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
Magistrate Judge Jolson

CHARLETA B. TAVERAS,[1]
NATASHA D. KAUFMAN,[2]
OTTO BEATTY, III,
DENNIS BROMMER,
D. MICHAEL CRITES,
CATHERINE A. CUNNINGHAM, and
A. SCOTT NORMAN, in their official capacities,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION
AND ATTACHED MEMORANDUM OF LAW IN SUPPORT

Plaintiffs pursuant to Federal Rule of Civil Procedure 65(a) and Local Rule 65.1 move the Court to enter a preliminary injunction (1) declaring that Ohio Revised Code § 3517.152, which restricts membership on the Commission to members of the two major political parties and prohibits members from minor political parties from serving, violates the First and Fourteenth Amendments, (2) prohibiting its enforcement, (3) directing Defendants (hereinafter the "Ohio Elections Commission" or "Commission") to vacate their previous dismissal of Plaintiffs' two administrative complaints described in the Verified Complaint, Doc. No. 1, (4)

[1] Defendant-Wilhelm's tenure in office expired and he was replaced by Charleta B. Taveras, who under Federal Rule of Civil Procedure 25(d) is automatically substituted for her predecessor in office.

[2] Defendant-Balcolm's tenure in office expired and she was replaced by Natasha D. Kaufman, who under Federal Rule of Civil Procedure 25(d) is automatically substituted for her predecessor in office.

directing the Commission to refer Plaintiffs' two administrative complaints to a neutral decision maker for timely resolution under Ohio law, (5) enjoining the Ohio Elections Commission as presently constituted from considering administrative complaints brought against or on behalf of minor political parties or their candidates in the future, and (6) directing the Commission as presently constituted to refer administrative complaints brought against or on behalf of minor political parties or their candidates to neutral decision makers in the future.

In support of this Motion, Plaintiffs incorporate into this Motion their Verified Complaint, Doc. No. 1, the supporting Exhibits included with their Motion for Summary Judgment, Docs. No. 6-1, 6-2, 6-3, 6-4, and 6-5, the four Exhibits attached to Plaintiffs' Response to Defendants' Motion to Dismiss, Docs. No. 11-1, 11-2, 11-3, and 11-4, and the attached Memorandum of Law.

Plaintiffs pursuant to Local Rule 65.1 certify that Defendants have been properly served under Federal Rule of Civil Procedure 4 and that Defendants' counsel has previously entered appearances in this case and accordingly has been and will be properly served under Federal Rule of Civil Procedure 5 with the Verified Complaint, this Motion, all Motions, the accompanying Memorandum of Law, and all Exhibits previously filed with the Court.

Respectfully submitted,

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Case No. 19-2501
Judge Marbley
Magistrate Judge Jolson

TAVERAS,[1] **et al.,**

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs filed this action on June 15, 2019 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. *See* Verified Complaint, Doc. No. 1. Plaintiffs seek preliminary relief enjoining Ohio's political party restrictions found in O.R.C. § 3517.152, directing the Commission to reconsider through a neutral decision maker its dismissal of Plaintiffs' two administrative complaints, and barring the Commission (as presently constructed) from participating in future matters brought by or against minor political parties.

Facts[2]

During the 2018 gubernatorial campaign, Richard Cordray (the Democratic nominee) and Richard Michael ("Mike") DeWine (the Republican nominee), along with three non-profit

[1] Charleta B. Taveras is automatically substituted under Federal Rule of Civil Procedure 25(d).

[2] The material uncontested facts supporting this Motion are set out in Plaintiffs' Verified Complaint, Doc. No.1, the five Exhibits attached to the Plaintiffs' Motion for Summary Judgment, Doc. Nos. 6-1, 6-2, 6-3, 6-4, and 6-5,and the four Exhibits attached to Plaintiffs' Response to Defendants' Motion to Dismiss, Docs. No. 11-1, 11-2, 11-3, and 11-4, which Plaintiffs incorporate herein.

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, Doc. No. 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, respectively. *Id*.

Of the four qualified 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-Newton (Green), were excluded. *Id*. at ¶¶ PAGEID # 22-23, ¶¶ 92-95.

Because they treated the four gubernatorial candidates unequally and without pre-existing objective criteria, the three debates violated federal tax laws and, Plaintiffs argued to the Commission, 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 model on which it is patterned) 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 may sponsor, coordinate, plan or stage candidates' debates under federal campaign finance laws and federal tax laws is to at bare minimum do so on an egalitarian basis, applying existing rules equally to all

qualified candidates. *Id*. *See La Botz v. Federal Election Commission*, 889 F. Supp.2d 51 (D.D.C. 2012). Ohio law, enforced by the Commission, imposes this same restriction.

The Libertarian Party filed timely complaints with the Ohio Elections Commission challenging these debates in September and October of 2018. Verified Complaint, Doc. No. 1, PAGEID # 39, ¶ 190. 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. These facts, as repeated in the Verified Complaint, were exhaustively recited and documented by the Libertarian Party in its administrative complaints. Verified Complaint, R.1, at PAGEID # 41, ¶ 198.

The Ohio Elections Commission, whose members are the Defendants in this case, dismissed Plaintiffs administrative complaints in December 2018. In doing so, the Commission rejected the official recommendation of its own Executive Director/Attorney. *See* Administrative Minutes, Doc. No. 6-2; Case Doc. No. 6-4.[3] The Commission offered no explanation in its decision, but Commissioner-Norman stated to the Associated Press that "he didn't think the minor parties had the law on their side. Debates featuring only the Democratic and Republican candidates are nothing new in Ohio." Julie Carr Smyth, *Ohio election panel tosses minor political parties' debate complaint*, ASSOCIATED PRESS, December 6, 2018;[4] *see* Verified Complaint, R.1, at PAGEID # 42, ¶ 205. Commissioner Norman's public statement made clear to the major parties, their corporate supporters, their candidates, voters and everyone else in Ohio

[3] Two Commissioners, Crites and Wilhelm, disqualified 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." *See* Doc. No.6-5. This illustrates the impact restricting membership to major-party has on the Commission's assigned functions.

[4] http://www.apnews.com/cyc9411bcle407ebdb0fc2d2f6b2fb8 (last visited Feb. 19, 2019).

that it was perfectly proper to hold exclusive debates between "Democratic and Republican candidates." If nothing else, the Commission would not enforce Ohio's ban.

Plaintiff-LPO on February 14, 2019, when the Commission's decision became final and the administrative record was finalized, filed two timely administrative appeals, one from the dismissal of each of the two consolidated administrative hearings, in the Franklin County Court of Common Pleas. It shortly thereafter amended its administrative appeals to include the federal constitutional claims now being presented to this Court. The Commission 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. The Court of Common Pleas, on the Commission's motion and over Plaintiff-LPO's objection, stayed all of its proceedings, including all future discovery, on April 19, 2019. *See* Plaintiffs' Response to Motion to Dismiss, Doc. No. 11-3.[5]

On June 15, 2019, because of the stay in state court and the uncertainty that court expressed over its jurisdiction, Plaintiffs filed the instant action in this Court making the identical federal constitutional claims it had attempted to argue in state court. On June 21, 2019, the parties to the by-then consolidated administrative appeals stipulated to a dismissal of Plaintiffs' constitutional claims without prejudice based on the state court's lack of jurisdiction over them.

Based on the Commission's assurance in state court that no additional documents relating to the gubernatorial debates existed,[6] Plaintiffs proceeded in this Court under the assumption that they were in complete possession not only of the true and authentic official administrative

[5] The Court of Common Pleas' Order remains in place and the proceedings remain frozen.

[6] In the state court proceedings, Plaintiffs had on March 8, 2019 served on Defendants a Request for Production of Documents asking for relevant documents beyond those in the administrative record. *See* Plaintiffs' Response to Motion for Protective Order, Ex. 1, Doc. No. 24-1. On April 8, 2019, Defendants denied that any documents existed outside the official administrative record. Defendants, Plaintiffs now know, were wrong, as the record in the present case demonstrates. Defendants were in possession of relevant documents but failed to produce them.

record, but also of all relevant documents of any sort pertaining to the administrative complaints.

Plaintiffs reasonably drew from the Commission's representation, and it refusal to allow discovery in the state court proceedings, that summary judgment was immediately in order in this Court. Plaintiffs accordingly on June 28, 2019 moved for Summary Judgment. *See* Motion for Summary Judgment, Doc. No. 6. Although moving early for Summary Judgment is not common, Plaintiffs' Motion reflected a reasoned cost-benefit analysis at the time. Plaintiffs had been formally assured in state court that the record was complete and no other relevant documents existed. The Commission refused to allow discovery in the state court proceedings. Plaintiffs reasonably believed that discovery in the federal action, which was identical to that they had attempted in state court, was unnecessary. Plaintiffs believed that summary judgment was the most efficient mechanism for all involved to resolve the case in a timely fashion before the 2020 election cycle commenced six months later.

Defendants on July 12, 2019 moved this Court to dismiss Plaintiffs' case for lack of jurisdiction (both personal and subject matter), *see* Doc. No. 7, and to stay briefing on Plaintiffs' Motion. *See* Doc. No. 10. This Court on August 1, 2019 granted Defendants' motion to stay briefing on Plaintiffs' Motion for Summary Judgment. *See* Opinion and Order, Doc. No. 16, at PAGEID # 311. In doing so, however, the Court noted the time-sensitive nature of the case and the temporal constraints imposed on scheduling decisions by the upcoming electoral cycle. It referred to Plaintiffs' argument "that these claims need to be addressed before any 2020 debates" and responded that "there is yet time to do so, and such time constraints can be considered when setting a case schedule." *Id.* (emphasis added).

Like Plaintiffs, the Court was led to believe that only "minimal" discovery was needed; after all, "Defense counsel has not shown how allowing discovery in this case would rebut the

Plaintiffs' Motion for Summary Judgment." *Id*. at PAGEID# 308. Indeed, the Court reported that "Defendants concede that discovery is likely unnecessary." *Id*. (emphasis added). "Nevertheless," the Court concluded, "Defendants should …be given the opportunity to evaluate the need for discovery and collect the facts, however minimal, required to defend the case." *Id*. at 310.

Magistrate Judge Jolson on August 8, 2019 directed the parties to propose a scheduling order, *see* Doc. No. 17, which they filed on August 13, 2019. *See* Doc. No. 18. The parties' agreed order, adopted by the Court on August 22, 2019, set two critical deadlines in this case: (1) "All discovery shall be completed by September 30, 2019;" and (2) "Any dispositive motion shall be filed by December 20, 2019." Scheduling Order, Doc. No. 19, at PAGEID # 318 (emphasis added).

Plaintiffs on August 12, 2019, meanwhile, served 25 Interrogatories on Defendants and noticed the deposition of Defendant-Norman as well as tendering a Rule 30(b)(6) Notice to depose the Ohio Elections Commission. Over two weeks later, on August 30, 2019, Defendants objected to the deposition of Defendant-Norman. Defendants also refused to answer the great bulk of Plaintiffs' Interrogatories, claiming deliberative privilege protected virtually everything. Defendants also on August 30, 2019 served on Plaintiffs 28 Interrogatories, various requests for admissions and a Rule 34 request for documents.

Because of Defendants' objections to Plaintiffs' discovery requests, Magistrate Judge Jolson on September 11, 2019 stayed discovery. Order, Doc. No. 25, at PAGEID # 417 (emphasis added). On October 3, 2019, Judge Jolson continued this stay in light of Defendants' claim to deliberative process privilege until the Court disposed of Defendants' Motion to Dismiss. *See* Order, Doc. No. 27.

Plaintiffs during the 41 days the discovery stay was in place answered all of Defendants' Interrogatories and requests for admissions and gathered hundreds of pages of documents for delivery to Defendants. These Answers and documents were served on Defendants in complete fulfillment of Defendants' discovery requests on October 24, 2019, two days after the Court resolved Defendants' Motion to Dismiss.

The Court on October 22, 2019 ruled on Defendants' Motion to Dismiss, dismissing Counts Two and Three while leaving in place Count One, Plaintiffs' facial First Amendment challenge to O.R.C. § 3517.152(a). In allowing Count One to move forward, the Court observed that § 3517.152(a) "prohibits any person affiliated with a minor political group, such as Ohio's Libertarian Party, from being considered for membership on the Commission." *Libertarian Party of Ohio v. Wilhelm*, 2019 WL 5395532, *4 (S.D. Ohio 2019); Doc. No. 29. Relying on *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), the Court concluded that Ohio's prohibition on minor-party members serving on the Commission violated the First Amendment in the absence of some compelling justification:

> O.R.C. § 3517.152 is comparable to the statute at issue in *Adams*, which categorically excluded affiliates of a minority party from becoming judges in Delaware. And, the role of Ohio's Elections Commission, in many ways, resembles that of a judge adjudicating a case. For instance, the Commission is authorized to find violations of Ohio's campaign finance laws, assess fines, and refer violations to the local prosecutor. *See* O.A.C. §§ 3517-1-14(B)(3) and (C). These decisions, in theory, should not bear on political affiliation; rather, they should be objective determinations based on the law. It is difficult to ascertain why an individual who is affiliated with a minor political party cannot effectively perform this function, or even be considered for a position on the Commission.
>
> To be clear, the Court recognizes that the state of Ohio has an interest in the adjudication of its election laws and the appearance of neutrality on its Elections Commission. But to justify the strict construct of O.R.C. § 3517.12, Defendants must demonstrate that this interest is compelling and that the statute is narrowly tailored to achieve that interest. At this juncture, the Court expresses no opinion as to whether Defendants can satisfy this burden.

Libertarian Party of Ohio v. Wilhem, 2019 WL 5395532, at *6 (citations omitted).

Recognizing that the Court's dismissal of Counts Two and Three of their Complaint dispensed with the need for even minimal discovery, Plaintiffs on October 24, 2019 notified Defendants that they (Plaintiffs) were withdrawing all their discovery requests. Plaintiffs on this day also served on Defendants answers, admissions and documents that Defendants had previously requested on August 30, 2019 in full satisfaction of their written discovery requests. But for the discovery stay put in place on September 11, 2019, these responses would have been due and delivered by September 30, 2019, the discovery deadline. (Assuming the discovery deadline were extended for 41 days, which is how long the stay was in place, Plaintiffs' responses were now being delivered two weeks early.) Plaintiffs additionally notified Defendants that the two witnesses (Plaintiff-Thomas and Travis Irvine) Defendants had sought to depose before the stay were prepared to sit that week for their depositions.

Had those depositions been conducted, all discovery would have been completed by November 1, 2019 notwithstanding the stay on discovery. Rather than conclude their discovery in this timely fashion, however, Defendants sought and obtained, over Plaintiffs' objection, an additional extension on both the discovery deadline and the briefing deadline. *See* Order, Doc. No. 36. Discovery, which was supposed to have been minimal and which was to be completed by September 30, 2019, was extended to December 16, 2020. Briefing on Summary Judgment -- which this Court had stayed on August 1, 2019 for what it was led to believe would be the time needed to conduct minimal discovery -- will not resume until January 13, 2020. *See* Doc. No. 36.

Argument

Because briefing on Summary Judgment cannot now be completed until February 17, 2020 (assuming the usual time for responses and barring additional objections and extensions

sought by Defendants), and given that the 2020 partisan election cycle formally begins on December 18, 2019 with the filing of candidates' nominating papers for partisan offices, *see* 2020 OHIO ELECTIONS CALENDAR,[7] Plaintiffs respectfully request preliminary relief to maintain a politically level playing field throughout the 2020 campaign season.

As explained in detail below, even if a decision on Plaintiffs' Motion for Summary Judgment were rendered by March 1, 2020, immediately following the close of briefing, the electoral "ballgame" would already have progressed well beyond its second or third inning. Removing a biased umpire in the middle of that game does not make the whole game fair. To insure that voters, candidates, and political parties enjoy a fair game, the biased umpire needs to be removed before the first pitch. The umpire needs to removed now.

The Standard For Winning Preliminary Relief

"When a district court is asked to issue a preliminary injunction, it … balances four factors …: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995).

A. Likelihood of Success

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

The Ohio Elections Commission is authorized to investigate and find violations of Ohio's campaign finance restrictions, including § 3599.03 of the Ohio Revised Code (which bans

[7] https://www.ohiosos.gov/globalassets/publications/election/2020electioncalendar_12x18.pdf (last visited Oct. 31, 2019).

corporate contributions used to finance exclusive debates), assess fines, and refer criminal violations to local prosecutors. *See* O.A.C. 3517-1-14(B)(3); O.A.C. § 3517-1-14(C)(2)(a). The Commission consequently exercises 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).[8]

As this Court recognized in denying Defendants' Motion to Dismiss on October 22, 2019, § 3517.152(a) "prohibits any person affiliated with a minor political group, such as Ohio's Libertarian Party, from being considered for membership on the Commission." *Libertarian Party of Ohio v. Wilhelm*, 2019 WL 5395532, *4 (S.D. Ohio 2019); Doc. No. 29. The Commission, as this Court further recognized, "is authorized to find violations of Ohio's campaign finance laws, assess fines, and refer violations to the local prosecutor. *See* O.A.C. §§ 3517-1-14(B)(3) and

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

(C)." *Libertarian Party of Ohio v. Wilhelm*, 2019 WL 5395532, *4 (S.D. Ohio 2019); Doc. No. 29.

Because of O.R.C. § 3517.152's political-party restrictions, members of minor political parties, including the Libertarian Party, are categorically precluded from serving as Commissioners. They can have no say in the enforcement of campaign finance laws against them and their candidates. Those decisions, even when leveled by or against the major parties, are made exclusively by members of the major parties themselves. It is no different than having a baseball team's players call balls and strikes on themselves while also calling balls and strikes on the opposing team. It is patently unfair.

Relying on *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), this Court in denying Defendants' Motion to Dismiss correctly concluded that Ohio's prohibition on minor-party membership, in the absence of a compelling justification, violated the First and Fourteenth Amendments:

> O.R.C. § 3517.152 is comparable to the statute at issue in *Adams*, which categorically excluded affiliates of a minority party from becoming judges in Delaware. And, the role of Ohio's Elections Commission, in many ways, resembles that of a judge adjudicating a case. For instance, the Commission is authorized to find violations of Ohio's campaign finance laws, assess fines, and refer violations to the local prosecutor. *See* O.A.C. §§ 3517-1-14(B)(3) and (C). These decisions, in theory, should not bear on political affiliation; rather, they should be objective determinations based on the law. <u>It is difficult to ascertain why an individual who is affiliated with a minor political party cannot effectively perform this function, or even be considered for a position on the Commission</u>.

Libertarian Party of Ohio v. Wilhelm, 2019 WL 5395532, at *6 (citations omitted and emphasis added).

The Court continued:

> To be clear, the Court recognizes that the state of Ohio has an interest in the adjudication of its election laws and the appearance of neutrality on its Elections Commission. But to

> justify the strict construct of O.R.C. § 3517.12, Defendants must demonstrate that this interest is compelling and that the statute is narrowly tailored to achieve that interest.

Id. (emphasis added).

The Court's reliance on *Adams v. Governor*, 922 F.3d 166 (3d Cir. 2019), is undoubtedly correct. 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 Adams. The categorical restrictions found in Delaware law -- one "that limit[ed] Adams's ability to apply for a judicial position while associating with the political party of his choice," *id*. at 169 (emphasis added) -- violated the First Amendment. Delaware's categorical restrictions on judicial appointments closely resemble those now found in O.R.C. § 3517.152. Like O.R.C. § 3517.152, it categorically prohibited non-major party members from applying or being considered. And like Ohio's law here, it attempted to achieve political balance by excluding people who were not members of major parties. For example, according to Delaware's 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. Similar restrictions were imposed on other courts. In sum, the Third Circuit explained in Adams, 922 F.3d at 171: "[i]n 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, must satisfy strict scrutiny. Simply put, it cannot.

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. "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," the Third Circuit stated, "simply do not fit this description." *Id*. at 179.

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 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, for example, the penalties that may be imposed by the Commission for improper corporate contributions may reach into thousands of dollars.

Plaintiffs concede that Ohio, like Delaware, has a legitimate interest in political balance in the context of investigating and adjudicating election disputes. The problem is that O.R.C. § 3517.152, like Delaware's law, does not further this goal. Far from advancing political balance, it precludes it. It insures that political balance cannot exist by excluding members of qualified parties. At bare minimum, the members of recognized political parties ought to be allowed to at least be considered for membership on the Commission. Under Ohio law, however, that is impossible.

Even if Ohio's Commissioners make policy through adjudication, and even if Ohio's interest in political balance were truly compelling, Ohio's categorical exclusion of members of qualified minor political parties is not narrowly tailored. It is not the least restrictive way of obtaining Ohiio's objective. It is far too much medicine to pass the means prong of strict scrutiny.

The Third Circuit in *Adams*, 922 F.3d at 180-81, recognized this fact 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 a majority of the Judges on that panel.

To be sure, using political party affiliation to maintain proper balance within agencies -- even agencies charged with administering election laws -- can be proper. Many boards and commissions throughout the country, 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). Federal agencies commonly employ similar requirements.[9] None of these agencies, however, categorically ban members of minor political parties from serving.

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 quasi-adjudicatory agencies. 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

[9] 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.

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 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 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 restriction. 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*.[10] Nothing in Alabama law prohibited members of minor parties from serving.

2. The Commission's Dismissal of Plaintiffs' Administrative Complaints Must Be Set Aside, the Commission Directed to Properly Reconsider it, and the Commission Enjoined from Considering Matters Involving Minor-Party Candidates and Parties in the Future.

Ohio's facial violation of the First Amendment requires reversal of the Commission's summary dismissal of the Libertarian Party's administrative complaints. As it stands, an inherently biased adjudicative body has publicly stated to the voters of Ohio, as well as the major parties, their corporate sponsors, and their candidates, that it is permissible and proper for corporations to funnel money to major-party candidates through exclusive debates. This announcement was incorrect as a matter of Ohio law, and worse yet was rendered by a constitutionally flawed agency. The Commission was and remains inherently and unconstitutionally biased.

In *Williams v. 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) had to be set aside:

[10] 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*.

> 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.

(Emphasis added).

Here, as in *Williams*, the potential for unconstitutional animus is built into the Commission. Members of minor political parties cannot take any of the Commission's seven seats. This is the same problem in *Williams* multiplied by seven. As stated by the Supreme Court, after all, "[a]n 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 (emphasis added).

As in *Williams*, the matter must be sent back to the Commission for further review. Plaintiffs' administrative complaints must be considered by a politically neutral decision maker. How this is achieved is best left to the Commission in the first instance.

Further, the Commission must be restrained from taking action in future cases in which its political neutrality might be reasonably questioned. It must be restrained from taking action in cases involving minor political parties and their candidates. Whether an administrative complaint is filed on behalf of or against a minor party or its candidates, the Commission (as presently constructed) must be disqualified. It must use a neutral decision maker.

B. Irreparable Harm

According to its official web page, the Commission "handles between 800 and 1000 complaints filed with it in a year from three (3) sources: one of the 88 County Boards of Elections, the office of the Secretary of State, or from individuals upon the submission of an affidavit of complaint based on personal knowledge." OHIO ELECTIONS COMMISSION, HISTORY,

http://elc.ohio.gov/ (last visited Oct. 29, 2019). "The vast majority of these matters," it states, "deal with candidates, campaign committees, political action committees, or corporations that are either late in filing or fail to file the required campaign finance reports." *Id*. "The remainder of the cases concern whether someone did or did not include a disclaimer on their political literature, corporate activities in the political arena, or the inclusion of allegedly false statements in campaign materials." *Id*.

The activities of the Ohio Elections Commission accordingly reach well beyond determining the legality of debates. Its authority reaches all aspects of the electoral process, beginning with the filing of candidates' papers, continuing through their campaigning and filing campaign finance reports, stretching through debates, and culminating in their successes or defeats at the polls. In Ohio, candidates file for the 2020 primaries on December 18, 2019. *See* 2020 OHIO ELECTIONS CALENDAR.[11] They and their parties must file campaign finance reports by January 31, 2020. *Id*. Additional reports are filed before March 5, 2020. *Id*. It is doubtful given Defendants' insistence on continuing discovery and delayed deadlines that Plaintiffs' Motion for Summary Judgment can be resolved before any of this happens. Preliminary relief is needed now to remove Ohio's biased umpire before the first pitch.

The Commission's dismissal of Plaintiffs' administrative complaints and public announcement that exclusive debates between major-party candidates are proper has inflicted irreparable injury on Plaintiffs. Indeed, the Commission's institutional bias threatens Plaintiffs with irreparable harm in all facets of the 2020 electoral process.[12] All of this is irreparable. It is

[11] https://www.ohiosos.gov/globalassets/publications/election/2020electioncalendar_12x18.pdf (last visited Oct. 29, 2019).

[12] For instance, as reported in *Earl v. Ohio Elections Commission*, 2016 WL 5637037 (Ohio 10th DCA 2016), the Commission refused to investigate a Libertarian Party member's administrative complaint charging Republicans with making illegal campaign contributions to the Republican

irreparable now. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."*See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. Defendants Will Suffer No Injury

Defendants will suffer no injury should the Court enter preliminary relief. Ohio's elections laws can be enforced so long as they are not enforced by the Commission's biased membership against minor parties and candidates. Enforcement can easily be referred to neutral decision makers who do not suffer the Commission's debilitating First Amendment flaw.

D. The Public Will Benefit

Preliminary relief will benefit the public because it will insure that parties and candidates play on a level playing field during the entire 2020 election cycle. Voters will plainly benefit.

E. No Security Should Be Required

The Sixth Circuit has observed that security is not mandatory under Rule 65(c), and can be dispensed with in the discretion of the court. *See Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). No security is needed in this case, as it threatens no financial harm to Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs' respectfully request that their Motion for Preliminary Injunction be **GRANTED**.

Party's candidate for Governor, notwithstanding documentation showing that hundreds of thousands of dollars had been suspiciously dispersed.

Respectfully submitted,

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