UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIBERTARIAN PARTY OF OHIO, et al.,

Appellants-Plaintiffs,

V. **CASE NO. 15-4270**

JON HUSTED,
in his Official Capacity as Ohio Secretary of State,

Appellee-Defendant,

and

THE STATE OF OHIO,

Appellee-Intervenor-Defendant.
_____/

APPELLANTS' MOTION FOR EMERGENCY INJUNCTION AND EXPEDITED APPEAL

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UNITED STATES COURT OF APPEALS
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Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-4270 Case Name: Libertarian Party of Ohio v. Husted

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Ohio, et al.,
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 November 20, 2015 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.

Plaintiffs/Appellants respectfully move this Court to stay the judgment of the District Court below and grant an emergency injunction pending appeal to Plaintiffs under Federal Rule of Appellate Procedure 8(a). Specifically, Appellants request that the District Court's partial summary judgment dismissing their claim under Ohio's Constitution (Count Five of the Third Amended Complaint (hereinafter "Count Five")) because of the Eleventh Amendment, *see* Doc. No. 336 at PAGEID # 8705 (Opinion and Order, dated Oct. 14, 2015),[1] be stayed, and that the two relevant Defendants/Appellees, Intervenor-Defendant-Ohio and Defendant-Secretary, be immediately enjoined under Ohio law from enforcing S.B. 193. Appellants additionally respectfully request that this appeal be expedited. In support, Appellants include a Motion to Exceed the Page Limit, their Notice of Appeal, and the Opinion and Order, dated October 14, 2015, of the District Court.

REASONS FOR GRANTING EMERGENCY RELIEF

Plaintiff/Appellant, the Libertarian Party of Ohio (hereinafter "Plaintiff-LPO" or "LPO"),[2] has had to continually resort to federal courts, including this Court, in order to secure and defend its right to access Ohio's ballot. Four prior

[1] References in the form of "Doc. No. __, [description of document]" are to documents listed on the District Court's CM/ECF docket sheet unless otherwise noted.

[2] For brevity's sake, Plaintiffs/Appellants are sometimes collectively referred to as "the LPO" or "LPO."

successful suits (including the present case), *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sep. 7, 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012); *Libertarian Party of Ohio v. Husted*, Doc. No. 47 (Opinion and Order and Preliminary Injunction, dated Jan. 7, 2014), have insured LPO's participation in Ohio's elections since 2008.

On November 6, 2013, Ohio Governor John Kasich signed S.B. 193 -- Ohio's latest ballot access law. This bill, by its terms, dissolved all minor parties in Ohio, including LPO. It does so in perpetuity until those dissolved minor parties each wins 3% of the vote in a gubernatorial or presidential election. These dissolved parties lose their right to hold primaries. They lose their right to register party members. They cannot again hold primaries and register party members until the election cycle after they gather tens of thousands of signatures, petition, "re-qualify" as political parties, and then participate in a general election.

LPO challenged the law removing it from the ballot, S.B. 193, within two days of its being signed by the Governor. On November 8, 2013 Plaintiffs challenged S.B. 193 and sought preliminary relief. While LPO won limited relief awarding it access to the 2014 primary and general election ballots on January 7, 2014, the District Court did not resolve LPO's facial challenge to S.B. 193 under

either the Equal Protection Clause or Ohio's Constitution. It did not grant or deny their request for preliminary injunctive relief under either argument.

Instead, resolution of Appellants' claims to preliminary and permanent injunctive relief under Counts Four and Five (the facial Equal Protection and Ohio constitutional challenges to S.B. 193) did not come until October 14, 2015. The District Court dismissed LPO's challenge to S.B. 193 under Ohio's Constitution on jurisdictional grounds. *See* Doc. No. 336 at PAGEID # 8705 (Opinion and Order), and denied their request for preliminary and permanent injunctive relief by awarding summary judgment to Appellees. *Id.* at PAGEID # 8700.

PROCEEDINGS BELOW

Proceedings below essentially fall into three phases. The first phase involved LPO's challenge to Ohio's newly enacted legislation requiring that circulators be Ohio residents. Ohio's Constitution requires that political parties hold primaries. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006). Running in party primaries, in turn, requires that prospective primary candidates submit nominating petitions supported by voters' signatures. *See* O.R.C. § 3513.05. The number of signatures required by Ohio law to support nominating petitions varies; statewide candidates for minor-party primaries must collect 500 valid signatures. Regardless of the number, all signatures must be gathered and witnessed by "circulators." *See* O.R.C. § 3513.05.

On June 21, 2013, Ohio changed its law, specifically O.R.C. § 3503.06, to require that the circulators of candidates' nominating petitions be residents of Ohio. Because of this change, which was codified at O.R.C. § 3503.06(C)(1)(a), LPO's candidates for its 2014 primary were prevented from using non-resident, paid circulators to gather signatures. Because minor parties have fewer members and volunteers, they tend to rely on paid circulators, who in turn tend to be non-residents (often traveling from state to state). Because candidates' nominating petitions for the 2014 primary were due no later than February 5, 2014, Plaintiffs on September 25, 2013 filed their Complaint against the Secretary, Doc. No. 1 (Complaint), challenging Ohio's residence requirement and requesting preliminary (as well as permanent) relief. *See* Doc. No. 3 (Request for Preliminary Injunction).

On October 3, 2013, just one week later, the State of Ohio intervened to defend its new residence requirement. *See* Doc. No. 5 (Motion to Intervene). It did so notwithstanding that its Secretary of State was already defending Ohio's circulator-residence requirement. Two weeks after its intervention, on November 18, 2013, the State of Ohio responded to LPOs' motion for preliminary relief and began its active defense of its circulator-residence requirement. *See* Doc. No.14 (Response to Motion for Preliminary Injunction).

November 6, 2013 ushered in the second phase of the proceedings below. While LPOs' motion for preliminary relief challenging Ohio's circulator-residence

requirement was pending, the State of Ohio passed legislation voiding LPO's status as a political party. Known as S.B. 193, this legislation not only stripped LPO of its status as a qualified political party, it also denied to LPO the right to participate in Ohio's 2014 primary. It left LPO with no mechanism to access Ohio's 2014 primary, required that LPO collect tens of thousands of signatures by July of 2014 in order to re-qualify as a political party in time for the 2014 general election, and only following this general election allowed LPO to register members via the next primary.

On November 8, 2013, just two days after it was signed by the Governor, LPO amended its Complaint to also challenge S.B. 193. *See* Doc. No. 16 (Amended Complaint). LPO immediately on November 10, 2013 sought emergency injunctive relief under both the federal Constitution (Counts Three and Four) and Ohio's Constitution (Count Five). *See* Doc. No. 17 (Motion for Preliminary Injunction).

Neither Ohio nor the Secretary objected to Plaintiffs' amended Complaint, even though Count Five named Intervenor-Defendant-Ohio as a defendant along with the Secretary of State. Rather than object, they both stepped forward to separately defend S.B. 193. Both responded to Plaintiffs' motion for preliminary relief enjoining S.B. 193's enforcement; both argued that S.B. 193 was constitutional as a matter of federal law. Both actively litigated Counts Three and

Four, which were the LPO's two federal challenges to S.B. 193. *See* Doc. No. 31 (Secretary's Response) & Doc. No. 32 (State of Ohio's Response).

On November 13, 2013, the District Court enjoined enforcement of Ohio's circulator-residence requirement, which the State of Ohio had initially intervened to defend. *See* Doc. No. 18. That decision was not appealed.

On November 29, 2013, the State of Ohio answered Plaintiffs' amended Complaint by defending S.B. 193. *See* Doc. No. 21. Rather than assert its full Eleventh Amendment immunity and claim that it was not a proper party to Plaintiffs' challenges to S.B. 193, the State of Ohio sought to selectively choose what it would and would not litigate. Along with the Secretary of State, it actively defended against Counts Three and Four -- Plaintiffs' two federal constitutional claims -- without reservation. In regard to LPO's Ohio constitutional law claim (Count Five), however, Intervenor-Defendant-Ohio asserted Eleventh Amendment immunity.

On January 7, 2014, the District Court enjoined the application of S.B. 193 to Ohio's 2014 election. *See* Doc. No. 47 at PAGEID # 837-38 (Opinion and Order). The District Court agreed with the LPO under Count Three of its Amended Complaint that an application of S.B. 193 to Ohio's upcoming election on such short notice would violate federal Due Process. *Id.* The District Court, meanwhile, reserved ruling on the ultimate validity of S.B. 193 under Count Four

(Plaintiffs' federal constitutional challenge) and Count Five (Plaintiffs' Ohio constitutional challenge. *Id.* at PAGEID # 834-36. It stated that because Plaintiffs were to be included in the 2014 election, it need not resolve the LPO's challenge under Counts Four and Five "at this juncture." *Id.* at PAGEID # 836.

On January 10, 2014, the State of Ohio and the Secretary both appealed the District Court's preliminary injunction prohibiting application of S.B. 193 to the 2014 election. *See* Doc. No. 50 (Notice of Appeal). The Case Number assigned to the appeal was 14-3030. On January 15, 2014, this Court refused to expedite the appeal. *See* Sixth Circuit Doc. No. 006111937423. On February 18, 2014, the State of Ohio and the Secretary agreed to dismiss their interlocutory appeal. This Court granted this stipulation on February 21, 2014. *See* Sixth Circuit Doc. No. 006111971695.

Having twice won injunctive relief, LPO's litigation with Ohio entered its third phase after several LPO candidates qualified for LPO's primary on February 5, 2014. Because these facts are not relevant to this appeal, Appellants need only report at this stage that the Ohio Republican Party (ORP) and Kasich Campaign for Governor succeeded in having the LPO's gubernatorial candidate, Charlie Earl, removed from the ballot. Appellants challenged this tactic with four new claims now found in Counts Six, Seven, Eight and Nine on March 7, 2014. *See* Doc. No. 56 (Amended Complaint). Ultimately, Appellants failed to win emergency relief

under these Counts from the District Court or this Court on interlocutory appeal. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014).

Continuing discovery under these Counts in phase three, though not related to Appellants' challenge to S.B. 193, caused considerable delay. Appellants were forced to repeatedly seek (and obtain) discovery orders forcing the Secretary and Intervenor-Defendant-Felsoci to disclose information. That discovery did not conclude until the Court ordered more production on October 2, 2015.

Appellants twice attempted to have the District Court resolve their challenge to S.B. 193 notwithstanding the ongoing discovery regarding the unrelated phase three Counts. The first effort was on February 27, 2015, after Appellants learned that the Secretary was enforcing S.B. 193. *See* Doc. No. 284 (Motion to Maintain Status Quo). The next was on August 21, 2015, after it became apparent that Defendants were not cooperating in concluding discovery under the phase three Counts. *See* Doc. No. 319 (Request for Status Conference).

On October 14, 2015, the District Court granted the State of Ohio and the Defendant-Secretary summary judgment under Count Four of the Plaintiffs' Third Amended Complaint, finding that S.B. 193 did not violate the federal Constitution. *See* Doc. No. 336 at PAGEID # 8700. In that same Order, the District Court dismissed LPO's Ohio constitutional law claim against the State of Ohio and the Secretary under the Eleventh Amendment. *Id.* at PAGEID # 8705.

Only Count Seven, part of phase three, remained. On October 16, 2015, the District Court directed the parties to renew their cross-motions for summary judgment in light of the newly discovered evidence. *See* Doc. No. 337 (Order). Plaintiffs did so that very day. *See* Doc. No. 338 (Renewed Motion for Summary Judgment). Briefing on Count Seven was completed on November 9, 2015.

On October 23, 2015, two weeks before the additional briefing on Count Seven was completed, LPO moved the District Court to allow an immediate appeal under Count Five to address the Defendants' selective invocation of the Eleventh Amendment. *See* Doc. No. 339 (Motion to Modify). In doing so, LPO informed the District Court of LPO's concern over Ohio's closely approaching December 16, 2015 deadline for the 2016 primary.

On October 27, 2015, the District Court directed the State of Ohio and the Secretary to respond to LPO's Rule 54(b) Motion by October 30, 2015. *See* Doc. No. 340 (Order). Defendants' deadline was later extended to November 6, 2015 on the Secretary's motion. *See* Doc. No. 348 (Order). LPO replied on November 6, 2015, completing briefing on LPO's Rule 54(b) motion.

The District Court has yet to rule on Appellants' motion to modify. Because time is of the essence, LPO filed its Notice of Appeal before resolution of that motion to modify on November 18, 2015. *See* Doc. No. 353 (Notice of Appeal). LPO the day before that filed a motion to stay under Rule 62(c) with the District

Court. *See* Doc. No. 352 (Motion to Stay). The District Court has yet to rule on these motions. As explained below, jurisdiction will be proper in this Court regardless of whether the motion to modify is granted.

JURISDICTION

LPO's appeal is admittedly premature, but is still timely and proper. It will ripen once the District Court resolves its timely motion to modify, which was filed on October 23, 2015. *See* Doc. No. 339. Defendants opposed that motion and also opposed expedited briefing on the motion. The District Court ordered expedited briefing, *see* Doc. No. 343 (Order), which was completed on November 6, 2015.

LPO's motion to modify specifically requested a Rule 54(b) order that there was "no just reason" to delay an immediate appeal of LPO's challenge to S.B. 193. The District Court's dismissal of Count Five and summary judgment under Count Four were not final for purposes of appeal because the District Court on October 16, 2015, *see* Doc. No. 337, ordered additional briefing on an unrelated challenge under Count Seven of the Third Amended Complaint. LPO filed its additional brief under Count Seven that same day, October 16, 2015. Defendants completed additional briefing on Count Seven on November 9, 2015.

LPO's timely motion to modify the October 14, 2015 judgment tolls the deadline to appeal under Federal Rule of Appellate Procedure 4. *See Wackenhut Corp. v. Guardsmark, Inc.*, 856 F.2d 197 (6th Cir. 1988) (citing *Sierra On-Line,*

Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1418-19 (9th Cir. 1984); *United States v. Hill*, 95 F.3d 1153, *1 (6th Cir. 1996) ("a timely motion to modify or amend an order generally tolls the time for filing a notice of appeal"). Once the District Court disposes of that motion, LPO's premature appeal will ripen and take effect under Federal Rule of Appellate Procedure 4(a)(4)(B).

Assuming that the District Court grants LPO's motion to modify and certifies the appeal under Rule 54(b), jurisdiction will be proper under 28 U.S.C. § 1291. *See, e.g., Gillis v. United States Department of Health and Human Services*, 759 F.2d 565, 569 (6th Cir. 1985).

Should the District Court deny the motion to modify, in contrast, jurisdiction will still be proper under 28 U.S.C. § 1292(a)(1), since the District Court's rejections of Counts Four and Five effectively denies LPO of preliminary and permanent injunctive relief relative to S.B. 193. *See Graves v. Mahoning County*, 534 Fed. Appx. 399, 403 (6th Cir. 2013); *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). The District Court's interlocutory decision rejecting preliminary and permanent injunctive relief might have a "serious, perhaps irreparable, consequence," within the meaning of *Carson*. Further, because the election is closely approaching, the rejection of LPO's challenge to S.B. 193 might only be "effectively challenged" by immediate appeal. *Id.*

LEGAL ARGUMENT

"When a district court is asked to issue a preliminary injunction, it ... balances four factors ... : (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995). These same four factors are balanced by this Court when deciding whether to issue an emergency injunction. *See Blankenship v. Blackwell*, 2004 WL 2390113, at *1 (6th Cir. 2004).

I. Appellants' Likelihood of Success on the Merits.

A. S.B. 193 Dissolved LPO, Stole its Primary, Prevents it From Registering Members, and Places it at a Political Disadvantage in Violation of Equal Protection.

Senate Bill 193 violates the Equal Protection Clause. It accomplishes this by placing new parties, including LPO, at a political disadvantage. It leaves parties that are not recognized by Ohio, including LPO after the November 2014 election, with no mechanism by which they can register party members on an equal basis with the established parties. With the passage of S.B. 193, political parties that are allowed to hold primaries will thereby register party members. Parties like the

LPO will not. Party membership, recognized as such by the State, is a huge benefit in any election cycle. It cannot constitutionally be awarded to some parties but not others.

Ohio, unlike most states, officially registers voters with political parties through party primaries. *See, e.g.*, O.R.C. § 3513.05 ("an elector is considered to be a member of a political party if the elector voted in that party's primary election within the preceding two calendar years"); Jon Husted, Ohio Secretary of State, Frequently Asked Questions: General Voting & Voter Registration, http://www.sos.state.oh.us/sos/elections/Voters/FAQ/genFAQs.aspx#declare ("Under Ohio election law, you declare your political party affiliation by requesting the ballot of a political party in a partisan primary election. If you do not desire to affiliate with a political party in Ohio, you are considered to be an unaffiliated voter.") (last visited Nov. 17, 2015).

Party membership carries many practical benefits. *See, e.g., Baer v. Meyer*, 577 F. Supp.2d 838, 843 (D. Colo. 1984) (stating that party registration "lists are invaluable in organizing campaigns, enlisting party workers and raising funds."); O.R.C. § 3517.19 (allowing political parties in Ohio to sell their membership lists created by the State). And in Ohio, party membership has many legal benefits, too. For example, S.B. 193, § 1 (amending O.R.C. § 3517.012), imposes party-membership requirements on the signers and circulators of candidates' nominating

petitions. *See also* O.R.C. § 3513.05. Without members, LPO will have a difficult time circulating petitions and collecting signatures.

In *Williams v. Rhodes*, 393 U.S. 23, 25 (1968), the Supreme Court observed:

> It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause.

Id. at 30. Applying the logic of *Williams v. Rhodes*, courts have often invalidated "perks" and disparate benefits awarded to the established parties. In *Reform Party of Allegheny County v. Allegheny County Department of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (en banc), for example, the Third Circuit recognized that although an across-the-board anti-fusion law (preventing parties from cross-endorsing other parties' candidates) does not violate the First Amendment, one that allows major parties, but denies to minor parties, the right to do so violates Equal Protection. *See also Green Party of Pennsylvania v. Aichele*, 89 F. Supp.3d 723, 749 (E.D. Pa. 2015) (striking law that allowed only major political party members to cross-support candidates).

Council of Alternative Political Parties v. State of New Jersey Division of Elections, 781 A.2d 1041 (N.J. App. 2001), offers an illustration in the context of officially recognized party membership. There, the Court invalidated a statute that "preclude[d] a registered voter from declaring a party affiliation other than

Republican, Democrat or Independent ...." *Id*. at 1043. The court concluded that "the statutory scheme imposes a significant handicap on the alternative parties' ability to organize while reinforcing the position of the established statutory parties." *Id*. at 1051. *See also Green Party of Michigan v. Land*, 541 F. Supp.2d 912 (E.D. Mich. 2008) (invalidating Michigan law that provided only the major parties with membership lists).

B. Ohio's Constitution Guarantees Primaries for Political Parties.

Ohio's Constitution, Article V, § 7, provides that "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law ...." It has been interpreted by the Ohio Supreme Court to require that a political party's candidates gain access to Ohio's general election ballot by "filing a declaration of candidacy accompanied by a petition entitling one to be a participant in the direct party primary wherein candidates from all political parties seek their nomination ...." *State ex rel. Gottlieb v. Sulligan*, 193 N.E.2d 270, 272-73 (Ohio 1963) (emphasis added). Unlike independent candidates, who may qualify for the general election by nominating petition, party candidates are required and entitled to use primaries.

This Court in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006), which invalidated Ohio's previous limitations on minor-party access, repeated what Ohio has told it: The Ohio "Constitution requires that all political

parties, including minor parties, nominate their candidates at primary elections." (Citing OHIO CONST. art. V, § 7). Ohio's constitutional requirement was extremely important to the Secretary's defense of Ohio's early-filing deadline in that case. Ohio, after all, had always argued that because Ohio's Constitution required primaries for minor parties, it was forced to require that the minor parties qualify early -- well before the primary was to be held.

Senate Bill 193, which is the focus of LPO's challenge under Count Five, strips minor political parties of this right. It prohibits emerging minor parties, like the LPO, from conducting primaries. In order to qualify as a political party under S.B. 193, a minor party, like the LPO, must first gather tens of thousands of signatures. Its candidates must also collect their own shares of signatures. Only after these two sets of signatures are submitted to the Secretary and verified in July of an election year are the party and its candidates allowed to participate in the general election. The minor party is not allowed to hold a primary.

1. Ohio Waived Immunity By Voluntarily Intervening and Defending S.B. 193.

Ohio's new minor-party-access mechanism in S.B. 193 plainly violates Ohio's Constitution. The question is whether the District Court possessed jurisdiction to consider the challenge. The District Court incorrectly ruled that the Eleventh Amendment prohibited its consideration of Ohio's Constitution. First, the District Court erroneously ruled that "Plaintiffs' reliance on *Lapides* [*v. Board of*

Regents of University System of Georgia, 535 U.S. 613 (2002),] is misplaced." Doc. No. 336 at PAGEID # 8703 (Opinion and Order). Removal, the Court observed, "did not occur here; rather, Plaintiffs instituted the instant action in federal court." *Id.* Therefore, the Supreme Court's holding in *Lapides*, the District Court concluded, did not apply. *Id.*

Next, the District Court incorrectly ruled that in order for LPO to overcome Ohio's Eleventh Amendment immunity, LPO was required to show that Intervenor-Defendant-Ohio had "unequivocally expressed" its consent to suit. *See id*. Because Ohio had expressly reserved its Eleventh Amendment immunity to LPO's challenge under Ohio law, the District Court concluded, LPO could not meet this requirement. Ohio remained immune under Ohio law even though it voluntarily intervened and voluntarily litigated S.B. 193's validity. The District Court erred twice.

LPO has conceded throughout this litigation that the Eleventh Amendment prohibited its filing suit against the State of Ohio -- for any reason -- in federal court. *See Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996). LPO admitted that it could not have sued and served the State of Ohio, by name, in this case for any reason. LPO could not have forced the State of Ohio to defend its residence requirement for circulators; it could not have forced Ohio to defend S.B. 193 -- for any reason. All LPO could do was challenge Ohio's circulator-residence

requirement and S.B. 193 by suing the Defendant-Secretary under federal law and the logic of *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young* creates an exception to the Eleventh Amendment for federal claims seeking prospective relief against state officers in their "official capacities."

Ex parte Young, of course, does not authorize suits against state officials seeking prospective declaratory and injunctive relief under state law. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984). The "fiction" of *Ex parte Young* is that state officials are not states for purposes of the Eleventh Amendment when they violate federal constitutional norms. Consequently, LPO had to concede that without the State of Ohio's voluntary intervention in this case, it could not have proceeded against Intervenor-Defendant-Ohio or Defendant-Secretary in this case under Ohio's Constitution and Ohio's remedial mechanism.

This "fiction" created by *Ex parte Young* is theoretically complicated, to be sure; fortunately, for purposes of the present case, the Supreme Court in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), has addressed and answered the relevant question. *Lapides* establishes that when a State voluntarily invokes the jurisdiction of a federal court, it has waived its Eleventh Amendment immunity. The State of Ohio here voluntarily intervened in

this case, *see* Doc. No. 5 (Motion to Intervene), and subsequently voluntarily defended S.B. 193. Ohio waived its Eleventh Amendment immunity.

Ohio seeks to have it both ways; it wants to voluntarily defend S.B. 193's validity under the federal Constitution while avoiding LPO's challenge under Ohio law. A long history of Supreme Court cases establishes that Ohio cannot game the system by voluntarily invoking federal jurisdiction, asserting its substantive defenses to federal claims, and then dodging state-law theories of liability. *Clark v. Barnard*, 108 U.S. 436 (1883); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284 (1906); *People of Porto Rico v. Ramos*, 232 U.S. 627, 631 (1914); *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002).

Contrary to the District Court's conclusion, the Supreme Court's holding in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), controls this case. There, the Supreme Court expressly rejected the very argument that Ohio makes here. The Supreme Court ruled that a State may not voluntarily invoke federal jurisdiction, argue federal law, and retain Eleventh Amendment immunity to state-law claims. Put another way, a waiver of immunity to federal claims through voluntary invocation of federal jurisdiction necessarily carries with it a waiver of immunity to any state-law claims that have also been made. States cannot have it both ways.

In *Lapides*, Georgia had been properly sued in state court. Georgia then removed the action to federal court, where it asserted that the Eleventh Amendment barred the plaintiff's state-law claims against it. *Id.* at 616. The Supreme Court rejected this litigation tactic, finding that Georgia's voluntary invocation of federal jurisdiction waived its Eleventh Amendment immunity completely; in particular, it waived any Eleventh Amendment objection to state-law claims made against it:

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand.

Id. at 619.

The Supreme Court further explained that "[t]o adopt the State's Eleventh Amendment position would permit States to *achieve unfair tactical advantages*, if not in this case, in others." *Id.* at 621 (emphasis added and citations omitted); *see also Ramos*, 232 U.S. at 632 ("[T]he immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."). A state that voluntarily invokes federal jurisdiction[3]

[3] Even a State that is involuntarily brought into federal litigation cannot raise Eleventh Amendment immunity whenever it chooses. *See Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003).

cannot have it both ways; allowing it to do so would lead to "unfair tactical advantages." It allows a State an unwarranted advantage, as has proved true in the present case. If Ohio is correct, it can choose its forum and then the terms of its defense; LPO meanwhile will be forced to 'eat cake' by splitting its litigation against Ohio between two court systems. This is the patent unfairness pointed to in *Lapides*.

The Supreme Court in *Lapides* relied on *Clark v. Barnard*, 108 U.S. 436 (1883), a case where a state had intervened in federal litigation, as the paradigmatic example of how anomalous it would be to allow a state to voluntarily invoke federal jurisdiction while claiming immunity: "[T]he Court has made clear in general that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Lapides*, 535 U.S. at 619 (emphasis in original) (citing *Clark v. Barnard*, 108 U.S. 436 (1883)); *see also Ramos*, 232 U.S. at 631-32 (determining that when a state voluntarily intervenes it irrevocably waives its Eleventh Amendment immunity).

In *Clark*, Rhode Island had intervened in federal court to claim an interest in a fund that formed the *res* of the litigation. It then attempted to defend itself from the claims of suitors by asserting the Eleventh Amendment. The Supreme Court

rejected such an unfair tactical advantage: "Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." *Clark*, 108 U.S. at 448 (emphasis added).

Contrary to the District Court's conclusion, courts have uniformly recognized that the Supreme Court's ruling in *Lapides* is not limited to removals, but applies to all kinds of voluntary invocations of federal-court jurisdiction. Indeed, as explained above, *Lapides* was premised on *Clark*, which involved a state that had intervened in federal litigation. Additionally, in *Board of Regents of Wisconsin v. Phoenix International Software, Inc*., 653 F.3d 448, 461 (7th Cir. 2011), it was argued that "*Lapides* turned on the fact that the case reached the federal court through removal." The Court responded: "We think not." *Id*. "When a state chooses to intervene in a federal case, it waives its immunity for purposes of those proceedings." *Id*. at 463. The Court continued:

> As the *Lapides* Court explained, "In large part the rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create." "[R]emoval is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of the matter (here of state law) in a federal forum." But it is, in the end, just a mechanism for invoking the federal court's jurisdiction. There is no reason to think that the state's use of any other mechanism—such as filing an original action in federal court—carries less force for waiver purposes.

Id. at 461- 62 (citations omitted).

In *Carty v. State Office of Risk Management*, 733 F.3d 550, 554 (5th Cir. 2013), where the State had intervened in a federal action and then attempted to assert Eleventh Amendment immunity, the Court stated that the litigation conduct principle recognized in *Lapides* "finds waiver [of immunity from suit] through invocation of federal court jurisdiction by an attorney authorized to represent the state in the pertinent litigation." "For over a century," the Court stated, "this principle has been applied to cases like the present one, in which a state intervenes in a case asserting a claim to a fund." *Id*. "Because [the state] voluntarily invoked the jurisdiction of the federal courts, it has waived its sovereign immunity from suit." *Id*.

In *Biomedical Patent Management Corp. v. California, Dept. of Health Services*, 505 F.3d 1328, 1333 (Fed. Cir. 2007), to add another example, the Court stated that "it is clear that, by intervening and asserting claims against BPMC in the 1997 lawsuit, DHS voluntarily invoked the district court's jurisdiction and, thus, waived its sovereign immunity for purposes of that lawsuit." *See also Reeder v. Carroll*, 2010 WL 797136 *2 (N.D. Iowa 2010) ("A state may also waive its Eleventh Amendment immunity when it intervenes in a federal lawsuit."); *Ameripride Services, Inc. v. Valley Industrial Service*, 2008 WL 5068672 at *6 (E.D. Cal. 2008) ("*Lapides* surveyed earlier Supreme Court cases finding waiver of sovereign immunity by voluntary appearance in federal court as an intervenor, or

by voluntary filing of a claim against a bankrupt party."); *Galassini v. Town of Fountain Hills*, 2013 WL 5445483 at *28-*29 (D. Az. 2013) (holding that a state's voluntary intervention waived its Eleventh Amendment immunity).

Because it erroneously strayed from applying the Supreme Court's decision in *Lapides*, the District Court also applied an incorrect standard to the problem of waiver. Relying on cases that did not involve a state's litigation conduct, the District Court stated that "the test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id*. at PAGEID # 8702 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676 (1999)). Waiver, the District Court insisted, must be "unequivocally expressed." *Id*. (quoting *VIBO Corp., Inc., v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012).

The problem with the District Court's reliance on these cases is clear; *VIBO* was not a litigation conduct case; nor was *College Savings Bank*. A different standard applies when a state's voluntary litigation conduct is at issue. Under these circumstances, the question is not whether the state expressly consented to suit or somehow made its consent "unequivocally" clear. The question is whether a state has voluntarily invoked the jurisdiction of the federal court. If its express consent were required under these circumstances, after all, *Lapides* would have come out

the other way. Georgia expressly reserved its Eleventh Amendment immunity to state-law claims, just as Ohio has done here.

Lower courts have recognized the differing standards for waiver through litigation conduct, established by *Lapides*, and the consent analysis stated in cases like *College Savings Bank*. The former is a function of a state's voluntarily invoking federal judicial involvement; the latter focuses on the intent of the state. In *Skelton v. Henry*, 390 F.3d 614, 618 (8th Cir. 2004), for example, the court stated: "We focus on whether the state's action in litigation clearly invokes the jurisdiction of the federal court, not on the intention of the state to waive immunity." It explained that "[a] state may waive its immunity from suit in federal court by voluntarily submitting its rights for judicial determination. Waiver in litigation prevents states from selectively invoking immunity to achieve litigation advantages." *Id.*

In *Beckham v. National Railroad Passenger Corp*., 569 F. Supp.2d 542, 552 (D. Md. 2008), the court more recently explained the same point:

> Unlike in a case of waiver by statute, waiver by litigation conduct does not require a showing of clear intent: [W]aiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages.

(Citations omitted).

The District Court's conclusion that Ohio remained immune because "there is no suggestion here that the State of Ohio expressly consented to being sued in federal court," Doc. No. 336 at PAGEID #8704, is beside the point. Similarly, its reliance on the fact that Ohio "expressly asserted its immunity afforded to it by the Eleventh Amendment as to Count Five [the Ohio constitutional challenge]," *id.*, is misplaced. Whether Ohio intended to subject itself to suit in federal court under Ohio law or otherwise expressly consented to suit in federal court is irrelevant. The question is whether Ohio voluntarily invoked federal jurisdiction. Here, it plainly did. It invoked federal jurisdiction, elected to litigate (and successfully defend) S.B. 193's validity on federal grounds. It is unfair to handcuff LPO it by allowing Ohio to voluntarily invoke federal jurisdiction and defend against only the theories that it chooses.

2. LPO's Amendment to The Complaint Does Not Change *Lapides'* Application to Ohio's Intervention.

Courts both before and after *Lapides* have ruled that a state's voluntary invocation of federal jurisdiction exposes it to counterclaims. *See, e.g.*, *Regents of the University of New Mexico v. Knight*, 321 F.3d 1111, 1125-26 (Fed. Cir. 2003) ("courts have deemed that a state that voluntarily appears in federal court has waived its immunity for all compulsory counterclaims"); *Board of Regents of Wisconsin v. Phoenix International Software, Inc.*, 653 F.3d 448, 461-62 (7th Cir. 2011) (holding that state's voluntary invocation of federal jurisdiction subjects it to

counterclaims); *United States v. Metropolitan St. Louis Sewer District*, 578 F.3d 722, 725 (8th Cir. 2009) (holding that because state joined United States as a co-plaintiff in federal court it was therefore governed by *Lapides* and subject to counterclaims); *Biomedical Patent Management Corp. v. California, Dept. of Health Services*, 505 F.3d 1328, 1333 (Fed. Cir. 2007) (same). For this same reason, the Supreme Court has ruled that states that voluntarily invoke federal jurisdiction are subject to ancillary enforcement proceedings. *See Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (holding that subsequent proceeding to enforce injunction was covered by state's initial waiver).

Counterclaims, by definition, are filed after a State's invocation of federal jurisdiction. Yet the fact that they are filed after a State invokes federal jurisdiction does not mean that a State gets to start fresh with Eleventh Amendment immunity. Its prior voluntary invocation of federal jurisdiction still waives its Eleventh Amendment immunity. It is not immune from subsequently asserted claims.

Courts have applied this same logic to amended pleadings. In *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004), for example, where a State had removed a state-court action to federal court, the Ninth Circuit concluded that "the rule in *Lapides* applies ... to claims asserted after removal as well as to those asserted before removal." (Emphasis added). It explained: "Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original

complaint[.]... As for timing of the claims, the State removed the case, not the claims, and like all cases in federal court, it became subject to liberal amendment of the complaint." *Id*. at 564-65 (emphasis added); *see also id*. at 565 ("Amendment of a complaint does not affect waiver ... of Eleventh Amendment immunity").

The Third Circuit in *Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190,197 (3d Cir. 2008), approved this reasoning: "in *Embury*, the Court of Appeals for the Ninth Circuit determined that the waiver-by-removal rule established in *Lapides* applied to both state and federal claims, as well as to claims asserted after removal. ... We agree." The State of Ohio below provided no authority asserting that this is not the proper approach after *Lapides.* LPO is aware of none.

To be clear, LPO is not insisting that a State must subject itself to any and all subsequently asserted claims made against a State following its voluntary invocation of federal jurisdiction. For example, lower courts have ruled that only compulsory counter-claims be defended. *See, e.g., Regents of the University of New Mexico v. Knight*, 321 F.3d 1111, 1125-26 (Fed. Cir. 2003). States, moreover, need not intervene at all. They can protect themselves from state-law claims by leaving the defense in federal courts to their officials sued under *Ex*

parte Young. They are under no compulsion to help. *See*, *e.g.*, *Commonwealth of PA v. Lockheed Martin Corp*., 731 F. Supp.2d 411, 415 (M.D. Pa. 2010).

When they do intervene, states (like all other parties) are free to object to amended pleadings, something Ohio and the Secretary chose not to do in the present case. States are always free to raise objections under the Federal Rules of Civil Procedure. This includes arguing that an amended pleading is improper.

What a State cannot do is what Ohio did here; after voluntarily intervening, allow an amended pleading to be made without objection, actively defend against it, and then attempt to "smuggle in" an Eleventh Amendment limitation to one of the plaintiff's theories of liability. "Additional limits" on a State's amenability to federal procedural rules, the Supreme Court has observed, "cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity." *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011).

LPO's amended Complaint challenging S.B. 193 was filed on November 8, 2013. Doc. No. 16 (Amended Complaint). Ohio did not object to the amended Complaint. It did not claim that its intervention did not extend to defending S.B. 193. Instead, it embraced LPO's challenge -- at least part of it. On November 29, 2013, Ohio answered the amended Complaint and defended S.B. 193. Doc. No. 21 (Ohio's Answer). It selectively invoked the Eleventh Amendment, just as Georgia

did in *Lapides*. It did not claim, as it could have, that it joined the litigation only to defend its circulator requirement. It wanted to litigate S.B. 193's constitutionality; but it wanted to do so on its own terms. It did exactly what the Supreme Court said it could not do in *Lapides*; it sought to selectively assert the Eleventh Amendment to avoid addressing a state-law issue that it hoped to avoid. It gamed the system.

3. Ohio Has Waived Suit from Declaratory and Injunctive Relief in Its Own Courts of General Jurisdiction.

The Supreme Court's holding in *Lapides*, 535 U.S. at 617-18, only extended to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." Were Ohio to possess immunity from declaratory and injunctive relief for violations of its own Constitution in its own courts, its intervention in the present federal proceeding would not have waived this immunity.

Ohio law plainly authorizes declaratory and injunctive actions against Ohio -- both those against it by name and through its departments and agencies (including the Secretary of State) -- in Ohio's Courts of Common Pleas. O.R.C. § 2743.03(A). Neither Ohio nor its agencies enjoy state-law sovereign immunity from such actions. *See, e.g., Mega Outdoor, L.L.C., v. Dayton*, 878 N.E.2d 683, 692 (Ohio App. 2007) ("Sovereign immunity applies to money damages, not to claims for equitable relief, such as injunctive relief."); *Racing Guild of Ohio, Local 304 v. State Racing Commission*, 503 N.E.2d 1025 (Ohio 1986) (same).

II. Plaintiffs Are Threatened With Irreparable Injury.

Appellants are threatened with irreparable injury. LPO was removed from Ohio's 2015 ballot by operation of S.B. 193. LPO is now told that its candidates who seek to qualify for Ohio's 2016 primary ballot cannot. The qualifying deadline for primary candidates is December 16, 2015. Ohio's primary election is March 15, 2016. In the absence of emergency relief, Appellants will not be allowed to participate as a qualified political party in Ohio's 2016 primary.

III. Appellees Risk No Harm.

The State of Ohio and the Secretary of State risk no harm if the LPO is restored to Ohio's ballot before December 16, 2015, let alone March 15, 2016. December 16, 2015 is simply the qualifying deadline for candidates. Ballots are not finalized until much later. Assuming timely relief, Ohio will suffer no harm or expense at all.

IV. The Public Will Benefit.

Emergency relief will benefit the public by insuring that voters are afforded a choice of candidates. *See Williams v. Rhodes*, 393 U.S. 23, 39 (1968) ("third parties are often important channels through which political dissent is aired"). The past several elections prove that LPO is Ohio's third most popular political party. Its state-wide candidates in 2010 and 2014 won nearly 5% of the total vote. The public will benefit by having the LPO on Ohio's ballot as a third choice.

V. No Security is Required.

"[T]he court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant." C. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2954. This Court has so held. *Moltan Co. v. Eagle-Picher Industries, Inc*., 55 F.3d 1171, 1176 (6th Cir. 1995). Appellees risk no monetary harm should an emergency injunction be issued.

CONCLUSION

Appellants' motion for emergency relief and expedited briefing should be **GRANTED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Motion, accompanying Memorandum, and attached exhibits were filed using the Court's electronic filing system and that copies of this First Amended Complaint will be automatically served on all parties of record through the Court's electronic filing system.

s/*Mark R. Brown*
Mark R. Brown

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(5) & (6)

I hereby certify that this Motion complies with the typeface limitations found in Federal Rule of Appellate Procedure 32(a)(5) & (6) in that the type-face is proportionally spaced 14-point Times New Roman type.

s/*Mark R. Brown*
Mark R. Brown