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

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

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully move for Summary Judgment under Federal Rule of Civil Procedure 56 in the above-styled case. According to the Court's Scheduling Order entered on October 31, 2019, Order, R.36, dispositive motions in the above-styled case are due by January 13, 2020. Plaintiffs respectfully submit that (as is demonstrated in the accompanying Memorandum of Law) there remains "no genuine dispute as to any material fact" in the case and that Plaintiffs are therefore "entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a).

Because Plaintiffs are entitled to judgment as a matter of law, Plaintiffs respectfully request that the Court grant Plaintiffs' the relief demanded in their Verified Complaint, including (1) "[a] declaration under 42 U.S.C. §1983 and 28 U.S.C. § 2201 that the Ohio Elections Commission's dismissal of Plaintiffs' two administrative complaints violated the First Amendment to the United States Constitution as incorporated through the Fourteenth Amendment to the United States Constitution," Verified Complaint, R.1, at PAGEID # 52;

(2) "[a] declaration under 42 U.S.C. §1983 and 28 U.S.C. § 2201 that the Ohio Elections Commission's politically-biased membership restrictions found in O.R.C. § 3517.152 violate the

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

First Amendment to the United States Constitution as incorporated through the Fourteenth Amendment to the United States Constitution," *id.*;

(3) "[a]n injunction under 42 U.S.C. §1983 prohibiting enforcement of Ohio's politically biased membership restrictions in O.R.C. § 3517.152 placed on members of the Ohio Elections Commission," *id.*;

(4) "[a]n injunction directing the Ohio Elections Commission to reconsider Plaintiffs' two unconstitutionally dismissed administrative complaints under a properly constituted tribunal using Ohio law without political animus favoring the Democratic and Republican parties," *id.*;

(5) "[a]ny other relief that the Court deems just," *id.* at PAGEID # 53; and

(6) "[a]n award of costs and attorney's fees under 42 U.S.C. § 1988(b)." *Id.*

Plaintiffs submit the accompanying Memorandum of Law, with citations to relevant parts of the Record, including the Verified Complaint, R.1; five Exhibits attached to Plaintiffs' First Motion for Summary Judgment, R.6-1, 6-2, 6-3, 6-4, and 6-5; four Exhibits attached to Plaintiffs' Response to OEC's Motion to Dismiss, R.11-1, 11-2, 11-3, and 11-4; the Declaration of Plaintiff-Harold Thomas, R.44-1; and admissions in Defendants' Answer, R. 40, in support of this Motion.

Respectfully submitted,

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

Statement of the Case

Plaintiffs (hereinafter LPO) filed this action on June 15, 2019 against Defendants in their official capacities as members of Ohio's Elections Commission (OEC) under 42 U.S.C. § 1983, *Ex parte Young*, 209 U.S. 123 (1908), and the First and Fourteenth Amendments. *See* Verified Complaint, R.1. LPO seeks permanent relief (1) declaring unconstitutional and enjoining Ohio's political party restrictions on OEC membership found in O.R.C. § 3517.152, (2) reinstating, and directing OEC to reconsider through a constitutionally structured decision maker, LPO's two administrative complaints filed with OEC against the 2018 Democratic and Republican gubernatorial candidates and their corporate sponsors, and (3) enjoining OEC (as presently constructed by O.R.C. § 3517.152) from adjudicating future election disputes in Ohio. *See* Verified Complaint, R.1, at PAGEID # 52-53.

Based on its reasonable belief that the material facts in this matter were not in dispute, LPO on June 28, 2019 filed its first Motion for Summary Judgment in this case. *See* Motion for Summary Judgment, R.6. Rather than respond to LPO's' Motion for Summary Judgment, OEC on July 12, 2019 moved to dismiss LPO's' case for lack of jurisdiction (both personal and subject matter), *see* R.7, and to stay briefing on LPOs' Motion for Summary Judgment. *See* R.10.

The Court on August 1, 2019 granted Defendants' motion to stay briefing on Plaintiffs' First Motion for Summary Judgment. *See* Opinion and Order, R.16, at PAGEID # 311. In doing so, however, the Court noted the time-sensitive nature of the case and the temporal constraints imposed by the upcoming election cycle. *Id*. The Court observed that it believed only "minimal," if any, discovery would be needed -- "Defendants concede that discovery is likely unnecessary." *Id*. at PAGEID #308.

The Court on August 8, 2019 directed the parties to propose a scheduling order, *see* R.17, which was duly filed on August 13, 2019. *See* R.18. The parties' agreed order, adopted by the Court on August 22, 2019, set two deadlines in the 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, R.19, at PAGEID # 318.

LPO on August 12, 2019 served 25 Interrogatories on Defendants, noticed the deposition of Defendant-Norman, and tendered a Rule 30(b)(6) Notice to depose OEC. After waiting two weeks, on August 30, 2019 OEC objected to the deposition of Defendant-Norman. Defendants also refused to answer the great bulk of LPO's Interrogatories, claiming deliberative privilege. Meanwhile, OEC on August 30, 2019 served on LPO 28 Interrogatories, various requests for admissions and a Rule 34 request for documents.

Based on OECs' objections, Judge Jolson on September 11, 2019 stayed discovery. Order, R.25, at PAGEID # 417. On October 3, 2019, she continued this stay on discovery until that time the Court disposed of OEC's Motion to Dismiss. *See* R. 27.[1]

The Court ruled on OEC's Motion to Dismiss on October 22, 2019. In its ruling, the Court dismissed Counts Two and Three of LPO's Verified Complaint (which alleged violations of the First Amendment and Equal Protection Clause through selective non-enforcement)[2] while leaving in place Count One, LPO's facial First Amendment challenge to O.R.C. § 3517.152's categorical exclusion of minor-party members from service on Ohio's Election Commission.

[1] LPO during the roughly 41 days of the discovery-stay answered all of OEC's Interrogatories and requests for admissions and gathered hundreds of pages of documents for delivery to OEC. These Answers and documents were served on OEC in fulfillment of OEC's discovery requests on October 24, 2019, two days after the Court resolved OEC's Motion to Dismiss.

[2] Recognizing that the Court's dismissal of Counts Two and Three of their Complaint dispensed with the need for even minimal discovery, LPO on October 24, 2019 notified OEC that it (LPO) was withdrawing its outstanding discovery requests.

In allowing Count One to move forward, the Court observed that O.R.C. § 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); R.29. Relying on *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), *cert. granted sub nom., Carney v. Adams*, 2019 WL 6647103 (U.S., Dec. 6, 2019), the Court concluded that Ohio's prohibition on minor-party members serving on OEC would necessarily violate 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.

Wilhelm, 2019 WL 5395532, at *6 (citations omitted and emphasis added).

Following the Court's October 22, 2019 Order sustaining the viability of LPO's Count One challenge to O.R.C. § 3517.152, OEC sought and obtained, over LPO's objection, an extension from on both the prior-agreed-to discovery deadline and its resulting briefing schedule. *See* Order, R.36. Per OEC's request, the discovery deadline was extended to December 16, 2019 and the briefing schedule was pushed back to January 13, 2020. *See* Order, R.36.

Because of these extensions and press of the upcoming election cycle (set to officially begin on December 18, 2019 with the filing of political primary papers,)[3] LPO on November 1, 2019 was forced to seek preliminary relief. *See* Motion for Preliminary Injunction, R.37. The Court on November 4, 2019, Order, R.39, ordered a scheduling conference for November 14, 2019. *See* Order, R.41. Following the November 14, 2019 conference, the Court scheduled a hearing for November 25, 2019 on LPO's Motion for Preliminary Injunction. *See* Order, R.41. Discovery was directed by the Court to be completed before this hearing.

LPO on November 18, 2019 requested that its Motion for Preliminary Injunction be consolidated with a trial on the merits and finally resolved at the November 25, 2019 hearing. *See* Plaintiffs' Motion to Consolidate with Trial on Merits, R.42. Defendants objected and the hearing was accordingly conducted as a preliminary injunction hearing. The outcome of that hearing remains pending at this time.

All discovery having now been completed and all stays having been lifted, and in accordance with the January 13, 2020 deadline directed by the Court's Scheduling Order, LPO respectfully submits as its dispositive motion this Second Motion for Summary Judgment.

Facts[4]

At all relevant times in this case LPO was and remains a recognized, ballot-qualified political party in Ohio. Complaint, R.1, at PAGEID # 4, ¶ 3; Answer, R.40, at PAGEID # 533, ¶

[3] Ohio's political party primaries, which LPO will participate in as a qualified political party, are scheduled to conclude on March 17, 2020 (election day).

[4] The material uncontested facts supporting this Motion are set out in the Verified Complaint, R.1, the five Exhibits attached to LPO's Motion for Summary Judgment, R.6-1, 6-2, 6-3, 6-4, and 6-5, the four Exhibits attached to LPO's' Response to OEC's Motion to Dismiss, R.11-1, 11-2, 11-3, and 11-4, the Declaration of Harold Thomas, R.44-1 (submitted in support of preliminary relief), and OEC's admissions in its Answer, R. 40. These records are incorporated herein.

3; Complaint, R. 1, at PAGEID # 13, ¶ 13; Answer, R. 40, at PAGEID # 534, ¶ 13.[5] LPO is the third most popular political party in Ohio and in the United States. Its gubernatorial candidate in Ohio in 2018, for example, won 79,985 votes. *See* Declaration of Harold D. Thomas, R.44-1 at PAGEID # 604. Its presidential candidate in 2014 won 174,498 votes. *Id*. LPO routinely runs candidates for office in Ohio. *Id*. In 2018, it ran over twenty candidates for federal, state and local offices. *Id*. In 2019, LPO ran twelve candidates. *Id*. Five won. *Id*. In 2020, LPO expects to run at least twenty candidates for federal, state and local offices. *Id*. at PAGEID # 605. While it is not possible under Ohio law to attach a precise figure to LPO's membership,[6] it is safe to say that LPO's present number of members reaches into the thousands. *See id*.

Defendants are Commissioners of Ohio's Elections Commission (OEC), Complaint, R.1, at PAGEID # 4, ¶ 4; Answer, R.40, at PAGEID # 534-35, ¶ 4, are sued in their official capacities, Complaint, R.1, at PAGEID # 6, ¶ 11; Answer, R.40, at PAGEID # 534, ¶ 11, and at

[5] Defendants answered many allegations in the Complaint by asserting that they (the allegations) stated legal conclusions and required no response. Courts routinely treat responses like these as admissions. "[L]awyers sometimes will respond to an allegation by saying that 'it is a legal conclusion that requires no response.' … Under a strict interpretation of Rule 8(b), these responses constitute admissions." S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 145-46 (2014); *Thompson, v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc*., 2008 WL 5377712, *1-*2 (E.D. Wis. 2008) ("Rule 8 does not permit a defendant to respond only by stating that the plaintiff's allegations 'constitute conclusions of law.'"); *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 278 (N.D. Ill. 2001) (same).; *N. Ind. Metals v. Iowa Exp., Inc*., 2008 WL 27536330, *3 (N.D. Ind. 2008) (same); *Rudzinski v. Metropolitan Life Insurance Co*., 2007 WL 2973830, *4 (N.D. Ill. 2007) (same); *Gulf Restoration Network v. United States Environmental Protection Agency*, 2018 WL 5297743, *2 (E.D. La. 2018) ("Rule 8 itself provides a built-in mechanism for curing such pleading defects: 'An allegation … is admitted if a responsive pleading is required and the allegation is not denied.'").

[6] Because LPO was not allowed primaries in 2018, *see Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 401-02 (6th Cir. 2016), and did not officially exist in 2016, it could not establish an official membership list in the same way that Republicans and Democrats do. *Id*. Until it conducts its primary in March of 2020, its political party membership in Ohio "is purely a matter of self-identification, …." *State ex rel. Bender v. Franklin County Board of Elections*, 157 Ohio St. 3d 120, 124, 132 N.E.3d 664, 668 (2019). This self-identification rule covers all parties and officially reflects party membership just as voting in a political party's primary does in Ohio. *Id*.

all relevant times were acting under color of Ohio law while engaged in state action. Complaint, R.1, at PAGEID # 6, ¶ 10; Answer, R.40, at PAGEID # 534, ¶ 10.

The Ohio Elections Commission (OEC) 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." Complaint, R.1, at PAGEID # 5, ¶ 8; Answer, R.40, at PAGEID # 534, ¶ 8. OEC is authorized by Ohio law to find violations of O.R.C. § 3599.03 (prohibiting corporate aid and illegal debates), assess fines, and refer those who violate § 3599.03 of the Ohio Revised Code for criminal prosecution. Complaint, R.1, at PAGEID # 6, ¶ 9; Answer, R.40, at PAGEID # 534, ¶ 9.

OEC is composed of seven members, six of whom categorically must be members of Ohio's two prevailing "major"[7] political parties. Complaint, R.1, at PAGEID # 4, ¶ 5; Answer, R. 40, at PAGEID # 534, ¶ 5. The remaining, seventh, member must be an unaffiliated voter in Ohio. *Id*. These restrictions were admitted by OEC, *id*., and are proven by the Ohio Secretary of State's official Campaign Finance Handbook, which states:

> 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 Secretary of State, Campaign Finance Handbook, Chapter 14: Ohio Elections Commission 14-3 (2019)[8] (emphasis added).

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[7] A "major" political party in Ohio is one whose candidate for Governor or President "received not less than twenty per cent of the total vote cast for such office at the most recent regular state election." O.R.C. § 3501.01(F).

[8] https://www.sos.state.oh.us/globalassets/candidates/cfguide/chapters/chapter14.pdf) (last visited November 18, 2019).

These mandates governing the composition of OEC's membership are found in O.R.C. § 3517.152, which states:

> [T]he speaker of the house of representatives[9] 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. … [T]he governor shall appoint three persons from each list to the commission.
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> Not later than thirty days after the governor appoints these six members, they shall, by a majority vote, appoint to the commission a seventh member, who shall not be affiliated with a political party. If the six members fail to appoint the seventh member within this thirty-day period, the chief justice of the supreme court, not later than thirty days after the end of the period during which the six members were required to appoint a member, shall appoint the seventh member, who shall not be affiliated with a political party.

(Emphasis added).[10]

For the 2018 election in Ohio, LPO ran Travis Irvine for Governor. Complaint, R. 1, at PAGEID # 6, ¶ 14; Answer, R. 40, at PAGEID # 535, ¶ 14. Meanwhile, the Democratic candidate for Governor in 2018 was Richard Cordray, Complaint, R.1, at PAGEID # 6, ¶ 17;

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[9] Since August 24, 1995, when O.R.C. § 3517.152(A) took effect, all nine Speakers of Ohio's House of Representatives have been either Republicans or Democrats. The speakers have been: Jo Ann Davidson (R), Larry Householder (D), Jon Husted (R), Armond Budich (D), William Batchelder (R), Kirk Schuring (R), Ryan Smith (R), and Larry Householder (R). *See* List of Speakers of Ohio House of Representatives, Wikipedia, https://en.wikipedia.org/wiki/List_of_Speakers_of_the_Ohio_House_of_Representatives (last visited Nov. 19, 2019). Consequently, all political party members of the OEC have been either Democrats or Republicans since § 3517.152 was passed in 1995.

[10] *See also* Kara Baker, Comment, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159, 166 n.60 (2001) ("The Commission is composed of seven members. Six members of the commission are appointed by the governor. The governor appoints three commissioners from each list of five potential candidates submitted by the two prevailing political parties. The six appointed members will then elect the seventh member by majority vote." (citations omitted).

Answer, R.40, at PAGEID # 535, ¶ 17, and the Republican candidate for Governor was Mike DeWine. Complaint, R.1, at PAGEID # 7, ¶ 18; Answer, R.40, at PAGEID # 535, ¶ 18.

Sometime during the summer of 2018, the University of Dayton, Marietta College, the City Club of Cleveland, DeWine and Cordray agreed to stage three exclusive gubernatorial debates in Ohio. Only the Republican (DeWine) and Democratic (Cordray) candidates for Governor would be invited. *See* B.J. Colangelo, *Richard Cordray and Mike DeWine Announce Three Gubernatorial Debates, Including in Cleveland*, CLEVELAND SCENE, Sept. 7, 2018.[11] These debates were held on September 19, 2018 (Dayton), October 1, 2018 (Marietta), and October 8, 2018 (Cleveland).

On September 24, 2018, after the first debate had been held in Dayton, LPO filed with OEC an administrative complaint alleging that the University of Dayton, DeWine, Cordray, the DeWine Campaign, and the Cordray Campaign, together had staged an illegal debate. Complaint, R.1, at PAGEID # 39-40, ¶¶ 190-91; Answer, R.40, at PAGEID # 551, ¶¶ 190-91. On October 9, 2018, following the second (Marietta) and third (Cleveland) debates, LPO filed with OEC an administrative complaint alleging that the City Club of Cleveland, Marietta College, DeWine, Cordray, the DeWine Campaign, and the Cordray Campaign together had staged illegal debates. Complaint, R.1, at PAGEID # 40, ¶ 194; Answer, R.40, at PAGEID # 552, ¶ 194. Both administrative complaints sought appropriate penalties for the offending candidates, campaigns, and corporate sponsors.

LPO's administrative complaints alleged that the staging of these three exclusive debates constituted illegal corporate campaign contributions to Richard Cordray, Richard Michael

[11] https://www.clevescene.com/scene-and-heard/archives/2018/09/07/richard-cordray-and-mike-dewine-announce-three-gubernatorial-debates-including-in-cleveland (last visited Nov. 14, 2019).

DeWine, the Cordray Campaign, and the DeWine Campaign. Complaint, R.1, at PAGEID # 39-40, ¶¶ 190-91; Answer, R.40, at PAGEID # 551, ¶¶ 190-91; Complaint, R.1, at PAGEID # 40, ¶ 195; Answer, R.40, at PAGEID # 552, ¶ 195. OEC does not now contest that these three exclusive debates, under the facts alleged by LPO in its administrative complaints, were illegal under Ohio law. *See* Complaint, R.1, at PAGEID # 23-24, ¶¶ 99-103; Answer, R.40, at PAGEID # 543, ¶¶ 99-103.

On December 6, 2018, OEC announced that it was dismissing both of LPO's administrative complaints. Complaint, R.1, at PAGEID # 42, ¶ 204; Answer, R.40, at PAGEID # 553, ¶ 204. Immediately after OEC's announcement of its dismissal, moreover, OEC Commissioner Norman stated to an Associated Press reporter that exclusive debates between Republicans and Democrats are perfectly proper under Ohio law; the reporter noted that "he (Commissioner Norman) 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." Complaint, R.1, at PAGEID # 42, ¶ 205; Answer, R.40, at PAGEID # 553, ¶ 205.

LPO was formally notified of the OEC's dismissal of its two administrative complaints on February 1, 2019. Complaint, R.1, at PAGEID # 42, ¶ 206; Answer, R.40, at PAGEID # 553, ¶ 206. On February 14, 2019, Plaintiff filed two separate administrative appeals from these two dismissals with the Franklin County Court of Common Pleas. Complaint, R.1, at PAGEID # 44, ¶ 218; Answer, R.40, at PAGEID # 554, ¶ 218. Plaintiffs on March 1, 2019 amended these administrative appeals to include the exact same federal constitutional challenges now being pressed in this Court.

On April 19, 2019, after OEC filed motions to dismiss and stay those two administrative appeals in state court, the Court of Common Pleas stayed both proceedings and directed the

parties to file briefs addressing whether LPO's federal constitutional claims fell within the jurisdiction of the state court. Complaint, R.1, at PAGEID # 45, ¶ 220; Answer, R. 40, at PAGEID # 554, ¶ 220; LPO's Response to Motion to Dismiss, R.11-1 & 11-2. The stay ordered by the state court in those appeals remains in place. Complaint, R.1, at PAGEID # 45, ¶ 223; Answer, R.40, at PAGEID # 554, ¶ 223. LPO and OEC thereafter jointly agreed to a dismissal of LPO's constitutional claims from those administrative appeals without prejudice, *see* LPO's Response to Motion to Dismiss, R.11-4, leaving LPO's federal constitutional claims solely to this (federal) Court. No action on LPO's two remaining administrative appeals (based on state law), meanwhile, has been taken in state court. The two appeals in state court remain stayed.

Argument

> "We do not have Obama judges or Trump judges, Bush judges or Clinton judges … What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."

Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES, Nov. 21, 2018 (quoting the Chief Justice of the United States).[12]

> If there is any category of jobs for whose performance party affiliation is not an appropriate requirement, that is the job of being a judge, where partisanship is not only unneeded but positively undesirable.

Rutan v. Republican Party of Illinois, 497 U.S. 62, 92-93 (1990) (Scalia, J., dissenting).

> [T]here is no such thing as a Republican judge or a Democratic judge. We just have judges in this country.

Senate Confirmation Hearing, the Honorable Neil M. Gorsuch, March 21, 2017, at 70 (statement by Gorsuch, J.).[13]

[12] https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html (last visited Jan. 7, 2020).

I. Ohio's Ban on Minor Party Members Serving on OEC Violates the First and Fourteenth Amendments.

This Court recognized in denying OEC's Motion to Dismiss that Ohio law, specifically O.R.C. § 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); R. 29. OEC, as this Court further found, "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)." *Wilhelm*, 2019 WL 5395532, *4; R.29. OEC's members, in short, act as judges. They judge; they punish; and sometimes they refuse to penalize those who deserve punishment. Regardless, Ohioans like all Americans are entitled to impartial justice -- in appearance as well as fact. OEC, unfortunately, can provide neither. It is constructed to benefit the major parties.

Relying on *Adams v. Governor of Delaware*, 922 F.3d 166 (3d Cir. 2019), *cert. granted sub nom.*, *Carney v. Adams*, 2019 WL 6647103 (U.S., Dec. 6, 2019), the District Court in its October 22, 2019 Order denying OEC's Motion to Dismiss correctly stated:

> 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>.

Wilhelm, 2019 WL 5395532, at *6 (citations omitted and emphasis added). The Court continued:

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[13] https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf (last visited Jan. 7, 2020).

> 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 October 22, 2019 conclusions are 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 one. Adams's challenged both Delaware's balancing requirement (limiting the number of judges from each of the two major political parties) and Delaware's prohibition on members of non-major parties (*i.e*., members of minor parties and independents) from serving.

The Third Circuit agreed with Adams in regard to both his challenges. Relevant to LPO's challenge to Ohio's absolute ban on minor party members in the present case,[14] the Third Circuit held that the categorical restriction found in Delaware's law -- the 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. Because Delaware's categorical prohibition on judicial appointments closely resembles that found in O.R.C. § 3517.152, the Third Circuit's conclusion is persuasive authority that Ohio's exclusion of minor party members is likewise unconstitutional.

[14] LPO does not challenge Ohio's authority to achieve balance by prohibiting either of the two major political parties, or any political party, from obtaining a majority of the membership on OEC. LPO's challenge is to Ohio's ban on members of minor political parties. This particular restriction plainly violates the First Amendment, as has been noted in academic commentary. *See, e.g.*, Joel Edan Friedlander, *Is Delaware's 'Other Major Political Party' Really Entitled to Half of Delaware's Judiciary*, 58 ARIZ. L. REV. 1139, 1147 (2016) (stating that "the Two-Party Feature of the Political Balance Requirement [in Delaware] is at odds with U.S. Supreme Court precedent, and, if challenged, would likely not survive heightened scrutiny.")

Like O.R.C. § 3517.152, Delaware's law categorically prohibited non-major party members (as well as independents) from applying or being considered. And like Ohio's law, it attempted to achieve political balance not only by restricting the numbers of members from the two major parties (which LPO does not challenge), but also by excluding people who are not members of those major parties from serving (which LPO challenges). According to Delaware's law, for example, "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. No room was left for members of other political parties. This categorical exclusion, the Third Circuit explained, very plainly violated the First Amendment.

Section 3517.152 is unconstitutionally structured in the 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). Like in Delaware, members of minor parties need not -- must not -- apply. They cannot serve on the Commission. They cannot be OEC election judges.

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 membership when appointing Cabinet officers. Although it recognized this exception, the Third Circuit correctly ruled that it did not excuse Delaware's categorical prohibition on judging.

Among its reasons, the Third Circuit correctly 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 an executive political patronage exception. *Id*. "The purpose of the policymaking exception," the Third Circuit 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 correctly stated, "simply do not fit this description." *Id*. at 179.

Because Delaware's categorical political restriction on judges interfered with First Amendment associational rights, the Court in *Adams*, 922 F.3d at 183, ruled that Delaware's law had to survive 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.

As this Court has previously found in the present case, OEC's members, like the judges in Delaware, exercise adjudicative authority:

> 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. 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.

Wilhelm, 2019 WL 5395532, at *6 (citations omitted). Consequently, as this Court previously concluded, Ohio's prohibition on members of minor parties serving on OEC is subject to the same constitutional test: "Defendants must demonstrate that this interest is compelling and that the statute is narrowly tailored to achieve that interest." *Id*.

Ohio, like Delaware, has a legitimate interest in political balance. 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 political parties. Consequently, even assuming that Ohio's Commissioners (unlike judges) 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 from service would still fail. It is far from the least restrictive way of obtaining Ohio's objective. Ohio's approach, like Delaware's, simply cannot 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 reinforced the majority's concern: "I absolutely agree … 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*.

To be sure, political party affiliation may to some extent be used to maintain proper balance within agencies -- even agencies charged with administering elections. Many boards and commissions throughout the country, both within and without the electoral context, have their memberships restricted to achieve political balance. 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). Independent federal agencies are often restricted in this fashion.[15] None of these agencies, however, are categorically banned from including members of minor political parties. None are defined in the way that Delaware and Ohio have defined qualifications for judges and Commissioners, respectively.[16]

OEC has not cited 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 adjudicatory agencies. The reason is simple; no States other than Delaware and Ohio take this draconian approach. None of the political patronage cases, including those from the Sixth Circuit, offer support for categorical restrictions. Rather, they merely hold that appointments may take account of politics. Just as a President can constitutionally favor members of his own political party, so can a Governor. But this is a far cry from saying that a President or Governor absolutely, categorically, cannot appoint a person because of his or her political association.

McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996), which sustained the use of political party status to replace an election auditor, does not support Defendants' argument. 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.

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[15] 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 LPO's' knowledge restricts membership to appointed agencies in the way that O.R.C. § 3517.152 does.

[16] *See* Friedlander, *supra*, 58 ARIZ. L. REV. at 1144 ("There are other partisan-balance requirements in American law, but the wording of Delaware's Political Balance Requirement is unusually strict, due to its Two-Party Feature.").

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 then, 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.*[17] Nothing in Alabama law prohibited members of minor parties from serving.

The best that OEC can do is cite the Supreme Court's grant of certiorari in and somehow claim that this supports its position. Predictions and hopes about what the law may come to be, however, are hardly persuasive. A federal court's "task is to rule on what the law is, not what it might eventually be." *Garcia v. Texas*, 564 U.S. 940, 941 (2011). Should one choose to venture a guess about what might happen in *Adams*, moreover, confidence is best placed in the recent words of the Justices themselves. "We do not have Obama judges or Trump judges, Bush judges or Clinton judges." Liptak, *supra*, N.Y. TIMES, (quoting the Chief Justice of the United States). "[T]here is no such thing as a Republican judge or a Democratic judge. We just have judges in this country." Senate Confirmation Hearing, *supra*, at 70 (statement by Gorsuch, J.). Justice Scalia used even more forceful language when he stated that "party affiliation is not an appropriate requirement" for judges. *Rutan*, 497 U.S. at 92 (Scalia, J., dissenting). Guesses are always tricky, but odds are that come late Spring/early Summer when the Supreme Court hands down its decision in *Adams*, Delaware's and Ohio's laws will be just as unconstitutional then as they are now.

II. The Commission's Dismissal of Plaintiffs' Administrative Complaints Must Be Set Aside.

Ohio's facial violation of the First Amendment requires reversal of OEC's dismissal of LPO's administrative complaints. An inherently biased adjudicative body has publicly stated in this case to voters, candidates and everyone else in Ohio that it is permissible and proper for corporations to funnel money to major-party candidates through exclusive debates. This

[17] 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.*

decision's impact on the ability of minor parties to compete in Ohio cannot be overstated. It is incorrect. It invites future illegal debates. It threatens the ability of minor parties to survive in Ohio. It must be reconsidered by a properly constituted agency.

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:

> 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 OEC. Members of minor political parties cannot take any of OEC's seven seats. This is the same problem in *Williams* multiplied by seven. As stated by the Supreme Court in *Williams*, 136 S. Ct. at 1909, "[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." (Emphasis added).

Even assuming that OEC's construction did not create an obvious appearance of partiality, its decision would still have to be set aside. In addition to defects that cast doubt on impartiality, "structural" defects in the administration of justice all by themselves require automatic reversal. The denial of counsel, for example, is structural and requires a new trial. *See Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963). So does the "unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to public trial [under the First Amendment]."

Fulminante, 499 U.S. at 310 (citations omitted). A singular race-based exclusion from a trial jury requires automatic reversal. *See United States v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999).

The Supreme Court, moreover, has extended automatic reversal beyond the administration of criminal justice. Unconstitutional structural defects in the appointments of federal administrative officers, for example, void those agents' actions. *See, e.g., Freytag v. Comm'r,* 501 U.S. 868, 878-79 (1991). An improperly appointed official's action is "subject to automatic reversal." *Neder v. United States*, 527 U.S. 1, 8 (1999); *see, e.g., Bandimere v. SEC*, 844 F.3d 1168, 1181 n.31 (10th Cir. 2016) (Appointments Clause violations are "structural errors" that "are subject to automatic reversal"); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015) ("[A]n Appointments Clause violation is a structural error that warrants reversal."). Thus, when a proceeding is "tainted with an appointments violation," the challenger "is entitled" to an entirely "new" proceeding. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018*). See also Ryder v. United States*, 515 U.S. 177, 182-83 (1995) (holding that Appointments Clause violation required automatic relief).

The OEC here is unconstitutionally constructed. Worse yet, it is unconstitutionally biased. Either or both of these reasons require setting aside its dismissal of LPO's administrative complaints. LPO's administrative complaints must be reinstated and reconsidered by a properly constructed agency. At bare minimum, they must be addressed by an impartial decision maker. Ohio's prohibiting members of serving on OEC, meanwhile, must be declared unconstitutional and enjoined. Ohio voters are entitled not only to legal, fair and free elections, but also to the appearance of legal, fair and free elections.

Conclusion

LPO respectfully requests that its Motion for Summary Judgment be **GRANTED**.

Respectfully submitted,

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