In the United States Court of Appeals
for the Sixth Circuit

No. 20-3585

LIBERTARIAN PARTY OF OHIO;
HAROLD THOMAS,
Plaintiffs - Appellants

v.

DEGEE WILHEM, In his official capacity;
HELEN E. BAKOLM, In her official capacity;
OTTO BEATTY, III, In his official capacity;
DENNIS BROMMER, In his official capacity;
D. MICHAEL CRITES; In his official capacity:
CATHERINE A. CUNNINGHAM, In her official capacity;
SCOTT NORMAN, In his official capacity,
Defendants - Appellees

On Appeal from the United States District Court
For the Southern District of Ohio

BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-3585 Case Name: Libertarian Party of Ohio v. Tavares

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Ohio and Harold Thomas
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on June 5, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Mark R. Brown

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents important First Amendment issues and Appellants believe that oral argument may be useful to this Court. Still, Appellants also recognize that the onset of the 2020 general election season and the need for a timely resolution of this case justifies dispensing with oral argument in the discretion of the Court.

Statement of Jurisdiction

The District Court possessed jurisdiction in this 42 U.S.C. § 1983 suit under 28 U.S.C. § 1331. It entered final judgment on June 5, 2020. *See* Opinion and Order, R. 64; Judgment, R. 65. Appellants filed their Notice of Appeal that same day. *See* Notice of Appeal, R. 66. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

1. Whether Ohio may constitutionally restrict the membership of its adjudicatory agencies to members of the two "major" political parties under this Court's precedents, including *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020).

2. Whether Ohio's categorical political party restriction on the membership of its principal adjudicatory agency charged with enforcing its election laws violates the First Amendment's Freedom of Association under the Supreme Court's patronage precedents, including *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

3. Whether Ohio's barring members of "minor" political parties from serving on a state-wide adjudicatory agency charged with resolving

election disputes violates First Amendment principles announced in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Burdick v. Takushi*, 504 U.S. 428 (1992), and their progeny.

Statement of the Case

Introduction

Plaintiff-Appellant-LPO (hereinafter collectively for Plaintiffs-Appellants as "Libertarian Party" or "LPO") is one of three remaining ballot-qualified, recognized political parties in Ohio. LPO is presently running under its party ballot line state and local candidates for office in Ohio's November 2020 general election, as well as candidates for federal office (including President). In December of 2018, Defendants-Appellees (hereinafter "Ohio Elections Commission" or "OEC") ruled in two administrative cases filed with it by LPO (and the Green Party)[1] that Ohio law allowed corporate sponsors of candidates' debates to limit those debates to candidates of the Republican and Democratic Parties.

Debates in Ohio, according to OEC's ruling, may be funded by corporations for the sole benefit of the Democratic and Republican parties. Corporations may provide this support while totally ignoring

[1] The Green Party fell off the ballot following the 2018 general election.

competing candidates who are affiliated with Ohio's minor political parties. Republicans and Democrats, according to the OEC, may lawfully be favored by corporate America.

OEC's seven members cannot include otherwise qualified individuals who are associated with so-called "minor" political parties. Instead, OEC's membership must (and did at the time of its debate decision here) consist of three Democrats, three Republicans, and one person who is not associated with any political party.

OEC's necessarily biased membership has resulted in a necessarily biased decision. Corporations now know that they may legally obtain political favors from the two major political parties by providing financial favors like debates in exchange. LPO's candidates will suffer in Ohio's 2020 elections by being excluded from debates and other corporate largesse, which corporate Ohio now knows for certain will not be pursued by Ohio's chief elections enforcement agency.

Proceedings Below[2]

LPO filed this action on June 15, 2019 against OEC under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908), after having its proceeding on these same federal claims in State Court dismissed for want of subject matter jurisdiction. *See* Verified Complaint, R.1. LPO sought in the District Court permanent relief (1) declaring unconstitutional and enjoining Ohio's political party restrictions on OEC membership found in O.R.C. § 3517.152(A)(1), (2) directing OEC to reconsider through a constitutionally structured decision maker LPO's claim that corporate debate sponsors in Ohio must stage debates fairly and not exclusively for the Democratic and Republican parties, and (3) enjoining OEC (as presently constructed by O.R.C. § 3517.152(A)(1)) from adjudicating future election disputes involving LPO in the future. *See* Verified Complaint, R.1, at PAGEID # 52-53.

[2] Two of OEC's members were replaced after this action commenced. Defendant-Wilhelm's tenure in office expired and he was replaced by Charleta B. Taveras. Defendant-Balcolm's tenure in office expired and she was replaced by Natasha D. Kaufman. Under Federal Rule of Civil Procedure 25(d) and Federal Rule of Appellate Procedure 43(c)(2), Commissioners Taveras and Kaufman are automatically substituted in this litigation.

Because of the prior proceedings in the prior State Court action (which included a complete administrative record), and OEC's representation in that proceeding that discovery was unnecessary and improper, LPO on June 28, 2019 immediately filed for Summary Judgment in the District Court. *See* Motion for Summary Judgment, R.6. Rather than respond to LPO's Motion, OEC on July 12, 2019 moved to dismiss LPO's' case for lack of jurisdiction (both personal[3] and subject matter)[4], *see* R.7, to stay briefing, *see* R.10, and to conduct discovery.

After temporarily staying further briefing and all discovery (both on OEC's motions), the District Court ruled on OEC's Motion to Dismiss on October 22, 2019. In its ruling, the Court dismissed part of the Verified Complaint while leaving in place LPO's facial First Amendment challenge to O.R.C. § 3517.152(A)(1)'s categorical exclusion

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[3] OEC claimed under *Amen v. Dearborn*, 532 F.2d 554 (6th Cir. 1976), that its members were entitled to personal service. The District Court disagreed. Opinion and Order, R.29, at PAGEID# 458.

[4] OEC argued that subject matter jurisdiction failed under Article III and that the District Court was precluded from entertaining the case under *Burford v. Sun Oil Co., Inc.*, 319 U.S. 315 (1943). *See* Motion to Dismiss, R.7, at PAGEID # 190. Although the District Court dismissed LPO's selective enforcement claim under Article III, it rejected all of OEC's subject matter arguments in regard to LPO's facial challenge to the composition of OEC.

of minor-party members from service on Ohio's Election Commission. In allowing Appellants' First Amendment challenge to continue, the District Court observed that O.R.C. § 3517.152(A)(1) "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*, 140 S. Ct. 602 (U.S., Dec. 6, 2019) (hereinafter *Carney*), the District Court on October 22, 2019 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. … 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. § 3517.152, 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); Opinion and Order, R.29, at PAGEID # 464.

Immediately following the District Court's October 22, 2019 Order sustaining the viability of LPO's challenge to O.R.C. § 3517.152 and because of OEC's continuing delay tactics, LPO on November 1, 2020 moved for preliminary relief. *See* Motion for TRO and Preliminary Injunction, R. 37.

While LPO's motion for preliminary relief was under consideration, the Supreme Court granted review in *Carney v. Adams*, 140 S. Ct. 602, which was then set for argument on March 25, 2020. Meanwhile, the Sixth Circuit expedited an interlocutory appeal in *Daunt v. Benson*, 2019 WL 6271435 (W.D. Mich., Nov. 25, 2019), *appeal expedited*, No. 19-2377, Doc. No. 22 (6th Cir., Dec. 16, 2019), and fixed the argument in that case for March 17, 2020. Both of these cases addressed issues at the heart of LPO's challenge to Ohio's requirement

that members of its Elections Commission be members of the two major political parties.

On January 13, 2020, the District Court denied LPO's Motion for Preliminary Injunction. *See* Opinion and Order, R. 50. In a 180-degree reversal from its prior decision, the District Court ruled that Ohio needed only to pass rational basis review, relying on what it deemed a controlling precedent that has never been cited by or in the Sixth Circuit before, *Pirincin v. Board of Elections*, 368 F. Supp. 64 (N.D. Ohio), *aff'd*, 414 U.S. 990 (1973).

Because of the pendency of the *Carney* case in the Supreme Court, the expedited treatment rendered *Daunt* in this Court, the March 25, 2020 argument date set for *Carney*, and the expectation that both *Carney* and *Daunt* would be soon decided, LPO on January 17, 2020 moved for reconsideration in anticipation of those decisions. *See* Motion for Reconsideration, R.51. However, COVID-19 intervened, delayed the oral argument in *Carney*, and pushed that case's oral argument and ultimate resolution to the October 2020 Term.

Daunt was timely argued and decided on April 15, 2020. Even without *Carney*'s resolution, LPO immediately called *Daunt* to the

attention of the District Court, *see* Notice of Supplemental Authority, R.59, requested a Status Conference, *see* Motion for Status Conference, R.60, and asked the District Court to proceed to final judgment notwithstanding the relevance of *Carney* in the Supreme Court. The District Court agreed to do so.

On June 5, 2020, the District Court rendered final judgment in favor of OEC. Opinion and Order, R. 64; Judgment, R. 65. This time it took a middle-ground between rational basis review and strict scrutiny, purporting to rely as this Court did in *Daunt*, 956 F.3d 396, on both patronage precedents and under *Anderson-Burdick*. In doing so, however, it failed to identify any appropriate test under either approach.

First, under *Anderson-Burdick*, the District Court concluded that "the statute is content neutral and does not limit political participation by an identifiable political group." *Id.* at PAGEID # 911. "To be sure," it added, "O.R.C. § 3517.152(A)(1) does not limit service on Ohio's Elections Commission to members of the Democratic and Republican parties; rather, it limits service to affiliates of the two major political parties in the state of Ohio, without reference to a specific party." *Id.*

But it reasoned that "the statute does not foreclose the opportunity for a minor political party to build its base and become one of the two major parties in the state, which would in turn provide an avenue for its members to serve on the Elections Commission." *Id.*

"O.R.C. § 3517.152(A)(1), therefore, is a generally applicable, nondiscriminatory regulation providing equality of opportunity," the District Court concluded. *Id.* Without deciding whether this burden was minimal, severe, or something in-between, the Court stated that "O.R.C. § 3517.152(A)(1) survives scrutiny under the *Anderson-Burdick* test." *Id.* at 912.

In terms of the patronage cases, Freedom of Association and the unconstitutional conditions doctrine, the Court stated it was wrong in its first holding about applying strict scrutiny; it "neglected to give proper deference to the Sixth Circuit's charge to construe any ambiguities in favor of governmental defendants." *Id.* at 914. Section 3517.152 "more accurately conditions membership on the Elections Commission on a political party's success at the polls, which is not discriminatory per se." *Id.* (citation omitted). "Two reasons support this finding. First, the Elections Commission, like judges, acts in a quasi-

judicial capacity." *Id.* "The Sixth Circuit has unequivocally stated that judges are policymakers within the meaning of *Elrod* and *Branti*, and thus, can be appointed based on political considerations." *Id.* (citations omitted).

"Second, … Ohio has an important interest in ensuring that political balance on its Elections Commission protects the fairness of the deliberative process and that judicial and policymaking decisions are well rounded and diversified." *Id.* Without deciding what level of scrutiny was appropriate, the District Court used this reasoning to sustain Ohio's law barring members of minor political parties from serving on this important quasi-adjudicatory agency.

LPO appealed the District Court's final judgment that same day, June 5, 2020, *see* Notice of Appeal, R. 66, and on that same day requested that this Court expedite briefing in order to render a decision before the inter-party debate season in Ohio begins. This Court did so by Order dated June 18, 2020. *See* Order, 6th Cir. Doc. No. 18-1.

Facts[5]

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; Complaint, R. 1, at PAGEID # 13, ¶ 13; Answer, R. 40, at PAGEID # 534, ¶ 13.[6] LPO is the third most popular political party in Ohio and the United States. Its gubernatorial candidate in Ohio in 2018 won 79,985 votes. *See*

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[5] The material uncontested facts 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.

[6] Defendants answered many allegations in the Complaint by asserting that they (the allegations) stated legal conclusions and required no response. Responses like these are treated 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); *State Farm Mut. Auto. Ins. Co. v. Riley*, 199 F.R.D. 276, 278 (N.D. Ill. 2001); *N. Ind. Metals v. Iowa Exp., Inc.*, 2008 WL 27536330, *3 (N.D. Ind. 2008); *Rudzinski v. Metropolitan Life Insurance Co.*, 2007 WL 2973830, *4 (N.D. Ill. 2007); *Gulf Restoration Network v. United States Environmental Protection Agency*, 2018 WL 5297743, *2 (E.D. La. 2018). In the absence of denials, allegations are accordingly taken as true here.

Declaration of Harold D. Thomas, R.44-1 at PAGEID # 604. The Libertarian Party's presidential candidate in 2016 won 174,498 votes in Ohio. *Id.*

LPO routinely runs candidates in Ohio. *Id.* In 2018, it ran over twenty candidates for federal, state and local offices. *Id.* In 2019's odd-year elections, LPO ran twelve candidates. *Id.* Five won. *Id.* For the November 3, 2020 election, LPO has over a dozen candidates for federal, state and local offices. *Id.* at PAGEID # 605. While it is not yet clear how many voters participated in LPO's COVID-19 delayed April 2020 primary,[7] LPO's pre-primary number of members in Ohio reached into the thousands. *See id.*

OEC's members are sued in their official capacities, Complaint, R.1, at PAGEID # 6, ¶ 11; Answer, R.40, at PAGEID # 534, ¶ 11, and at all relevant times were acting under color of Ohio law while engaged in

[7] Because LPO was not allowed primaries in 2018, *see Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 401-02 (6th Cir. 2016), it could not establish membership in that fashion until its April 2020 primary. Still, even before it conducted its primary in April of 2020, its political party membership in Ohio was recognized under Ohio law. *See State ex rel. Bender v. Franklin County Board of Elections*, 157 Ohio St. 3d 120, 124, 132 N.E.3d 664, 668 (2019) (stating that political party membership is not necessarily defined by participation in Ohio's primaries and is "purely a matter of self-identification"); *Husted*, 831 F.3d at 402 (same).

state action. Complaint, R.1, at PAGEID # 6, ¶ 10; Answer, R.40, at PAGEID # 534, ¶ 10.

The Ohio Elections Commission 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. It is authorized by Ohio law to find violations of O.R.C. § 3599.03, which is at the center of this case and prohibits corporate aid in the form of exclusive debates, assess fines, and even 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 has seven members, six of whom categorically must be members of Ohio's two "major"[8] political parties. Complaint, R.1, at PAGEID # 4, ¶ 5; Answer, R. 40, at PAGEID # 534, ¶ 5. The seventh

[8] 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).

member must be an unaffiliated voter in Ohio. *Id.* The Ohio Secretary of State's official Campaign Finance Handbook 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)[9] (emphasis added).

The "major" political party mandate governing the composition of OEC's membership are spelled out in O.R.C. § 3517.152(A)(1):

> [T]he speaker of the house of representatives[10] 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

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[9] https://www.sos.state.oh.us/globalassets/candidates/cfguide/chapters/chapter14.pdf).

[10] Since August 24, 1995, when O.R.C. § 3517.152(A) took effect, all nine Speakers of Ohio's House have been Republicans and 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.

> 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.

(Emphasis added).[11]

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 was Richard Cordray, Complaint, R.1, at PAGEID # 6, ¶ 17; Answer, R.40, at PAGEID # 535, ¶ 17, and the Republican candidate was Mike DeWine. Complaint, R.1, at PAGEID # 7, ¶ 18; Answer, R.40, at PAGEID # 535, ¶ 18.

During the summer of 2018, the University of Dayton, Marietta College, the City Club of Cleveland (in association with its so-called

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[11] *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).

"Ohio Debate Commission"), 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.[12] These debates were held on September 19, 2018 (Dayton), October 1, 2018 (Marietta), and October 8, 2018 (Cleveland).

On September 24, 2018, after LPO had sent ignored demand letters to the relevant participants and the first debate was 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, which again followed ignored demand letters, LPO filed with OEC an administrative complaint alleging that the City Club of Cleveland, Marietta College, DeWine,

[12] https://www.clevescene.com/scene-and-heard/archives/2018/09/07/richard-cordray-and-mike-dewine-announce-three-gubernatorial-debates-including-in-cleveland.

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 without notice or invitation to LPO constituted illegal corporate campaign contributions to Richard Cordray, Richard Michael 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.

Although it announced that these exclusive debates were lawful, OEC apparently does not now contest that under the facts alleged by LPO in its administrative complaints they should have been ruled illegal under Ohio law. OEC failed to deny these allegations in the Verified Complaint. *See* Complaint, R.1, at PAGEID # 23-24, ¶¶ 99-103; Answer, R.40, at PAGEID # 543, ¶¶ 99-103. In the event, corporate Ohio has been told by OEC that it may stage exclusive debates between

Democrats and Republicans with OEC's blessing. The common practice of corporations supporting the two major political parties' candidates in this fashion in Ohio will certainly continue to LPO's detriment and will impede its electoral efforts in the 2020 general election.

Contemporaneous with OEC's dismissal of LPO's complaints, Commissioner Norman explained OEC's rationale to an Associated Press reporter who frequently covers Ohio politics, Julie Carr Smyth. Exclusive debates between Republicans and Democrats, he explained, are perfectly proper under Ohio law. This was duly reported and picked up by media outlets across the State: "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; *see* Julie Carr Smyth, *Ohio election panel tosses minor parties' debate complaint*, AP, Dec. 6, 2018.[13]

OEC's summary dismissal of LPO's administrative complaints, coupled with Commissioner Norman's public announcement to the press that Ohio law authorizes exclusive debates between Republicans and

[13] https://apnews.com/c7c94b11bc1e407ebdb0fc2d2f6b2fb8.

Democrats, *see* Complaint, R.1, at PAGEID # 42, ¶ 205; Answer, R.40, at PAGEID # 553, ¶ 205, was (and remains) erroneous under Ohio law. Unfortunately, because Ohio law makes prosecutorial decisions like these unreviewable -- as demonstrated by the Court of Common Pleas' dismissal of LPO's administrative appeal as falling outside its power and jurisdiction -- OEC's dismissals and inherent bias cannot be corrected by Ohio's Courts.

Because Ohio's campaign finance laws are modeled on the Federal Election Campaign Act of 1971 (FECA) and its implementing regulations, *see Toledo Area AFL-CIO Council v. Pizza*, 898 F. Supp. 554, 560 (N.D. Ohio 1995) (stating that Ohio's campaign finance law is "modeled after a provision of the Federal Election Campaign Act of 1971 ('FECA')"), OEC's dismissal of LPO's complaints and announcement to the Ohio is very likely wrong. Federal law expressly bans exclusive debates like those put together by DeWine and Cordray.[14] Had Ohio's

[14]*See Natural Law Party of the United States of America v. Federal Election Commission*, 111 F. Supp.2d 33, 36 (D.D.C. 2000); *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000); *La Botz v. Federal Election Commission*, 889 F. Supp.2d 51 (D.D.C. 2012). Distinguishing federal law is impossible, unless one simply says Ohio for some reason no longer follows the federal model.

been a federal election, it would have clearly violated federal law. OEC's summary dismissal appears to be more akin to a bipartisan form of jury nullification than anything else.[15]

Indeed, OEC had previously (in less-partisan times) so stated, *see* Ohio Elections Commission Opinion 2010ELC-02, at 1 (September 2, 2010) ("because Ohio law is sufficiently similar to the federal prohibition [on electioneering communications] at issue in *Citizens United* [*v. Federal Elections Commission*, 558 U.S. 310 (2010)], a review of the statute and the Commission's application of it is appropriate"), as well as explaining that corporations could not use "any" of their properties to unequally assist candidates. *See* Ohio Elections Commission Opinion 2015ELC-01, at 2 (July 23, 2015).

Still, on December 6, 2018, after a short hearing, OEC announced that it was summarily dismissing both of LPO's administrative

[15] This was not the only high-profile OEC inaction taken in favor of major political parties at the expense of Ohio's third most popular competitor. During the 2014 election after Republican agents and the Republican Party itself funneled hundreds of thousands of improperly reported dollars to what proved to be a successful effort to remove LPO's gubernatorial and attorney general candidates from the ballot, LPO filed an administrative complaint with OEC. This complaint was likewise summarily dismissed by OEC. *See Earl v. OEC*, 2016 WL 5637037 (Ohio, 10th DCA 2016) (describing administrative complaint and dismissal); *Husted*, 831 F.3d 282 (describing background).

complaints. Complaint, R.1, at PAGEID # 42, ¶ 204; Answer, R.40, at PAGEID # 553, ¶ 204.LPO was notified of OEC's dismissal of its two administrative complaints on February 1, 2019, which allowed it to seek judicial review. Complaint, R.1, at PAGEID # 42, ¶ 206; Answer, R.40, at PAGEID # 553, ¶ 206. It immediately did. 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 federal constitutional challenges that are now being pressed in this action.

On April 19, 2019, after OEC had informed LPO that the administrative record was complete with no further need for discovery and filed motions to dismiss and stay LPO's two administrative appeals, the Court of Common Pleas stayed both proceedings and directed the parties to file briefs addressing whether LPO's federal constitutional claims fell within its subject matter jurisdiction. 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. LPO and OEC thereafter

jointly agreed to a dismissal of LPO's federal claims from the Court of Common Pleas administrative appeals without prejudice. *See* LPO's Response to Motion to Dismiss, R.11-4. On June 15, 2019 LPO filed the present action in federal District Court. The Court of Common Pleas on May 4, 2020 also dismissed LPO's remaining state-law claims in its administrative appeal for lack of subject matter jurisdiction, finding that OEC's dismissals were prosecutorial, discretionary and not reviewable.

Summary of the Argument

1. This Court's decision in *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020), establishes that Ohio cannot categorically exclude from service on its governmental agencies -- especially those that perform adjudicatory functions -- members of disfavored political parties. Applying the Supreme Court's patronage and Freedom of Association cases, the Court in *Daunt* correctly recognized that excluding a citizen from governmental appointment based on his or her political party affiliation presumably violates the First Amendment. It is subject to strict scrutiny. The Supreme Court, after all, has repeatedly stated that "Congress could not 'enact a regulation providing that no Republican,

Jew or Negro shall be appointed to federal office . . . .'" *Wieman v. Updegraff*, 344 U.S. 183, 191-92 (1952) (citation omitted). Ohio's law prohibiting Libertarians and other minor-party members from serving in State office does exactly that. It is impermissible and unconstitutional.

2. Ohio's law is also proven to violate the First Amendment under the *Anderson-Burdick* framework, *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992), as made clear by this Court in *Daunt*, 956 F.3d 396. Under *Anderson-Burdick*, "[a] law would not be content-neutral, and would thus impose a severe burden, if it 'limit[ed] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status'." *Daunt*, 956 F.3d at 407 (citation omitted). Ohio's law limits political participation by an identifiable political group, a minor political party, and is thus necessarily both severe and subject to strict scrutiny. Because Ohio's wholesale exclusion of minor-party members from the OEC is not absolutely necessary to any compelling interest, it violates the First Amendment.

3. Ohio's categorical exclusion of minor-party members cannot even pass *Anderson-Burdick*'s more flexible standard applied to burdens that are not severe. The Court in *Daunt*, 956 F.3d at 407, correctly recognized that "[r]egulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" (Citations omitted). Unlike the conflict-of-interest law sustained under this standard in *Daunt*, 956 F.3d at 409, Ohio's categorical exclusion of citizens based on political affiliation cannot. By forcing a choice between the exercise of associational rights and eligibility for office, Ohio's major-party requirement is far too much medicine. It cannot be sustained under even this less-demanding level of scrutiny.

Argument

> "We do not have Obama judges or Trump judges, Bush judges or Clinton judges."

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).[16]

> 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.).[17]

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[16] https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

[17] https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf.

I. *Daunt v. Benson* Establishes that Ohio's Preclusion of Minor Party Members from Service on Adjudicatory Agencies Like OEC Violates the First Amendment.

This Court's decision in *Daunt v. Benson*, 956 F.3d 396, establishes that Ohio cannot completely exclude from service on its governmental agencies -- especially those that perform adjudicatory functions -- members of disfavored political parties. In *Daunt*, the Court sustained Michigan's conflict of interest law that "prohibit[ed] eight classes of individuals with certain current or past political ties from serving as a commissioner." *Id.* at 401. In so holding, the Court's majority concluded that whether either *Anderson-Burdick* balancing or patronage precedents like *Elrod v. Burns*, 427 U.S. 347, were applied, the law survived scrutiny. It survived because it was a content-neutral restriction, one that did "not burden the plaintiffs-appellants based on their status as Republicans, …." *Daunt*, 956 F.3d at 408.

As with federal Hatch Act restrictions, the Court observed that "Michigan has a compelling interest 'in limiting the conflict of interest implicit in legislative control over redistricting.'" *Id.* at 409. It further explained:

> Michigan's interest in addressing the *appearance* of undue influence—whether or not members of the Commission are

> "actively partisan" — permits it to disqualify not only active partisans but also those whose recent partisan involvement, or whose association with active partisans, could create the appearance that the Commission is staffed by political insiders.

Id. at 411 (citation omitted).

The Supreme Court's patronage cases, *Elrod*, *Branti*, 445 U.S. 507 (1980), and *Rutan*, 497 U.S. 62, were distinguishable, the Court held, because they "involved individuals who faced adverse employment actions because of their association with a particular political party." *Daunt*, 956 F.3d at 413. "In this case, by contrast, Daunt and others like him are barred from the Commission because of their associations with professional politics, regardless of which party they or their family member supported." *Id.* (emphasis added). "[T]he patronage cases actually reaffirm the principles articulated in [the Hatch Act cases]," the Court concluded. *Id.*

The Court added: "the Supreme Court explained in *Elrod* that 'the activities that were restrained by the legislation involved in [the Hatch Act cases] are characteristic of patronage practices'—that is, the same patronage practices that the Court in *Elrod* so harshly criticized." *Id.* (citations omitted). Thus, "barring governmental employees from 'taking an active part in political management or political

campaigns,' served to 'safeguard the core interests of individual belief and association' that patronage-based systems undermined," *id.* (citations omitted), and "[t]he *Elrod*/*Branti*/*Rutan* line of patronage cases … supports the conclusion that the eligibility criteria do not impose an unconstitutional condition on the plaintiffs-appellants." *Id.*

This Court's conclusion in *Daunt* confirms what the Supreme Court's patronage and freedom of association cases have said for years: categorical political party restrictions placed on appointed governmental positions violate Freedom of Association. Barring a government worker or official from engaging in active political campaigns is permissible because it safeguards the core interests of individual belief and association. Absolutely barring members of political parties from participating in government through appointment, hiring or otherwise is impermissible for this very same reason.

Had Michigan banned Republicans from serving on its Commission, there is little doubt this Court would have ruled it violated the First Amendment. Likewise, Ohio's categorical ban on minor party members, like those who belong to LPO, violates the First Amendment's Freedom of Association.

A. *Daunt* Correctly Applied the Supreme Court's Patronage Precedents and the First Amendment's Freedom of Association.

The Court's reasoning in *Daunt* is correct. Categorical exclusions from government employment are unconstitutional under "decades of landmark precedent." *Janus v. AFSCME*, 138 S. Ct. 2448, 2469 (2018). The Supreme Court has long maintained that "Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .'" *Wieman*, 344 U.S. at 191-92 (citation omitted). "[N]either a State nor the Federal Government can constitutionally force a person [seeking public employment] to profess a belief or disbelief in any religion," *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), or to forswear membership in a disfavored political organization. *See Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967).

Ohio's law violates this fundamental principle by conditioning one's full participation in Ohio's political community and electoral machinery on forfeiting her Freedom of Association. Banning members of minor parties from office is no more constitutional than banning Jews or Republicans from office. *See Wieman*, 344 U.S. at 191-92. It is no

more constitutional as a political test than the old religious tests used to bar non-Christians from governmental service. *See Torcaso*, 367 U.S. at 495.

States may not "prescribe what shall be orthodox in politics," *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), it is simple as that. Under this benchmark, it is also clear that States may not condition one's political participation on his forfeiting this basic right. *Wieman*, 344 U.S. at 191—192; *Keyishian*, 385 U.S. at 609–610.

1. The Loyalty Oath Precedents Prove a State Cannot Prohibit Members of Minor or Disfavored Parties From Government Employment.

Wieman and *Keyishian* both involved loyalty oaths. In *Wieman*, an Oklahoma statute prohibited state agencies from hiring (or continuing to employ) anyone who declined to swear an oath denying past or presented association with any "party" or other group deemed "a communist front or subversive organization." 344 U.S. at 186. The Court invalidated this statute, holding that the Constitution did not permit a categorical exclusion "solely on the basis of organizational membership." *Id.* at 190.

The Court reiterated this constitutional ban on categorical political party membership preclusion in *Russell*, 384 U.S. at 13. Government's interest in national security is certainly important, but it can be achieved in less-restrictive ways than categorically barring Communists from government employment. Congress could instead bar those "who join [the Communist Party] with the specific intent to further illegal action." *Id.* at 17 (internal quotation omitted).

Keyishian, 385 U.S. at 602-03, applied this concept of narrow tailoring to State employment decisions. New York, the Court held, could not make teaching at a state university conditional upon a declaration of non-membership in the Communist Party. *Id.* at 596. The legitimate goal of protecting New York's educational system from subversion "can be more narrowly achieved.'" *Id.* at 602 (citation omitted). Proscribing any membership and even "knowing membership" in a political party swept far too broadly. *Id.* at 609.

As later stated by the Court in *Cole v. Richardson*, 405 U.S. 676, 680 (1972):

> Employment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional

> protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose.

Wieman and *Keyishian* remain "[l]andmark precedent[s]." *Janus*, 138 S. Ct. at 2469. Their protection of government employees who are knowing members of the Communist Party applies with more force, moreover, to applicants who are knowing members of the third largest political party in Ohio and the United States. Requiring that members of the third largest political party in America foreswear that party and its principles in order to gain government employment -- especially employment with the very body designed to fairly resolve political parties' disputes -- cannot be sustained. It could not with Communists and cannot with Libertarians.

2. There is No Policymaker Exception to Categorical Bans Like Ohio's.

Ohio's law cannot be defended under the Court's patronage exceptions noted in cases like *Elrod*, 427 U.S. 347. Those cases merely recognize a zone of discretionary, permissible ad hoc employment decisions based on party affiliation. The exception they discuss has no application to a categorical disqualification like that in Ohio.

Elrod and its progeny govern discretionary hiring and firing decisions, not statutory categorical disqualifications. *Elrod* arose from a newly elected Sheriff's practice of discharging some or all departmental employees who belonged to the vanquished party. 427 U.S. at 351. In labeling these partisan dismissals as impermissible "political patronage," the Court explained that patronage protection cannot be offered "wholesale" as categorical limitations do. *Id.* at 367. Instead, to the extent permissible patronage practices exist, they are limited to "patronage dismissals" in "policymaking positions." *Id.*

Subsequent decisions confirm that *Elrod*'s patronage framework governs only discretionary decisions. *Branti* involved partisan dismissals by a County Public Defender of several assistant attorneys who, under the relevant law, "serve[d] at his pleasure." 445 U.S. at 510. *Rutan* extended the framework to a Republican governor's decisions related to hiring, rehiring, transfer, and promotion that were committed to his discretion by state law. 497 U.S. at 65—67. The Court reaffirmed that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 497 U.S. at 78.

Moreover, the Court in *Rutan* explained that hiring decisions concerning most public employees cannot be justified by the government's interest in maintaining politically loyal employees because "a government can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions." *Id.* at 70 (citing *Elrod*, 427 U.S. at 367). In each of these cases, the Court was concerned with defining the circumstances in which a government decision maker (usually an elected official or political appointee) could consider political affiliations (usually of subordinates) when making employment decisions without running afoul of the First Amendment right to associate.

When the government's asserted interest for such decisions is a "need for politically loyal employees," *id.* at 70, the decision maker is free to consider the employee's political affiliation if the employee is a "policymaker"—or, more precisely, if "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

Whether the Commissioners occupy policy-making positions, as concluded by the District Court below, is therefore irrelevant. Even if they do, a categorical bar to appointments based on political affiliation is unconstitutional. Under the Supreme Court's holdings in *Rutan*, 497 U.S. 62; *Branti*, 445 U.S. 507; and *Elrod*, 427 U.S. 347, appointments may be individually made under certain circumstances based on an employee's association (or lack thereof) with the political party then in power. This is a far cry, however, from upholding a law that denies this discretion to the one who makes the appointment and categorically disqualifies classes of citizens—here, individuals who do not belong to a major party—from holding an appointed office. Such laws are no more acceptable when applied to "policymakers" than to other governmental officers and employees.

The "policymaker exception" is therefore only relevant in the circumstances that gave rise to it: when political loyalty to the "party in power" is necessary to serve the government's asserted interest "in securing employees who will loyally implement [that party's] policies." *Rutan*, 497 U.S. at 64, 70. If the government asserts some other interest to justify a challenged practice -- like simple balance or fairness -- the

policymaker exception is inapplicable and irrelevant. A statutory provision that requires party membership as a qualification for public office for reasons wholly unrelated to party loyalty, by definition, does not serve the interest identified in *Rutan*, *Branti*, and *Elrod*.

Moreover, laws such as the major-party requirement found in O.R.C. § 3517.152(A)(1) impose far more onerous and lasting disabilities on disfavored groups than do the more transitory choices of political officials to appoint their allies to office during the time they are in power. Thus, while a Democratic governor may legitimately prefer a Democrat as a speechwriter, and his Republican successor may likewise hire a Republican for the same position, *see Branti*, 445 U.S. at 518, a state law that requires that gubernatorial speechwriters must be Democrats or Republicans would not even arguably serve any interest sufficient to justify the burden it imposed on associational freedoms.

Nothing in the "policymaker" exception suggests otherwise. Here, Ohio's major-party requirement has no relationship to the concerns that gave rise to the Supreme Court's and this Court's recognition of a discretionary policymaker exception. Ohio's claimed interest at best is in maintaining political balance, not in securing politically loyal

employees. Ohio obviously cannot claim that political loyalty to the two parties in power is relevant to one's service as a judge, since any such suggestion would be contrary to the basic principle that a judge's duty is to "apply the law without fear or favor." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 438 (2015). Rather than applying the law without fear or favor, the facts of this case strongly suggest that Ohio's major party mandate produced political favor.

B. No Binding Authority From this Court Nor the Supreme Court Holds that Categorical Bans Based on Political Affiliation are Constitutional.

The District Court relied heavily on a pre-*Elrod* holding by a three-judge District Court in Ohio, *Pirincin v. Board of Elections*, 368 F. Supp. 64 (N.D. Ohio), *aff'd*, 414 U.S. 990 (1973), and a holding from the First Circuit, *Werme v. Merrill*, 84 F.3d 479, 484 (1st Cir. 1996), to support its conclusion. These cases cannot bear that weight.

Pirincin is inapposite for a number of reasons. Most importantly, the challenge in *Pirincin* was premised exclusively on the plaintiffs' claimed inability to cast effective votes. The plaintiffs prosecuted the case as a voting rights case because they had little more to work with at the time. The Supreme Court's modern jurisprudence surrounding

associational protections in the workplace were yet to come, *see*, *e.g.*, *Elrod*, 427 U.S. 347, and its associational protections for those seeking to access the franchise and ballot were not fully developed. *See*, *e.g.*, *Anderson*, 460 U.S. 780. *Pirincin* -- to the extent it ever had meaning -- was rendered meaningless by these later developments.

Not only was *Pirincin*'s constitutional complaint far different from that presented here, so were the governmental offices involved. The District Court in *Pirincin* focused on the fact that Ohio's local boards of elections' "duties are largely administrative." 368 F. Supp. at 75. Consequently, the District Court in *Pirincin* had no occasion to address political party requirements for important offices, let alone a state-wide office that polices and adjudicates significant electoral disputes.

Last but not least, "'(a) summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction … has very little precedential significance.'" *Jordan v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1973) (citation omitted). Because "the precedential effect of summary action is to be narrowly construed," *Anderson v. Celebrezze*, 664 F.2d 554, 558 (6th Cir. 1981), *rev'd on other grounds*, 460 U.S. 780 (1983) (citation omitted), this Court has observed that "'[s]ummary

dispositions ... extend only to 'the precise issues presented and necessarily decided by those actions.'" *Id.* (citation omitted). *See also Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1801 (2015) ("[A] summary affirmance is an affirmance of the judgment only,' and 'the rationale of the affirmance may not be gleaned solely from the opinion below.'") (citation omitted).

Consequently, *Pirincin* at most (even before *Elrod* was decided) meant that using political affiliation to appoint local agents who perform only ministerial tasks does not interfere with anyone's right to vote. It says nothing at all about First Amendment associational rights under patronage precedents, nor does it mention *Anderson-Burdick*'s modern formula.

Because *Werme*, 84 F.3d 479, relied on *Pirincin*, it is questionable for these same reasons. Further, and more importantly, *Werme*'s conclusion cannot be squared with decisions of the Supreme Court and this Court's decisions, including its recent holding in *Daunt v. Benson*.

Daunt need not be belabored here given its treatment above. Suffice it to say that even this Court's pre-*Daunt* precedents make clear

that the reasoning of both *Pirincin* and *Werme* do not reflect the law of this Circuit.

For instance, in *Newman v. Voinovich*, 986 F.2d 159, 161 (6th Cir. 1993), where the Sixth Circuit sustained a Governor's discretionary use of patronage as one factor in making interim judicial appointments, it expressed reservations over wholesale applications:

> 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.*

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-Appellees' argument either. That case involved a "major party" dispute because 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 categorical ban on members of minor (or any) 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(A)(1), 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).

None of this means that political party affiliation cannot be used in some fashion 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). Federal independent federal agencies are often restricted in this fashion.[18] None of these agencies, however, are categorically banned from including members of minor political parties.

C. The Third Circuit's Analysis in *Carney* Provides An Appropriate Framework.

Should this Court choose to look to persuasive precedent, the Third Circuit's analysis in *Carney*, 922 F.3d 166, provides a more appropriate framework. *Carney*'s analysis, after all, is consistent with

[18] 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.

this Court's precedents and is true to the Supreme Court's precedents. In *Carney*, the Third Circuit invalidated a Delaware law that restricted judicial appointments to members of the two major political parties. Like Ohio, Delaware used "major" political party -- as opposed to Democratic and Republican -- to define its categorical restriction. Still, even with this language the Third Circuit ruled that the law could not survive strict scrutiny.

Relevant to LPO's challenge here,[19] 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 -- violated the First Amendment. Because Delaware's categorical prohibition on

[19] LPO would not and could not successfully challenge Ohio's authority to achieve balance by prohibiting either of the two major political parties from obtaining a majority of the membership on OEC. Ohio, however, does not do that here. Ohio bans members of minor political parties from serving. 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.")

judicial appointments closely resembles that found in O.R.C. § 3517.152(A)(1), the Third Circuit's conclusion is persuasive authority that Ohio's exclusion of minor party members is likewise unconstitutional.

Like O.R.C. § 3517.152(A)(1), Delaware's law categorically prohibited minor-party members from applying or being considered. And like Ohio's law, it attempted to achieve political balance by excluding people who are not members of the two major parties from serving. 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." *Carney*, 922 F.3d at 170. That a minor party might one day become a major party, which was so important to the District Court below in the present case, Opinion and Order, R.64, at PAGEID # 911, was of no moment to the Third Circuit.

The plain language of O.R.C. § 3517.152(A)(1), as the District Court below correctly recognized in denying dismissal, "prohibits any person affiliated with a minor political group, such as Ohio's Libertarian Party, from being considered for membership on the

Commission." *Wilhelm*, 2019 WL 5395532, *4 (S.D. Ohio 2019); R.29. Like Delaware's prohibition, members of minor parties need not -- must not -- apply. They simply cannot serve. They are precluded from policing and adjudicating disputes under Ohio's election laws. They are not full members of Ohio's political community.

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*, 445 U.S. 507. Although it recognized this exception, the Third Circuit correctly ruled that it did not excuse Delaware's categorical prohibition on judging.

Because Delaware's categorical political restriction on judges interfered with First Amendment associational rights, the Court in *Carney*, 922 F.3d at 183, ruled that Delaware's law could not 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.

Ohio, like Delaware, no doubt has a legitimate interest in political balance. The problem is that O.R.C. § 3517.152(A)(1), like Delaware's law, does nothing to 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 make policy through adjudication, and even if Ohio's interest in political balance were truly compelling, Ohio's categorical exclusion of members of minor political parties from service would still fail. It is far from the least restrictive way of obtaining Ohio's objective. Indeed, it achieves the exact opposite.

Ohio's approach, like Delaware's, simply cannot pass the means prong of strict scrutiny. The Third Circuit in *Carney*, 922 F.3d at 180-81, correctly recognized that this sort of categorical ban cannot survive the means prong of strict scrutiny.

II. Under Both *Anderson-Burdick* and the Supreme Court's Patronage/Association Cases Strict Scrutiny Must Be Applied.

The District Court, as did this Court in *Daunt*, purported to apply both the patronage precedents and the framework spelled out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*,

504 U.S. 428 (1992). With neither, however, did the District Court identify the proper test -- or any test -- that governed this case. Had it properly applied either line of precedents, it would have discovered that strict scrutiny is the only proper analysis.

Although LPO does not believe it necessary to apply the *Anderson-Burdick* formula here -- since Ohio's law plainly violates the Supreme Court's freedom of association and patronage precedents -- *Anderson-Burdick*'s application supports the same result.

This Court made this plain in *Daunt*, 956 F.3d at 407, where it stated that "[a] law would not be content-neutral, and would thus impose a severe burden, if it 'limit[ed] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status'." (Citation omitted). Ohio's law limits political participation by an identifiable political group, a minor political party, and is thus necessarily severe and therefore subject to strict scrutiny, just as it is under the Court's patronage/association precedents.

A. Ohio's Categorical Ban On Minor Political Parties is Discriminatory.

The District Court correctly recognized in denying OEC's Motion to Dismiss that O.R.C. § 3517.152(A)(1) "prohibits any person affiliated with a minor political group, such as Ohio's Libertarian Party, from being considered for membership on the Commission." *Wilhelm*, 2019 WL 5395532 at *4; R. 29. It was only later, after the Supreme Court granted review in *Carney*, that the District Court changed its mind -- concluding without any modern support that because minor parties might one day become major they are not being treated differently. Opinion and Order, R.64, at PAGEID # 911.

The District Court's about-face apparently was related to the certiorari grant in *Carney*; the District Court must have felt that review indicated the Supreme Court's disapproval of that decision. If so, the District Court's assumption was incorrect; grants and denials of certiorari are "so discretionary with the Court" that they lack "precedential effect on this score." *Glidden Co. v. Zdanok*, 370 U.S. 530, 568 n.33 (1962).

Regardless of why it changed its mind, the District Court's reasoning is built on a faulty foundation. The assumption that

discrimination against minority groups is permissible because those groups might one day form majorities ignores the very principles on which a constitutional democracy is built. Minority groups possess (and need) *constitutional* rights, after all, precisely because they are in the minority. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

Constitutional protections, like those found in the First and Fourteenth Amendments, are therefore necessarily counter-majoritarian. *See*, *e.g.*, *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*, 572 U.S. 291, 337 (2014) (Sotomayor, J., dissenting) ("our Constitution places limits on what a majority of the people may do."); Martin A. Redish, *Killing the First Amendment With Kindness: A Troubled Reaction to Collins and Skover*, 68 TEX. L. REV. 1147, 1150 (1990) ("If our society sufficiently trusted those in power not

to infringe on the freedom of speech and press, the first amendment would not need to exist in its counter-majoritarian form.").

All of this is doubly true with restrictions on minority groups' abilities to participate in the political arena. In *Carolene Products*, 304 U.S. at 152 n.4, the Court noted that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" are justifiably "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." It specifically cited in this regard "restrictions upon the right to vote, on restraints upon the dissemination of information, on interferences with political organizations, [and] as to prohibition of peaceable assembly." (Citations omitted and emphasis added).

Holding that none of this applies because an "unpopular" minority group might one day become a majority turns decades of constitutional precedent on its head. *See also Larson v. Valente*, 456 U.S. 228, 245 (1982) ("Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations."); *Nieves v.*

Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring) ("If the state could … silence who voice unpopular ideas, little would be left of the our First Amendment liberties").

Ohio's absolute exclusion of members of minor political parties is unconstitutional not just because it discriminates against minority political groups, it is unconstitutional because it uses political association as a relevant qualification. Indeed, it uses political association as the principal qualification. Whether race, religion or political association, government cannot use a protected status -- especially when it reflects minority status -- as a justification for discrimination. *See*, *e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) ("if racial considerations predominated over others, the design of the district must withstand strict scrutiny"); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2017) ("when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor"); *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004) (plurality) ("What cases such as *Elrod v. Burns* require is not merely that Republicans be

given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*.") (emphasis original and citation omitted).

It can be no answer, then, to argue that Ohio discriminates between all political parties based on their size. Nor is it a defense to claim that a political party is too numerically weak to be protected -- or has the same opportunity to become dominant in the future (and enjoy the pleasure of appointments). That is true, after all, of every minority group that is made victim of unconstitutional discrimination. Every group can theoretically one day become dominant. That cannot change the fact that they are being discriminated against today.

Consequently, just as Ohio could not constitutionally pass a law conditioning appointment on an individual's being a member of a "majority race" or "majority religion," it cannot condition appointment on that person's being a member of a "major party." Imagine, for example, a law that restricts service on agencies and courts to members of the State's two "major" religions. Would anyone think that because Judaism has an equal opportunity to become "major" in the future the

rights of Jews who are presently being excluded are any less infringed? *See Wieman*, 344 U.S. at 191-92.

The District Court's conclusion that Ohio's law is neutral because minor parties might one day become major is plainly wrong. Ohio's law by its terms presently discriminates against "minor" political parties. It is not neutral. Strict scrutiny must be applied.

B. *Daunt* Was Correct in Holding that *Anderson-Burdick* Requires Strict Scrutiny for Discriminatory Laws.

"A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson*, 460 U.S. at 793. The First Amendment "protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (plurality opinion) (citation omitted). "Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest." *Id.* (citation omitted).

In *Clingman*, the Court reaffirmed its prior holding in *Keyishian* that it impermissibly infringes on associational rights "to disqualify [a minor party] from public benefits or privileges." *Id.* at 587. The plurality

reasoned that strict scrutiny did not apply to a mandated semi-closed primary there because the statute at issue did not prevent the Libertarian Party of Oklahoma from "engag[ing] in the same electoral activities as every other political party in Oklahoma." *Id.* The law, in short, was not discriminatory.

By contrast, Ohio's "major-party" requirement for the OEC must be tested by strict scrutiny because it necessarily limits "electoral activities" and opportunities in a discriminatory fashion. Ohio's citizens cannot form or advance new political parties with the objective of securing appointments of like-minded individuals to the Ohio Elections Commission. That privilege is left to the two reigning political parties. There are thus two sets of rules; one for the two dominant political parties and another for everyone else. This remains true even when the minor party is the third largest in the United States and Ohio.

This impediment may be analogized to an election law that renders it virtually impossible for a new political party to get its candidates on the ballot. Writing for the Court in *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), Justice Black rejected a proffered justification for laws that tend to give the Republican and Democratic parties "a

complete monopoly." "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Id.*

Ohio may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence." *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 367 (1997). "[A]n interest in securing the perceived benefits of a stable two-party system will not justify unreasonably exclusionary restrictions." *Id.* The same reasoning applies to an interest in securing the perceived benefits of a bi-partisan quasi-adjudicatory agency.

Unlike a "reasonable, non-discriminatory restriction[]" in a complex election code, Ohio's "major-party" requirement cannot be defended on the basis that it serves "the State's important regulatory interests." *Anderson*, 460 U.S. at 788. It is not a "reasonable election regulation[] that may, in practice, favor the traditional two-party system." *Timmons,* 520 U.S. at 367. It expressly allocates quasi-judicial power to the two major parties and leaves others to fend for themselves in front of a politically biased tribunal.

The fear that a minor party might gather support from members of a major party, of course, is not "a compelling interest, it is an impermissible one." *Clingman*, 544 U.S. at 617 (Stevens, J., dissenting) (citing *Timmons,* 520 U.S. at 367). Yet, Ohio's defense of its law is essentially that; it seeks to force voters to join the two dominant parties by claiming that only then can it achieve fairness and preserve democracy.

Ohio's syllogism is false. Maintaining political balance between two dominant political parties on an adjudicatory agency cannot insure fairness, let alone preserve democracy. It may ensure fairness between those two dominant parties, but it spells ostracism for those on the outside. Far from preserving democracy, it defeats democratic principles by insulating the two major parties from competition.

This kind of power-sharing arrangement is exactly what the Supreme Court's precedents protecting minor parties is designed to prevent. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats*

and Republicans from Political Competition, 1997 SUP. CT. REV. 331 (1997).

C. Minor Parties Enjoy First Amendment Rights to Compete on an Equal Basis and Even Playing Field in the Political Arena With the Two Major Parties.

The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). In addition, "[f]reedom of association … plainly presupposes a freedom not to associate." *Id.* at 623. "The right to associate with the political party of one's choice is an integral part of this basic freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Indeed, "political belief and association constitute the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356.

Anderson-Burdick dovetails with this basic principle by demanding equal treatment. In assessing whether restrictions on minor parties' abilities to participate in political matters are constitutional, a court "must first consider the character and magnitude" of the

infringement on protected interests. *Anderson*, 460 U.S. at 789. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review[.]" *Timmons*, 520 U.S. at 358 (citations omitted).

"A burden that falls unequally on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson*, 460 U.S. at 793. It is necessarily severe and must therefore satisfy strict scrutiny. Here, Ohio's major-party requirement "falls unequally"—in fact, exclusively—on Ohio citizens who have chosen to affiliate with non-major parties. It forces those who aspire to appointment to choose between exercising their constitutionally protected right not to associate with a major political party or seeking office. It therefore tilts the electoral playing field in favor of the two preferred "major" political parties and gives them an unfair advantage.

Whether this advantage flows from outright coercion or some form of government-induced choice is irrelevant. It is clear that government "may not deny a benefit to a person on a basis that infringes his

constitutionally protected interests," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), including the right to associate (or not) with a political party. *See Rutan*, 497 U.S. at 77 ("The government 'may not enact a regulation providing that no Republican … shall be appointed to federal office.'").

Because freedom of association "plainly presupposes a freedom not to associate," *Roberts*, 468 U.S. at 623, it is no solution to say that one who wants to be considered for appointment if free to abandon his or her political beliefs and join a major party. *See Storer v. Brown*, 415 U.S. 724, 746 (1974) (holding that states cannot require an independent candidate to affiliate with a political party in order to appear on the ballot). It is this unconstitutional choice that tilts the playing field.

The Supreme Court, moreover, has long recognized that provisions that grant a "complete monopoly" on public office to the two major political parties are subject to strict scrutiny. They by definition are exclusive and thereby severely burden the associational rights of citizens who are not members of those parties. *Rhodes*, 393 U.S. at 32; *see also Storer v. Brown*, 415 U.S. 724 (explaining that the restrictions in *Rhodes*, which effectively barred independents and members of third

parties from running for office, "severely burdened the right to associate for political purposes"). The Court has emphasized that restrictions that "place[] a particular burden on an identifiable segment of … independent-minded voters" by precluding their participation in public life are "especially difficult for the State to justify." *Anderson*, 460 U.S. at 792–93.

Conversely, when concluding that a law does not impose a severe burden on association, the Court has frequently has linked this conclusion to the law's not "exclud[ing] a particular group of citizens, or a political party, from participation," *Timmons*, 520 U.S. at 361, nor "disqualify[ing] [a minor party] from public benefits or privileges," *Clingman*, 544 U.S. at 587. In these latter instances, the playing field is left even for all to compete equally. May the best team win.

Ohio's major-party requirement is the antithesis of a fair and level playing field. It "den[ies] a benefit to a person because of his constitutionally protected speech or associations," and thus "penalize[s] and inhibit[s]" "his exercise of those freedoms." *Perry*, 408 U.S. at 597. Those who seek to affiliate with political parties are coerced into the two major parties, which then are given complete control over the

electoral machinery. Ohio law thus requires that the preferred players and their umpires all be on the same team. It is no less than demanding that all major league umpires be employed by the Yankees and Dodgers. So much for a fair and level playing field. Good luck Cincinnati Reds and Cleveland Indians!

D. Ohio's Major-Party Requirement is Not Narrowly Tailored to Achieve Any Legitimate Objective.

Ohio's major-party requirement is not narrowly tailored to serve any legitimate end, let alone a compelling state interest. Because the major-party requirement severely burdens the associational rights of Ohio's many citizens who are affiliated with minor parties, it cannot be upheld unless it is "narrowly tailored and advance[s] a compelling state interest." *Timmons*, 520 U.S. at 358 (citing *Burdick*, 504 U.S. at 434). Ohio's requirement does not do so.

No one can reasonably argue that members of minor parties are intrinsically less likely to possess the qualities of judgment and impartiality that are essential to preserving the fairness and appearance of fairness needed for Ohio's elections. Similarly, there is no reason to believe that Commissioners, if allowed to be members of minor parties, would have a greater tendency to render "unfair" or

"unbalanced" decisions. Indeed, the exact opposite is true; precluding minor party members from service on the OEC ensures "unfair" and "unbalanced" enforcement in favor of the two dominant political parties. It may be balanced and fair between them, but it is markedly unfair and unbalanced for those who stand apart.

The "precise interest[] put forward by [Ohio] as justification[] for the" major-party requirement, *Anderson*, 460 U.S. at 789, appears to be that it acts as some sort of prophylactic. Ohio apparently believes that without its major-party requirement, OEC might become too packed with conservatives, liberals, or something in between.

Even where First Amendment associational and speech rights are implicated, prophylactic measures aimed at preventing circumvention of laws that serve legitimate state interests can be constitutional -- if they meet the applicable test. *See*, *e.g.*, *Federal Election Commission v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (1996). When strict scrutiny applies, as here, prophylactic measures must not burden constitutionally protected interests more broadly than absolutely necessary to achieve a compelling end. *See Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 798–801

(1988). "Broad prophylactic rules" that severely burden free expression and association "are suspect," and "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Here, Ohio has not shown and cannot show that broadly excluding citizens who are not affiliated with a major political party from serving on the OEC is a narrowly tailored prophylactic measure. Such a theory is speculative at best, and is much more likely to prove counter-productive as far as non-major-party candidates and voters are concerned. Indeed, Ohio's major party restriction mandates the precise political imbalance that Ohio claims it seeks to avoid.

The present case puts proof in this pudding. Here, the OEC summarily dismissed credible claims that Ohio's ban on corporate aid, which is virtually identical to the federal ban on corporate aid, *see Toledo Area AFL-CIO Council*, 898 F. Supp. at 560, bars exclusive debates. The only explanation for this summary dismissal is the OEC's political imbalance -- an imbalance that is mandated by Ohio law.

Were Ohio truly interested in balance, as opposed to simply protecting the interests of the two major parties, it would follow the

approach taken by the federal government with its independent agencies, the Federal Elections Commission, in particular. As with the FEC, it would limit political parties to no more than a bare majority of seats on the OEC without excluding citizens who are not affiliated with major parties from serving. This kind of "bare majority" approach is the norm across America and is much better tailored toward avoiding political imbalance and unfair results.

Ohio's categorical exclusion of individuals based solely on their constitutionally protected political affiliations (or lack thereof) cannot be considered "narrowly tailored." *See Timmons*, 520 U.S. at 367 (explaining that states cannot "completely insulate the two-party system from minor parties' or independent candidates' competition and influence"). There are better ways to achieve the end. Ohio has no excuse for not employing better-tailored alternatives.

III. Ohio's Law Cannot Survive Any Level of Heightened Scrutiny.

Burdens on associational rights that are not severe must still be supported by interests "sufficient to outweigh" the burden and must serve those interests in a "reasonable" way. *Burdick*, 504 U.S. at 440–41. Under this approach, "[e]ven a significant interference with

protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (citation omitted).

This Court in *Daunt*, 956 F.3d at 407, correctly embraced this principle: "Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a 'flexible' analysis, 'weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it.'" (Citations omitted). It further ruled that when neutral "eligibility criteria clearly correspond to activities protected by the First Amendment," *id.* at 408, this more-than-minimal flexible analysis must at bare minimum be met.

The Court in *Daunt*, 956 F.3d at 409, sustained Michigan's conflict of interest law under this flexible standard because, on balance, Michigan's "compelling interest 'in limiting the conflict of interest implicit in legislative control over redistricting'" outweighed the "relatively insignificant" burden placed on the plaintiffs' ability to

"serve on the Commission after their six-year period of ineligibility expires."

In contrast, Ohio requires that those seeking to serve on its Elections Commission forfeit their memberships in minor political parties. Someone who wants to serve on the Commission cannot even vote in a minor-party primary without disqualifying himself or herself from service. Such a restriction cannot be considered "relatively insignificant," nor is it properly measured against a compelling interest in limiting conflicts of interest.

By forcing a choice between the exercise of associational rights and eligibility for judicial office, the major-party requirement is, at bare minimum, "a significant interference with protected rights of political association." *Buckley*, 424 U.S. at 25. Even if that interference were not severe enough to require strict scrutiny, it could be sustained only "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.*

Ohio's major-party requirement fails even this less-demanding "closely drawn" level of scrutiny. Ohio has not shown and cannot show

that whatever incremental increase in balance or fairness this restriction might bring about is sufficient to outweigh the significant burden on associational rights. A categorical exclusion of members of minor parties from Ohio's principal election agency is, simply put, an "unnecessary abridgement of associational freedoms." *Id.* It takes a sledge hammer to something that requires a scalpel. It cannot be sustained under any heightened level of scrutiny.

Conclusion

The District Court's judgment should be **REVERSED** and **REMANDED** for consideration by it of the appropriate relief.

Respectfully submitted,

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CERTIFICATE OF WORD-COUNT AND TYPE-SIZE

Appellants certify that they have prepared this document in 14-point Century font and that excluding the Cover, Corporate Disclosure Statement, Tables, Statement in Support of Oral Argument, Signature Block, Certificates and Addendum, the document contains 12,991 words.

s/Mark R. Brown
Mark R. Brown

CERTIFICATE OF SERVICE

I certify that this Brief was filed using the Court's electronic filing system and will thereby be served on all parties to this proceeding.

s/Mark R. Brown
Mark R. Brown

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Verified Complaint, R.1, PAGEID # 4, 6, 7, 13, 23, 24, 39, 40, 42, 45, 50, 52, 53

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