Because of the upcoming November presidential election, which was only five months away, the Sixth Circuit expedited proceedings.

Until this point in the litigation, Ohio's vote test for political parties was barely if at all relevant to LPO's challenge to S.B. 193. Ohio's vote test itself was never challenged by LPO or anyone else. The vote test became relevant only because the November 2016 presidential election closely approached. Ohio's vote test for political parties uses presidential contests to determine continuing party status. *See* R.C. § 3501.01(F)(2)(a). It was important to LPO to have its status as a recognized

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<sup>13</sup> <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LPO-Opinion052016.pdf> (last visited Dec. 30, 2016).

political party restored before the November election so that it could itself make use of Ohio's vote test for political parties.

In an apparent attempt to soften the impact of S.B. 193 and improve its defense in the Sixth Circuit, Respondent on July 7, 2016 specifically informed the Sixth Circuit that a "political group could obtain minor-party recognition and qualify for the ballot [] by receiving three percent of the total vote in a gubernatorial or presidential election." Brief of Appellees-Defendants Jon Husted and State of Ohio, No. 16-3537, United States Court of Appeals for the Sixth Circuit (filed July 7, 2016) at 3-4 (emphasis added).<sup>14</sup> The full text of Respondent's argument to the Sixth Circuit is as follows:

As relevant here, the Bill [S.B. 193] voided previous Secretary of State directives (issued pursuant to court order) recognizing minor parties as qualified for primary and general elections 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. S.B. 193 repealed those directives, which provided minor party status to the Party and others, and 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 election, see Ohio Rev. Code § 3501.01(F)(2)(a), or by filing a formation petition, see id. § 3501.01(F)(2)(b).

*Id.* (emphasis added).

Respondent also included a footnote in his Brief explaining why S.B. 193's change to R.C. 3501.01(F) still allowed the Green Party to remain a political party under Ohio's vote test:

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.

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LPO-StateBrief070716.pdf> (last visited Dec. 30, 2016).

*Id.* at 4 n.1. Section 4(B) of S.B. 193, as the Secretary explained, allowed the existing minor parties that were otherwise stripped of their recognized status by § 3 of S.B. 193, to remain qualified if their gubernatorial candidates polled 2% of the total vote.

Section 4(B) of S.B. 193 states:

A political party that polls for its candidate for Governor at least two per cent but less than twenty per cent of the entire vote cast for that office at the 2014 general election remains a minor political party for a period of four years after meeting that requirement.

*Id.*<sup>15</sup>

This relaxed vote test found in § 4(B) of S.B. 193 did not by its terms apply to "groups of voters," and was apparently included to soften the blow S.B. 193 dealt to the minor parties. The Green Party only satisfied this relaxed vote test only because it was still a political party in 2014. Because it only required 2% of the vote, LPO in *LPO v. Husted* (2016) hoped to take advantage of this relaxed vote-test while it pressed its challenge to S.B. 193. In addition, LPO recognized that its candidates stood a better chance running with the "Libertarian" label. It therefore sought emergency relief to have its status as a political party restored before the 2014 gubernatorial election and continued to have its status restored ever since -- including before the 2016 presidential election. LPO never claimed to anything less than a political party and had no reason to address whether political groups or groups of voters could also satisfy Ohio's vote test.

As it happened, of course, LPO had no gubernatorial candidate in 2014 and did not satisfy S.B. 193's 2% vote test.<sup>16</sup> But LPO continued to insist thereafter that it

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<sup>15</sup> [http://archives.legislature.state.oh.us/bills.cfm?ID=130\\_SB\\_193](http://archives.legislature.state.oh.us/bills.cfm?ID=130_SB_193) (last visited Dec. 30, 2016).

<sup>16</sup> LPO did not have a gubernatorial candidate in 2014 because its candidate was removed by Respondent from LPO's primary ballot at (LPO argues) the unlawful

should be restored as a political party. It wanted its candidates to run under the Libertarian label because they stood a better chance with this party label to re-qualify LPO as a political party under Ohio's 3% vote test. *See* R.C. § 3501.01(F)(2)(a).

Respondent and LPO both recognized and agreed throughout the litigation in *LPO v. Husted* (2016) that a political party remains a political party by satisfying the vote test found in R.C. § 3501.01(F)(2)(a). Both understood that LPO was attempting to seamlessly remain a qualified political party. Both understood that LPO's desire to meet Ohio's vote test was as an existing qualified political party and not as a "group of voters."

For its part, Respondent went beyond addressing how political parties qualify and informed the Sixth Circuit that even a "political group" in Ohio may meet Ohio's vote test. It is therefore not too difficult, Respondent suggested, to become a political party in Ohio. Because LPO's argument was that it was a political party, LPO had no cause to address this latter possibility in *LPO v. Husted* (2016).

Although Respondent's position was not particularly relevant then, Respondent's current litigation posture makes it quite relevant now. It demonstrates that Respondent has in the past interpreted Ohio's election laws to allow "political groups" to qualify under Ohio's vote test. It also raises questions surrounding why Respondent in less than six months changed his mind.

As LPO's Application with Justice Kagan was being filed and the presidential election closely approached, Relators substituted Gary Johnson and Bill Weld as their independent candidates for President and Vice-President, respectively. LPO duly

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behest of an agent of the Republican Party. This issue is pending before the United States Supreme Court in *LPO v. Husted* (2016).

reported this substitution to Justice Kagan and argued that the emergency relief it requested was still warranted:

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* Application for Stay and Emergency Relief Addressed to Justice Kagan, No. 16A181, filed Aug. 23, 2016, at 27 n.7 (emphasis added).<sup>17</sup>

Ignoring his own previous position that "political groups" may become political parties under Ohio's vote test, Respondent cited this language to reject Relators' request to be recognized as a political party. *See* Verified Complaint at ¶ 19 and Exhibit D attached thereto. How LPO's argument supports Respondent's current position remains unclear to Relators. LPO's footnote accurately reported Ohio law, had nothing to do with whether "groups of voters" may use Ohio's vote test, and made clear that LPO wanted its presidential ticket to be identified with its political label -- Libertarian -- because it wanted the candidates to re-qualify it as a political party. There was never an argument made by LPO in *LPO v. Husted* (2016) that an independent group of voters (like Relators) who nominate an independent presidential ticket may or may not use R.C. § 3517.01(A)(1)(a) to meet Ohio's vote test. Only Respondent addressed the matter, and he claimed that "political groups" could use Ohio's vote test.<sup>18</sup>

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LPO-SCOTUSapplication082316.pdf> (last visited Dec.30, 2016).

<sup>18</sup> The Secretary's response to LPO's emergency application filed with Justice Kagan supported LPO's description of Ohio law. In arguing that LPO did not experience irreparable harm Respondent stated that "minor parties that achieve this [political party] status by the vote-counting method may hold primary elections to nominate



\* \* \*

Respondent's seizing language in LPO's legal papers to now insist that LPO -- and somehow Relators -- have agreed that a "group of voters" cannot use R.C. § 3517.01(A)(1)(a)'s vote test is perplexing to say the least. LPO said no such thing. It agreed to no such thing. The "group of voters" involved in the current litigation, moreover, was not part of that case. Respondent's changing litigation position, meanwhile, has Ohio's vote test meaning one thing on July 7, 2016 and the complete opposite on December 16, 2016. Respondent does not have this kind of discretion. Mandamus is in order.

### **CONCLUSION**

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

Respectfully submitted,

*/s Mark R. Brown*

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their candidates to appear on the general-election ballot. Id. § 3501.01(F)(2)(a)." Opposition to Stay and Application for Emergency Injunction, filed Aug. 25, 2016, U.S., 16A181, at 4 (<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LPO-SCOTUSopposition082516.pdf>) (last visited Jan. 11, 2017). LPO did not disagree with this description of Ohio law, though LPO insisted that it (LPO) experienced irreparable harm by not being allowed as a political party to run Johnson and Weld as its presidential ticket.

**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

## APPENDIX

**R.C. § 3517.01(A)(1)** states:

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.

(b) The group filed with the secretary of state, subsequent to its failure to meet the requirements of division (A)(1)(a) of this section, a party formation petition that meets all of the following requirements:

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

(ii) The petition is signed by not fewer than five hundred qualified electors from each of at least a minimum of one-half of the congressional districts in this state. If an odd number of congressional districts exists in this state, the number of districts that results from dividing the number of congressional districts by two shall be rounded up to the next whole number.

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

(iv) The petition designates a committee of not less than three nor more than five individuals of the petitioners, who shall represent the petitioners in all matters relating to the petition. Notice of all matters or proceedings pertaining to the petition may be served on the committee, or any of them, either personally or by registered mail, or by leaving such notice at the usual place of residence of each of them.

**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.

(b) The political party has filed with the secretary of state, subsequent to its failure to meet the requirements of division (F)(2)(a) of this section, a petition that meets the requirements of section 3517.01 of the Revised Code.

A newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.

**Section 3 of S.B. 193** states:

Directives 2009-21, 2011-01, 2011-38, and 2013-02 issued by the Secretary of State are hereafter void and shall not be enforced or have effect on or after the effective date of this act.

**Section 4(B) of S.B. 193** states:

A political party that polls for its candidate for Governor at least two per cent but less than twenty per cent of the entire vote cast for that office at the 2014 general election remains a minor political party for a period of four years after meeting that requirement.