

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO**

Eastern Division

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

v.

**Case No. 19-2501
Judge Marbley**

WILHEM, et al.,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND MEMORADUM IN SUPPORT

Plaintiffs move the Court for Summary Judgment under Federal Rule of Civil Procedure 56(a), there being no genuine dispute as to any material fact and Plaintiffs being entitled to judgment as a matter of law.

In support of Plaintiffs' Motion for Summary Judgment, they rely on the allegations in their Verified Complaint, the attached Memorandum of Law, and five Exhibits, attached here as Exhibits 1 through 5, which were previously produced by the Ohio Elections Commission's as its administrative record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was filed using the Court's electronic filing system and will be delivered to all counsel of record. The foregoing was also e-mailed to Tiffany Carwile, Esq., counsel for the Defendants, at Tiffany.Carwile@ohioattorneygeneral.gov this same day.

/s/ Mark R. Brown

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs bring this action against Defendants in their official capacities as members of Ohio's Elections Commission under 42 U.S.C. § 1983, *Ex parte Young*, 209 U.S. 123 (1908), and the First and Fourteenth Amendments. Plaintiffs seek declaratory and injunctive relief holding that Ohio's political party restrictions on the membership of the Commission, found in O.R.C. § 3517.152, violate the First and Fourteenth Amendments. Plaintiffs further seek declaratory and injunctive relief holding the Commission's refusal to enforce Ohio law against the gubernatorial campaigns of the two major political parties violates the First and Fourteenth Amendments.

Federal Rule of Civil Procedure 56(a) states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine issue dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(b) provides that "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery."

Facts

The material uncontested facts in this matter are set out in Plaintiffs' Verified Complaint and the five Exhibits attached to this Motion. During the 2018 gubernatorial campaign, Richard

Cordray (the Democratic nominee) and Richard Michael ("Mike") DeWine (the Republican nominee), along with three non-profit corporations, the University of Dayton, Marietta College, and the City Club of Cleveland, and one public post-secondary educational institution in Ohio, Cleveland State University, staged three gubernatorial debates across the State of Ohio. Verified Complaint, R. 1, at PAGEID # 8-11, ¶¶ 29-42; PAGEID # 11-12, ¶¶ 43-51; PAGEID # 12-15, ¶¶ 52-64. Planning began in the summer of 2018 with the debates being held on September 19, 2018, October 1, 2018, and October 8, 2019 on the Dayton, Marietta, and Cleveland State campuses, respectively. *Id.*

Of the four qualified political party nominees for Governor in Ohio, only DeWine and Cordray were involved in the coordination, planning, sponsoring and staging of these three debates. *Id.* at PAGEID # 8-9, ¶¶ 31-34; PAGEID # 11-12, ¶¶ 45-48; PAGEID # 13, ¶¶ 55-58. The Libertarian Party and the Green Party were excluded from the planning of the debates, with the former's many demand letters seeking inclusion being rejected and/or ignored. *Id.* at PAGEID # 16-22, ¶¶ 64-91. Their respective candidates, Travis Irvine (Libertarian) and Constance Gadell-Netwon (Green), were excluded. *Id.* at ¶¶ PAGEID # 22-23, ¶¶ 92-95.

Because they treated the four gubernatorial candidates unequally and any without pre-existing objective criteria, the three debates plainly violated federal tax laws and Ohio's ban on corporate contributions to candidates. *Id.* PAGEID # 23-24, ¶¶ 99-110. Because of its ban on corporate aid, *see* O.R.C. § 3599.03, Ohio (like the federal government) bars corporations (both for-profit and non-profit) from coordinating, sponsoring, staging and holding exclusive, preferential debates for some candidates but not others. *Id.* at PAGEID # 25-27, ¶¶ 111-23. The only way a non-profit corporation in Ohio may sponsor, coordinate, plan or stage candidates'

debates is to at bare minimum do so on an egalitarian basis, applying existing rules equally to all qualified candidates. *Id.*

In order to insure that candidates are afforded equal treatment and to avoid post-hoc rationalizations, under federal campaign finance laws pre-existing objective criteria must be employed. *See La Botz v. Federal Election Commission*, 889 F. Supp.2d 51 (D.D.C. 2012). Ohio's campaign finance laws are modeled on this federal approach, *see Toledo Area AFL-CIO Council v. Pizza*, 898 F. Supp. 554, 560 (N.D. Ohio 1995), indicating that Ohio's ban on corporate contributions likewise requires some kind of pre-existing objective criteria. None of the three non-profits here developed or employed pre-existing objective criteria. Verified Complaint, R.1, at PAGEID # 8-9, ¶ 33; PAGEID # 11-12 ¶ 47; PAGEID # 13, ¶ 57. All of them violated Ohio's ban on corporate contributions. Cordray's and DeWine's complicity, meanwhile, rendered them equally liable under O.R.C. § 3599.03.

The Libertarian Party timely filed complaints with the Ohio Elections Commission, Verified Complaint, R.1, PAGEID # 39, ¶ 190, which is the public agency charged with enforcing Ohio's campaign finance laws. *Id.* at PAGEID # 5-6, ¶¶ 8-9. Neither Cordray, DeWine nor the three staging organizations presented evidence contradicting any of the factual allegations set out in Plaintiffs' administrative complaints. *Id.* at PAGEID # 41, ¶ 196; Administrative Transcript at 29, Exhibit 5; Minutes, Exhibit 2. These facts, as repeated in the Verified Complaint, were exhaustively recited and documented by the Libertarian Party before the Commission.¹ Verified Complaint, R.1, at PAGEID # 41, ¶ 198.

¹ The accuracy of the allegations made in the Libertarian Party's administrative complaints against Cordray, DeWine and the staging organizations is not relevant to Plaintiffs' Motion here. What is relevant here is that these uncontested factual allegations were presented to the Commission, were found by the Commission's lawyer to be credible, but were ignored. *See* Transcript, Exhibit 4.

Foregoing any factual challenge, Cordray, DeWine and the three staging organizations argued in their joint defenses pure law; they asserted that under Ohio law they had a right to hold unequal, exclusive debates. *Id.* at PAGEID # 41, ¶ 197; Administrative Case Summary, Exhibit 3; Administrative Transcript, Exhibit 4. They possessed such a right, they claimed, because Ohio law does not consider debates to be "electioneering communications," *id.*, within the meaning of 2004 amendments to Ohio's campaign finance laws.

As explained by Plaintiffs in their Complaint, this argument is both unprecedented and meritless. It was rejected by the Commission's attorney, Mr. Philip Richter, an expert with years of experience advising and representing the Commission. Mr. Richter officially made his recommendation that violations be found to the Commission before the hearing. *Id.* at PAGEID # 41-42, ¶¶ 199-201; Staff Attorney Recommendation, Exhibit 1. Notwithstanding that the Commission's lawyer is legally required to offer his recommendation, and that the Commission routinely accepts it, the Commission ignored his recommendation in this instance without explanation. Verified Complaint, R.1, at PAGEID # 42, ¶¶ 201-202.

The Libertarian Party's factual allegations remained unchallenged and its own attorney had rejected the staging organizations' and candidates' concerted legal defense but the Ohio Elections Commission nonetheless summarily dismissed the Libertarian Party's administrative complaints with a finding that there had been "no violation." *See* Administrative Minutes, Exhibit 2; Case Summary, Exhibit 4.² The Commission offered no explanation other than a comment made to a news reporter by Commissioner-Norman. He stated that "he didn't think the minor parties had the law on their side. Debates featuring only the Democratic and Republican

² Two Commissioners, Crites and Wilelm, recused themselves. Crites "due to his long-standing relationship with Mr. Dewine," and Wilhelm "due to the assistance offered by her husband to the Cordray campaign to help establish these events." E-mail from Staff Attorney, Exhibit 5.

candidates are nothing new in Ohio." Julie Carr Smyth, *Ohio election panel tosses minor political parties' debate complaint*, ASSOCIATED PRESS, December 6, 2018 (<http://www.apnews.com/cyc9411bcle407ebdb0fc2d2f6b2fb8>) (last visited Feb. 19, 2019); *see* Verified Complaint, R.1, at PAGEID # 42, ¶ 205.

The Libertarian Party on February 14, 2019, timely filed two administrative appeals, one from the dismissal of each of the two consolidated administrative hearings, in the Franklin County Court of Common Pleas. The Libertarian Party shortly thereafter amended its administrative appeals to include the federal claims now being presented to this Court. Defendants on March 28, 2019 moved to dismiss the Libertarian Party's federal constitutional claims as falling outside the jurisdiction of the Court of Common Pleas in an administrative appeal. The Court of Common Pleas, which consolidated the two appeals, on April 19, 2019 stayed the cases directed the parties to brief the jurisdictional issue.

On June 15, 2019, Plaintiffs filed the instant action in this Court making the identical federal constitutional claims it had attempted to prosecute in its consolidated administrative appeals before the Court of Common Pleas. On June 17, 2019, Plaintiffs filed an "England reservation" with the Court of Common Pleas withdrawing from its consideration the federal constitutional claims now being presented to this Court. On June 21, 2019, the parties to the consolidated administrative appeals in the Court of Common Pleas stipulated to a dismissal of the constitutional claims that had been added to the administrative appeals without prejudice based on the Court of Common Pleas' lack of jurisdiction over them. The consolidated administrative appeals of the Commission's finding of "no violation," meanwhile, remain pending in the Court of Common Pleas.

Argument

I. The Ohio Elections Commission's Politically-Restricted Composition Violates the First and Fourteenth Amendments.

The Ohio Elections Commission is authorized to find violations of Ohio's campaign finance restrictions, including § 3599.03 of the Ohio Revised Code (which bans corporate contributions), assess fines, and refer violations of O.R.C. § 3599.03 to local prosecutors. *See* O.A.C. 3517-1-14(B)(3); O.A.C. § 3517-1-14(C)(2)(a). The Commission exercises both executive and quasi-adjudicative authority under Ohio law.

Section 3517.152 of the Ohio Revised Code insures that six members of the seven-member Commission are members of the two major political parties in Ohio. It states:

the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member shall jointly submit to the governor a list of five persons who are affiliated with that political party. ... [T]he two legislative leaders in the two houses of the general assembly of the major political party of which the speaker is not a member shall jointly submit to the governor a list of five persons who are affiliated with the major political party of which the speaker is not a member. Not later than fifteen days after receiving each list, the governor shall appoint three persons from each list to the commission.

(Emphasis added). According to the Ohio Secretary of State:

The Ohio Elections Commission consists of seven persons, six of whom are appointed by the governor on the recommendation of the combined House and Senate caucuses of each of the major political parties. Three members must be appointed from each of two major political parties with the seventh member being an unaffiliated elector appointed by the other six members.

OHIO CAMPAIGN FINANCE HANDBOOK, CHAP. 14: OHIO ELECTIONS COMMISSION, at 14-3 (2013)

(emphasis added).³ Ohio's Elections Commission, the Secretary states, "is empowered to hear alleged violations of campaign finance law contained in Revised Code sections 3517.08-3517.13, 3517.17, 3517.18, 3517.20-3517.22, 3599.03 and 3599.031." *Id.*

³ *See* <https://www.sos.state.oh.us/globalassets/candidates/cfguide/chapters/chapter14.pdf> (last visited March 29, 2019).

Because of O.R.C. § 3517.152's political-party restrictions, members of minor and new political parties, including the Libertarian Party, are categorically ineligible to be members of the Ohio Elections Commission. Under Ohio law, the Ohio Elections Commission must at all times be politically dominated by a super-majority of the two major political parties. New and minor political parties need not -- indeed, must not -- apply. This structural bias not only creates an appearance of political impropriety on the Commission when charges are made against the two major political parties, it creates a reality of bias against those charges. It is no different than having the New England Patriots call, and not call, their own penalties.

As recently explained by the Third Circuit in *Adams v. Governor*, 922 F.3d 166 (3d Cir. 2019), politically restrictive laws like § 3517.152 violate the First and Fourteenth Amendments. In *Adams*, a politically unaffiliated lawyer (Adams) sought appointment as a judge in Delaware. Because Delaware categorically prohibited the appointment of judges who were not members of the two major parties, Adams was precluded from becoming a judge. He sued under the First and Fourteenth Amendments (as well as 42 U.S.C. § 1983), claiming that Delaware's law violated the First Amendment.

The Third Circuit agreed with the plaintiff, Adams. The categorical restrictions found in Delaware law "that limit Adams's ability to apply for a judicial position while associating with the political party of his choice," the Third Circuit concluded, "violate his First Amendment rights." *Id.* at 169 (emphasis added).

Delaware's categorical restrictions on judicial appointments closely resembles those found in O.R.C. § 3517.152. For example, according to Delaware law, "three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of

said Justices shall be of the other major political party." *Adams*, 922 F.3d at 170. "[W]hen the total number of Judges of the Superior Court shall be an even number," meanwhile,

not more than one-half of the members of all such offices shall be of the same political party; and at any time when the number of such offices shall be an odd number, then not more than a bare majority of the members of all such offices shall be of the same major political party, the remaining members of such offices shall be of the other major political party.

Id. Similar categorical restrictions were placed on Judges of the Common Pleas Court and Family Court. *Id.* at 171. In sum, the Third Circuit explained in *Adams*, 922 F.3d at 171:

there are also two separate, but connected, substantive components: the bare majority component (which limits the number of judicial positions that can be occupied by members of a single political party) and the major political party component (which mandates that the other judicial positions must be filled with members of the other major political party in Delaware).

"In practice, then, most courts must be filled with Democrats and Republicans exclusively." *Id.*

Section 3517.152 is structured in this same way. "Three members must be appointed from each of two major political parties with the seventh member being an unaffiliated elector appointed by the other six members." OHIO CAMPAIGN FINANCE HANDBOOK, CHAP. 14: OHIO ELECTIONS COMMISSION, at 14-3 (2013). Its terms are not advisory. Like Delaware law, members of other parties need not -- must not -- apply. They cannot serve. Consequently, Ohio's law, like Delaware's, violates the First Amendment.

Delaware, like Ohio here, argued that its law was justified by the Supreme Court's recognition of a "patronage" exception for some executive offices. *See, e.g., Branti v. Finkel*, 445 U.S. 507 (1980). Presidents, for example, are free to consider political party status when appointing the members of their Cabinet. Although it recognized this exception, the Third Circuit ruled that it did not excuse Delaware's categorical prohibition.

First, the Third Circuit explained that "judges are not policymakers," rather, their "decisions ... in any given case relate[] to the case under review and not to partisan political interests ..." *Id.* at 169. This by itself distinguished cases that had recognized executive political patronage exceptions. *Id.* Where policy-making officers are at issue, political patronage can prove constitutional.

This exception to the First Amendment, the Court observed, proved the rule. The Third Circuit observed that the illegality of Delaware's categorical ban was "clear from the principles animating [the exception spelled out in] *Elrod* and *Branti*." *Id.* at 178. "The purpose of the policymaking exception," the Court explained, "is to ensure that elected officials may put in place loyal employees who will not undercut or obstruct the new administration. If a job 'cannot properly be conditioned upon allegiance to the political party in control,' the policymaking exception is inappropriate." *Id.* at 178-79. "Judges simply do not fit this description." *Id.* at 179. "[T]he question before us is not whether judges make policy, it is whether they make policies that necessarily reflect the political will and partisan goals of the party in power." *Id.*

Because Delaware's categorical political requirement interfered with First Amendment associational rights, the Court in *Adams*, 922 F.3d at 183, ruled that Delaware had to be prepared to meet strict scrutiny:

[t]o justify a rule that impinges an employee's First Amendment association rights, the state must show both that the rule promotes "a vital state interest" and that the rule is "narrowly tailored" to that interest. Even assuming judicial political balance is a vital Delaware interest, the Governor must also show that the goals of political balance could not be realized without the restrictive nature of [Delaware law], and this he has failed to do.

Members of Ohio's Elections Commission, like judges in Delaware, exercise adjudicative authority. The Commission, according to Ohio Adm. Code § 3517-1-11(A)(2)(e), is empowered to "[m]ake a final disposition" in a case presented to it, and either dismiss it, refer the matter for

criminal prosecution, or "[i]mpose a penalty." See *Earl v. Ohio Elections Commission*, 2016 WL 5637037, *4 (Ohio 10th DCA 2016). Under § 3517-1-14(B)(3)(a) of the Ohio Administrative Code, the penalties that may be imposed by the Commission for improper corporate contributions may not exceed \$5000.00.

To the extent the Commission exercises investigatory power and refers matters for criminal prosecution, it cannot be seriously questioned that it is expected to perform its duties in a fair and principled (that is, non-partisan) fashion. To the extent there is a political patronage exception for certain kinds of executive offices, it cannot be applied in rote fashion to non-policymaking functions. What the Ohio's Elections Commission does, or is supposed to do, is to follow established policies. It does not make them. The Commission is designed to enforce Ohio's election laws, adjudicate disputes that arise under those laws, and impose significant monetary penalties.

Ohio, like Delaware, may have a legitimate interest in political balance in the context of investigating and adjudicating election disputes. The problem is that O.R.C. § 3517.152 does not further this goal. Far from advancing that goal, it contradicts it. It insures that there is no political balance on the Ohio Elections Commission. Members of minor or new political parties are categorically excluded. At bare minimum, in order to achieve political balance, the members of recognized political parties ought to be allowed to apply for the Commission's seventh seat. Under Ohio law, however, that is not possible.

Even if Ohio's Commissioners made policy, and even if Ohio's interest in political balance somehow proved vital, Ohio's categorical exclusion of members of some political parties renders the patronage restriction unconstitutional. It far too much medicine to pass the means prong of strict scrutiny. It is not absolutely necessary. Imagine a law that directed the President

to appoint to his Cabinet (policy-makers all) only members of his own political party, or even only members of the two major political parties. Such a law, of course, does not exist, but if it did it would be clearly unconstitutional. Patronage appointments for policy-making positions are sometimes constitutional, but even then it is the appointing officer that chooses who to select. The appointing officer may take account of politics, but she cannot be forced to. Her hand cannot be forced in the way Ohio law does to completely exclude members from a disfavored a political party.

The Third Circuit in *Adams*, 922 F.3d at 180-81, recognized this point in distinguishing the Sixth Circuit's decision in *Newman v. Voinovich*, 986 F.2d 159, 161 (6th Cir. 1993). There, the Sixth Circuit sustained the Ohio Governor's use of patronage as one factor in making interim judicial appointments. Even then, the Sixth Circuit expressed grave reservations: "we are troubled by the Governor's practice of considering only members of his party in making appointments to fill interim judicial vacancies. While this practice may be constitutional, we believe it is unwise." *Id.* at 163. Judge Jones added in his concurring opinion: "I absolutely agree with Judge Keith that political affiliation may be *an appropriate factor* to consider when making interim judicial appointments." *Id.* at 165 (Jones, J., concurring) (emphasis original). But "[u]sing political affiliation as a *factor* in filling appointments is drastically different from using political affiliation as *an exclusive means* of appointing judges." *Id.* Had Ohio law mandated that a particular political party be favored, or that a particular political party be excluded, it could not have passed muster under the reasoning of either Judge Keith or Judge Jones.

Ohio's exclusion of members of minor political parties from the Ohio Elections Commission is categorical. It leaves no patronage discretion to appointing officers. Party

membership is not just a factor. It is the only factor. Members of minor political parties are excluded.

To be sure, using political party affiliation to maintain balance within agencies -- even agencies charged with enforcing election laws -- can be proper. Many boards and commissions, both within and without the electoral context, define their membership with a nod toward political party affiliation. The Federal Election Commission, for example, is composed of six voting members, "[n]o more than 3" of which "may be affiliated with the same political party." 52 U.S.C. § 30106(a).

Unlike O.R.C. § 3517.152, however, the federal model does not mandate that a precise number of its election commissioners be members of the two major political parties. Nor does federal law prohibit members of minor political parties from serving. It simply says that from whatever political party they come, no more than three of the six members can be from a single political party.⁴ Three Libertarians, or three Greens, could be seated on the Federal Election Commission. Ohio's restriction is a far cry from this more reasonable method.

Defendants cannot cite a single authority supporting the constitutionality of a law like O.R.C. § 3517.152 -- a law that absolutely prohibits members of some political parties from serving on a quasi-adjudicatory commission. None of the political patronage cases from the Sixth Circuit offer support. *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996), which sustained the use of political party status to replace an election auditor, is inapposite. That case involved an intra-party dispute where employees of an incoming County Auditor had been dismissed

⁴ The same is true of all other federal agencies with multiple membership requirements and political limitations. The Federal Trade Commission, for instance, has five members "[n]ot more than three of [which] ... shall be members of the same political party." 15 U.S.C. § 41. No federal law to Plaintiffs' knowledge restricts membership to appointed agencies in the way that O.R.C. § 3517.152 does.

because of their political loyalty to the newcomer's predecessor. The case did not address officials exercising adjudicatory authority and did not involve a ban on members of new or minor political parties.

In *Peterson v. Dean*, 777 F.3d 334 (6th Cir. 2015), meanwhile, the Sixth Circuit merely ruled that the dismissals of several major-party county election commissioners were not unconstitutional under the First Amendment. It had nothing to do with limitations on who could be appointed. The challengers in that case were Democrats who had been dismissed following Republican successes in the 2008 election. *Id.* at 339. No prohibition on minor-party membership, like that presented by O.R.C. § 3517.152, was at issue. (It is not even clear that there were any minor political parties in Tennessee at the time.) Even under these facts, Judge Clay dissented. He argued that the use of patronage was inappropriate: "An official serving a multi-member commission composed of representatives from opposing political parties cannot be presumed to occupy a position of confidential trust in a manner analogous to category one officials and their chief deputies or staff advisors." *Id.* at 355 (Clay, J., dissenting).

Nor do patronage cases outside the Sixth Circuit support Ohio's draconian law. In *Vintson v. Anton*, 786 F.2d 1023 (11th Cir. 1986), a Republican (Vintson) challenged Alabama's practice of factoring for political affiliation when appointing elections inspectors at polling places. Vintson claimed that there were not enough Republicans appointed. Contrary to Ohio's approach, the law at issue in *Vintson* did not mandate a specific number of appointments from any political party, and did not limit appointments to members of the two major political parties. It was politically neutral, stating: "Each political party ... may ... furnish the appointing board a list of not less than three names of qualified electors from each voting place, and from each of said lists an inspector and clerk shall be appointed for each voting place." *Id.* at 1026. Another

provision of Alabama law stated that "[i]f no lists are furnished ..., the appointing board shall appoint inspectors, two of whom shall be members of opposing political parties, if practicable, and shall appoint clerks from opposing political parties, if practicable." *Id.*⁵ Nothing in Alabama law prohibited members of minor parties from serving.

Alabama's law was thus quite different from Ohio's. It did not prohibit minor political parties from having election inspectors appointed. Indeed, had a minor political party submitted a list, it would have had an election officer appointed. Nor did Alabama law categorically limit elections officials to members of the two major parties even when no lists were submitted.

Plaintiffs here do not claim that Ohio cannot use political party affiliation as a factor in the appointment and retention of members of the Ohio Elections Commission. Plaintiffs challenge only Ohio's complete prohibition on members of minor political parties from serving on the Ohio Elections Commission. While the former practice may be constitutional, *see Newman v. Voinovich*, 986 F.2d 159, 161 (6th Cir. 1993),⁶ the latter categorical command plainly is not. *See Adams v. Governor*, 922 F.3d 166 (3d Cir. 2019). Ohio's exclusion from membership on its Elections Commission of members of recognized minor political parties violates the First Amendment to the United States Constitution.

Ohio's facial violation of the First Amendment requires reversal of the Commission's summary dismissal of the Libertarian Party's administrative complaints. In *Williams v.*

⁵ As a factual matter in that case, though any political party (including minor ones) could submit a list and thereby have an appointment, "[i]n 1982 only the Democratic and Republican parties presented lists." *Id.*

⁶ As Judge Clay pointed out in *Dean*, 777 F.3d at 354, the law is unsettled over whether elections officials can even be subjected to patronage dismissals under the First Amendment. *See McConnell v. Adams*, 829 F.2d 1319, 1324 (4th Cir. 1987) (holding that elections officials in Virginia could not constitutionally be dismissed based on party affiliation). Of course, the present case does not deal with patronage dismissals. The question is whether state law may categorically exclude minor party members from ever being appointed to office.

Pennsylvania, 136 S. Ct. 1899, 1909-10 (2016), the Supreme Court ruled that a structurally-flawed decision by a multi-member body (there the Pennsylvania Supreme Court) could not constitute harmless error:

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

Here, the potential for unconstitutional animus is built into the Ohio Elections Commission. Minor party members cannot serve. As in *Williams*, its decision must be set aside. "An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication." *Williams*, 136 S. Ct. at 1909. Like in *Williams*, the matter must be sent back to the Commission for consideration by a politically neutral decision maker. How this is achieved - whether by referral to a local prosecutor (which is what the Commission is empowered to do) or in some other fashion -- is best left to the Commission in the first instance.

II. The Commission's Selective Non-Enforcement of Ohio Law Violated the First and Fourteenth Amendments.

Generally, plaintiffs lack standing to force government to investigate or prosecute alleged civil or criminal wrongdoing. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). This general rule parallels the equally standard rule that government has no constitutional duty to protect its citizenry. See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Consequently, had Plaintiffs asserted against the Commission a claim based on a

constitutional right to some sort of protection, their claim would have failed for lack of both standing and an enforceable right.

Plaintiffs, however, do not assert a right to constitutional protection. Plaintiffs' claim is based on selective non-enforcement under both the First Amendment and the Equal Protection Clause. Plaintiffs' claim is based in equal treatment. It is well-established that even though one has no right to governmental protection (through investigation, prosecution or adjudication), one does have a Fourteenth Amendment right to equal "protective services," the denial of which violates the Equal Protection Clause. The Supreme Court in *DeShaney*, 489 U.S. at 197 n.3, made this clear: "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." (Emphasis added).

Relying on *DeShaney*, courts across the country have recognized that the selective denial of governmental protective services, including investigation and prosecution by police, violates the Equal Protection Clause. *See, e.g., Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) ("selective withdrawal of police protection, as when the Southern states during the Reconstruction era refused to give police protection to their black citizens, is the prototypical denial of equal protection"); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1028 (9th Cir. 2000) ("There is a constitutional right ... to have police services administered in a nondiscriminatory manner."); *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) ("the government may not racially discriminate in the administration of any of its services"); *Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) ("There is no general constitutional right to police protection, but if the state provides police protection it is prohibited from irrational discrimination in providing such protection."); *Mody v. City of Hoboken*, 959 F.2d 461, 466 (3d Cir. 1992) ("discriminatory denial of police protection on the basis of race constitutes a violation

of section 1983"). *See generally* *Burnett v. Springfield Township*, 2014 WL 3109963, *4 (E.D. Pa. 2014) (stating that the plaintiff "does have standing to challenge the defendants' allegedly discriminatory response to both his initial report that his ex-girlfriend was potentially stalking him and to the burglary of his home").

As these cases makes clear, the relevant injury is not only the direct injury caused by the private actor who was not investigated or prosecuted, but is also "the alleged denial of equal police protection." *Estate of Macias*, 219 F.3d at 1028. The required injury-in-fact for purposes of the Equal Protection Clause "is the denial of equal treatment . . . , not the ultimate inability to obtain the benefit." *Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (emphasis added). *See also* *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) ("discrimination itself . . . can cause serious non-economic injuries").⁷

The Seventh Circuit, sitting en banc, discussed the rationale behind proper selective non-enforcement claims. *Del Marcelle v. Brown County*, 680 F.3d 887 (7th Cir. 2012). Nine of the ten judges agreed that even in the context of a "class-of-one" Equal Protection case -- that is, one that does not rely on a suspect/ quasi-suspect class or a fundamental right -- non-enforcement claims are proper. Judge Wood explained for five Judges that the relevant injury in these cases is the denial of equal treatment:

A person who has been adversely affected by discrimination has suffered injury-in-fact; the differential treatment is the cause of his injury; and the injury can be redressed either by damages or injunctive relief. No more is required to support standing.

680 F.3d at 908 (dissenting from the judgment).

⁷ In the event, both injuries exist here. The private actors who staged the debates severely injured the Libertarian Party by denying it the same public access afforded the major parties. The Libertarian Party, as a result, received far fewer votes than it would have. Indeed, it did not meet Ohio law's vote-count needed to remain a qualified political party. Verified Complaint, R.1, at PAGEID # 37-39, ¶¶ 177-89.

Judge Posner, writing for the plurality, did not dispute this. His opinion recognized that the plaintiff had a legitimate claim in theory, but affirmed dismissal based on the plaintiff's failure to properly plead an "improper motive." *Id.* at 899. The majority of Judges on the Seventh Circuit concluded that selective non-enforcement claims are proper even when the case involves a "class of one." *See Snyder v. Smith*, 7 F.Supp.3d 842, 861 (S.D. Ind. 2014) (analyzing *Del Marcelle*). A fortiori, selective non-enforcement claims in the context of suspect classes and fundamental rights are proper.

Freedom of speech and freedom of political association are fundamental rights protected by the First Amendment (as incorporated through the Fourteenth Amendment). Discrimination based on either violates the First Amendment. The Supreme Court has firmly established that the First Amendment protects against political favoritism: "[t]he basic constitutional requirement reflects the First Amendment's hostility to government action that 'prescribe[s] what shall be orthodox in politics.'" *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1417 (2016). A person or political party cannot be penalized for "support[ing] a particular political candidate." *Id.*

The Supreme Court and lower courts have uniformly recognized that selective enforcements and exclusions based on speech and political association is unconstitutional under the First and Fourteenth Amendments. *See Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."); *Wood v. Kesler*, 323 F.3d 872, 883 (11th Cir. 2003); *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 394-95 (6th Cir. 2016). A fortiori, selective non-enforcement claims involving speech and association are actionable under both the First Amendment and Equal Protection Clause. In *Mosley*, 408 U.S. at 96, the Court ruled that discrimination against individuals and groups based on speech is impermissible

under both the First Amendment and the Equal Protection Clause: "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

The use of speech and political association, no less than religion under the First Amendment or race under the Fourteenth Amendment, are "impermissible factors." *See Fulson v. City of Columbus*, 801 F. Supp. 1, 6 (S.D. Ohio 1992) (holding that "exercise of prosecutorial discretion" violates Equal Protection Clause when it is "based on race or some other impermissible factor").

In the present case, Defendants chose not to enforce Ohio law against the candidates of the two major political parties (and those who agreed with them to stage exclusive debates) because of the Defendants' animus in favor of the two major political parties. Verified Complaint, R.1, at PAGEID # 43-44, ¶¶ 207-216. Two of the Commissioners recognized their bias and disqualified themselves. *See* Exhibit 5. The remaining four political-party members, along with Commissioner Norman, the lone unaffiliated member, chose to proceed.

Defendants' improper animus in favor of the two major political parties may be inferred from the intersection of the following uncontested facts: (1) the Commission's unconstitutional membership restriction awarding the major political parties six seats on the Commission; (2) the Commission's disregard of its counsel's recommendation, *see* Exhibit 1; (3) its disregard of clearly established law in Ohio,⁸ Verified Complaint, R.1, at PAGEID # 23-25, ¶¶ 99-110, law to which its attention had been specifically directed by the Libertarian Party, *id.* at PAGEID #

⁸ An agency's disregard of plain law or unreasonable interpretation of that law may be used to infer improper animus. *See, e.g., Stewart B. McKinley Foundation v. Town Plan and Zoning Comm'n of Fairfield*, 790 F. Supp. 1197, 1213-16 (D. Conn. 1992).

41, ¶ 98; (4) the summary fashion, without explanation, in which it dismissed the Libertarian Party's administrative complaints based on "no violation," *see* Exhibit 3; and (5) Commissioner Norman's⁹ comment to a news reporter that it was permissible for debates in Ohio to be limited to the two major political parties. Verified Complaint, R.1, at PAGEID # 42, ¶ 205.

The Commission's dismissals can only be understood as being motivated by its political animus in favor of the two major political parties. There is no other reasonable explanation. Ohio law mandates that the Commission's seven seats be held by six individuals who are members of the two major political parties. Two Commissioners admitted bias and disqualified themselves. Even the lone unaffiliated member, Commissioner Norman, admitted his bias in favor of exclusive major-party debates. If that were not enough, the Commission disregarded the advice of its own lawyer, Mr. Richter, an expert who had worked for the Commission for years. It found "no violation" in spite of Mr. Richter's recommending that the Commission find a violation. Ohio's law banning corporate aid, moreover, is both plain and has been routinely enforced. The Commission's ignoring this law and summarily accepting the legal arguments of the major-party candidates demonstrates how eager it was to rule in their favor.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be **GRANTED.**

⁹ Commissioner Norman made the successful motion to dismiss the Libertarian Party's administrative complaints. *See* Exhibit 2 (attached).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was filed using the Court's electronic filing system and will be delivered to all counsel of record. The foregoing was also e-mailed to Tiffany Carwile, Esq., counsel for the Defendants, at Tiffany.Carwile@ohioattorneygeneral.gov this same day.

/s/ Mark R. Brown

Mark R. Brown