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A Critical and Historical Analysis of Ohio's Post-Millennium Regression to Major-Party Monopoly

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A Critical and Historical Analysis of Ohio’s Post-Millennium Regression to Major-Party Monopoly

BY MARK R. BROWN*

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Ohio has long been a poster child for two-dimensional government. Vanilla or chocolate, Democrat or Republican: those are the only political flavors available. Twenty years ago, it even appeared that these two flavors might merge into one fudge-swirl-smear across Ohio's political palate.¹

Bob Dylan once sang the "times they are a-Changin',"² and that is certainly true with the United States' (and Ohio's) political landscape. Today, Democrats and Republicans disagree on many issues. Abortion is back on the electoral table after the Supreme Court's shocking decision in *Dobbs v. Jackson Women's Health Organization*.³ Gun control has also become both a political and constitutional problem dividing the nation after the Court's sad holdings in *District of Columbia v. Heller*,⁴ *McDonald v. City of Chicago*,⁵ and *New York State Rifle & Pistol Association v. Bruen*.⁶ To top it off, the two major political parties can barely agree on who is President.

While it may be safe to say that today's Republicans and Democrats agree on little, one commonality they continue to share is their disdain for competition from outsiders.⁷ Whether minor parties or independent candidates, Republicans and Democrats agree that these electoral nuisances are undeserving of ballot access.⁸ Drastic measures—even unlawful ones—can therefore justifiably be taken, at least according to the two major parties.

Nowhere has this been more obvious than in Ohio.⁹ Twenty years ago I witnessed (and later chronicled) Ralph Nader's presidential campaign

1. See Mark R. Brown, *Policing Ballot Access: Lessons From Nader's 2004 Run for President*, 35 CAP. U. L. REV. 165, 171–73 (2006) (describing examples of two major parties' many agreements during 2004 presidential election).

2. See BOB DYLAN, *THE TIMES THEY ARE A-CHANGIN'* (Columbia Recordings 1965).

3. 142 S. Ct. 2228 (2022).

4. 554 U.S. 570 (2008).

5. 561 U.S. 742 (2010).

6. 142 S. Ct. 2111 (2022).

7. See Benjamin F. Chavis, Jr., *No labels is not a third party spoiler: It's ensuring a viable option for the American public*, THE HILL (Mar. 15, 2023), <https://thehill.com/opinion/congress-blog/3901602-no-labels-is-not-a-third-party-spoiler-its-ensuring-a-viable-option-for-the-american-public/>.

8. See, e.g., *N.C. Green Party v. N.C. State Bd. of Elections*, 2022 WL 3142606, ___ F. Supp.3d ___ (E.D.N.C. Aug. 5, 2022) (Democrats unsuccessfully attempt to remove minor candidate from ballot); *State ex rel. Maras v. LaRose*, 199 N.E.3d 532 (Ohio 2022) (Republicans unsuccessfully attempt to remove minor candidate from ballot).

9. To be sure, it happens in many states. Just this past election cycle, New York whittled its gubernatorial ballot down to the two major parties' candidates. See Jay Root, *For the First Time Since 1946, New Yorkers Have Just 2 Choices for Governor*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/nyregion/third-parties-governor-ny.html>. See *Libertarian Party of New York v. New York Bd. of Elec.*, 576 F. Supp.3d 151 (S.D. N.Y. 2021), *aff'd*, 2022

being successfully “ratfucked”¹⁰ across the United States by the Democratic Party.¹¹ Nader had successfully qualified for the ballot in Ohio that year but was removed for no other reason than Democrats exercised enough power to do so. They concocted a claim that Nader’s campaign had engaged in fraud, hired well-paid lawyers to make their case,¹² and used Ohio’s major-party-friendly election machinery to disqualify him.¹³

Little has changed, particularly in Ohio. Ohio’s major-party monopoly has only grown more powerful with time and the ascension of the Republican Party. Ohio’s Republican Party, which for the past dozen years has controlled both houses of the General Assembly, the Governor’s mansion, the Secretary of State’s office, and the Ohio Attorney General’s office, has used its clout to further insulate itself from competition. As Ohio’s Republican Senate President, Matt Huffman, announced at the height of Ohio’s gerrymandering fiasco,¹⁴ “we kind of do what we want.”¹⁵ With all due respect to Bob Dylan, Pete Townsend’s legendary anthem, “Meet the new boss, same as the old boss,”¹⁶ is more like Ohio’s political creed.

This Article focuses on the Republican Party’s successful manipulation of Ohio’s ballot access rules to the detriment of Ohio’s voters. In order to understand just how far Ohio’s Republican Party’s abuse has gone, an

WL 10763416 (2d Cir. 2022), cert. filed, No. 22-893 (U.S., March 16, 2023) (challenging New York’s new ballot access laws).

10. See BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT’S MEN* (1974).

11. See Brown, *supra* note 1, at 178–216 (describing Democratic challenges to Nader’s presidential campaign in several states including Ohio and how they succeeded); THERESA AMATO, *GRAND ILLUSION: THE MYTH OF VOTER CHOICE IN A TWO-PARTY SYSTEM* (2009) (describing Nader’s 2004 presidential campaign and the dirty tricks played by Democrats to sabotage it).

12. See Mark R. Brown, *How Ohio Stacks the System Against Independent and Minor Candidates*, CLEVELAND.COM (Sept. 11, 2022), <https://www.cleveland.com/opinion/2022/09/how-ohio-stacks-the-system-against-independent-and-minor-party-candidates-mark-r-brown.html> (“Ralph Nader in 2004 was successfully protested by Ohio Democrats using lawyers from the Washington, D.C., law firm of Kirkland & Ellis along with dozens of local operatives. Democrats fanned out across Ohio to threaten voters who signed Nader’s presidential petition, and made spurious legal arguments that were later ruled unconstitutional by a federal court.”).

13. See Brown, *supra* note 1, at 179–91 (describing Democratic efforts against Nader in Ohio).

14. Ohio’s Supreme Court repeatedly invalidated Republican-drawn General Assembly and congressional maps only to have the Republican legislature and Redistricting Commission ignore its orders. See, e.g., *League of Women Voters v. Ohio Redistricting Commission*, 192 N.E.3d 379 (Ohio 2022); *League of Women Voters v. Ohio Redistricting Commission*, 195 N.E.3d 974 (Ohio 2022); *League of Women Voters v. Ohio Redistricting Commission*, 198 N.E.3d 812 (Ohio 2022); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022); *Neiman v. LaRose*, ___ N.E.3d ___, 2022 WL 2812895 (Ohio July 19, 2022).

15. Michael Douglas, *We Must Demand Accountability for Ohio Republicans’ Gerrymandering Scheme*, AKRON BEACON JOURNAL (Aug. 21, 2022), <https://www.beaconjournal.com/story/opinion/columns/2022/08/21/ohio-republicans-ignore-will-of-people-with-gerrymandering/65407948007/>.

16. THE WHO, *WON’T GET FOOLED AGAIN* (Track Records 1971).

understanding of Ohio's ballot history is needed. Thus, Part I briefly describes the history behind Ohio's official ballot and how Ohio's modern ballot rules have evolved. Part II turns to the post-Millennium efforts of minor political parties, in particular the Libertarian Party, to force Ohio to return to its pre-Second Red Scare roots. Following initial successes in 2006, 2008, 2011, and 2013, Ohio regressed to its major-party monopoly by the 2022 election cycle—thanks to the Ohio Republican Party. It did so not only through anti-competitive legislation passed by the Republican-controlled General Assembly, but also through political machinations and electoral manipulations practiced by Ohio's ostensibly impartial elections officials. Executive fiats perpetrated by Republican Secretary of State Jon Husted and defended by Republican Attorney General Mike DeWine had as much to do with closing Ohio's ballots as the General Assembly's new draconian rules.

This was not a surprise. A significant obstacle I encountered while representing Ralph Nader in 2004 was the Democratic Party's omnipresence throughout Nader's ballot-access process. Democrats were everywhere, from filing protests to supplying lawyers to controlling decision makers. This major-party saturation makes it almost impossible in Ohio for a minor party or candidate to obtain a truly impartial result. To re-state the obvious, "neither major party can be trusted to police a general election ballot."¹⁷

I argued then, and continue to believe now, that a worthy step toward competitive balance is to deny major parties the ability to wage "vigilante political justice."¹⁸ The events described in this Article demonstrate that this ban must reach behind the scenes to prevent secret sabotage by major parties, too. It does no good to deny standing to a major party and then allow that party to file and finance protests through recruited "dupes."¹⁹ The next important step, also illustrated by the events described in this Article, is to insulate election officials from major party domination and control.²⁰ As things now stand in Ohio, major-party political hacks decide whether to allow minor candidates and parties access to Ohio's ballots.²¹ Even otherwise fair-minded officials, given their political allegiances, can easily "bend or break rules to oust a worrisome non-major opponent."²² This Article will add more proof to both of these propositions.

17. Brown, *supra* note 1, at 231.

18. *Id.* at 232.

19. See *infra* notes 198–204 and accompanying text.

20. See *infra* notes 205–13 and accompanying text.

21. See Brown, *supra* note 12.

22. Brown, *supra* note 1, at 232.

I. History Behind Ohio's Official Ballots

A. From 1891 until the Second World War

Government-printed, “official” ballots were introduced in the United States in the late nineteenth century, thus marking the modern age of candidates and parties “qualifying” for elections.²³ Before the use of official ballots, voters would mark their selections on pre-printed forms (often published in newspapers) supplied by candidates and parties, or simply use any scrap of paper to write their selections.²⁴ Any and all would do. With the advent of official, pre-printed ballots, this voter- and party-friendly approach changed. Parties and candidates now must “qualify” in order to have their votes counted.²⁵

Official ballots were first used in Ohio in 1891, with the two major political parties’ candidates automatically included.²⁶ Other voting groups in Ohio could also appear as qualified political parties if they either garnered votes from at least one percent of the electorate in the prior gubernatorial election, or if they submitted an equal number of signatures from voters.²⁷ Unaffiliated, independent candidates in 1891 could also qualify for statewide ballots by submitting petitions supported by 500 voters’ signatures,²⁸ a number that in 1892 was then raised to one percent of the vote of the previous election.²⁹

In 1904, Ohio put forward legislation providing political primaries for those political parties that had won at least ten percent of the vote in the previous election.³⁰ This included not only Democrats and Republicans, but at a later point the Progressive (Bull Moose) Party, which won enough votes in 1912 to qualify.³¹

23. See Mark R. Brown, *Ballot Fees as Impermissible Qualifications for Federal Office*, 54 AM. U. L. REV. 1283, 1288 (2005).

24. *Id.* at 1287.

25. *Id.* at 1288.

26. See Richard Winger, *Must Candidates Be Treated Equally?*, 45 CLEV. ST. L. REV. 87, 88 (1997) (hereinafter “Winger Article”).

27. See State ex rel. Plimmer v. Poston, 51 N.E. 150, 150–51 (Ohio 1898) (Minshall, J., dissenting) (describing Ohio’s ballot access approach). These two qualification requirements were quite common following the adoption of official, “Australian” ballots in the United States. See Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 884 (2000).

28. See Winger Article, *supra* note 26, at 88.

29. *Id.*

30. See State ex rel. Webber v. Felton, 84 N.E. 85, 87 (Ohio 1908).

31. See State ex rel. Murphy v. Graves, 109 N.E. 590 (Ohio 1914). See also Affidavit of Richard Winger at ¶11, State ex rel. Fockler v. Husted, No. 2016-1863, Relators’ Supreme Court Practice Rule 12.02(B)(1) Accompanying Memorandum in Support of the Writ, Exhibit 1 (Ohio, Dec. 22, 2016) (hereinafter “Winger Affidavit”). Winger is a well-recognized ballot access expert who

Ohio's Constitution was amended in 1912 to require primaries for all recognized political parties. Article V, section 7 of the amended Constitution states that "[a]ll nominations for elective state, district, county and municipal officers shall be made at direct primary elections or by a petition as provided by law."³² Although the broad constitutional language included the theoretical possibility of a party petition alternative, no such alternative was created by the 1914 legislation that enabled Ohio's primaries.³³

To be sure, Article V, section 7's implementing provision, the Primary Act of 1914, only required primaries for political parties with more than ten percent of the prior gubernatorial vote.³⁴ But parties with more than ten percent of the prior vote were the only recognized political parties in Ohio at the time. When Article V, section 7 was added to Ohio's Constitution in 1912 and put into force in 1914, Ohioans understood that all existing, recognized political parties would be required to hold government-financed primaries.³⁵ There were no recognized political parties that could evade that requirement.

Petitioning, meanwhile, continued to be the province of independent candidates who could then parlay their candidacies into political parties for future elections with enough votes. The 1914 Primary Act included a provision, section 4949, that allowed "all voluntary political parties *or associations* in this state which at the next preceding general election polled for its candidate for governor in the state or in any district, county or subdivision

has testified in dozens of cases about the history behind America's ballot access laws. In *Libertarian Party of Tennessee v. Goins*, 793 F. Supp.2d 1064, 1068 (N.D. Tenn. 2010), the court recognized Winger's expert status, stating: "Winger's testimony as an expert has been accepted in numerous ballot access actions, as reflected on his curriculum vitae. Significantly, the Sixth Circuit cited similar data presented by Winger in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006). The Ohio Supreme Court in the *Fockler* case (described herein, *see infra* notes 476-90) questioned the validity of Winger's affidavit because of its form, stating that it had "not been properly sworn," *State ex rel. Fockler v. Husted*, 82 N.E.3d 1135, 1139 (Ohio 2017), and noting that "Winger's affidavit fails to satisfy the requirements of S.Ct.Prac.R. 12.06, which requires affidavits to be made on personal knowledge." *Id.* at 1139 n.3. The same Ohio Supreme Court, however, had ruled long ago in *Burens v. Industrial Commission*, 162 Ohio St. 549, 553 (1955), that "[i]t is similarly well recognized that qualified expert witnesses are not confined in their testimony to facts which are within their own personal knowledge." Thus, if Winger was an expert (as he surely was), his affidavit could not have been improper for lack of a statement that it was "made on personal knowledge." Indeed, such a statement would have been false, since Winger had no personal knowledge of the historical events he described.

32. OHIO CONST., art. V, § 7. Article V, § 7 took effect on January 1, 1913. *See* Fitzgerald v. City of Cleveland, 103 N.E. 512, 516 (Ohio 1913); *State ex rel. Conner v. Norton*, 140 NE 878, 878 (1922) (quoting art. V., § 7).

33. This legislation was passed on May 3, 1913 and took effect on January 1, 1914. *See* Winger Affidavit, *supra* note 31, at ¶ 4. *See generally* Fitzgerald v. City of Cleveland, 103 N.E. 512, 516 (Ohio 1913).

34. *See* Winger Affidavit, *supra* note 31, at ¶ 5 (quoting Acts of the State of Ohio, vol. 103, at 476, § 4949).

35. *See* Winger Affidavit, *supra* note 31, at ¶ 6.

thereof, or municipality, at least ten percent of the entire vote cast therein for governor”³⁶ to become recognized political parties.³⁷ Allowing “associations” to win enough of the gubernatorial vote and thereby become recognized political parties was well-known to Ohio’s election law and was accordingly preserved by the 1914 Primary Act.

Under Ohio’s “associational” path to political party status, groups of voters would support independent candidates who petitioned for ballot access by collecting voters’ signatures equal to one percent of the vote for governor in the previous election.³⁸ These independent candidates were then allowed by Ohio to include “party or “principle” labels on ballots as their preferences.³⁹

Oddly, the 1914 Primary Act had no mechanism allowing new groups or associations immediate access to its ballots.⁴⁰ The 1914 legislation did not carry forward the old petitioning mechanism for minor political parties.⁴¹ The only path to creating a new, recognized political party was thus through section 4949. Following the 1914 statutory changes, “associations” like Socialists and Progressives had to use independent candidates and hope to win ten percent of the vote for Governor. Only then could they become recognized political parties in Ohio for the next election (which would then require that they conduct primaries). From 1914 until 1969, when the percentage was lowered, no association or group of voters had ever satisfied Ohio’s ten percent vote test.⁴² The percentage had simply been set too high.

By 1930 Ohio put legislation in place to create a petition alternative for new political parties to afford them immediate ballot access.⁴³ Section 4785-61 of the General Code, which preceded Ohio’s modern access law codified at O.R.C. § 3517.01, stated that

any group of voters which ... shall have filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding election
...

36. See H.B. 669, 80th Gen. Assemb., Reg. Sess. (Ohio 1913) (emphasis added).

37. See 1917 Ohio Attorney General Opinion 675, at 1835 (Oct. 2, 1917).

38. See Winger Article, *supra* note 26, at 88.

39. See Winger Affidavit, *supra* note 31, at ¶ 14.

40. *Id.* at ¶ 16.

41. *Id.* at ¶¶ 12, 16.

42. *Id.* at ¶ 24.

43. *Id.* at ¶ 17.

would be recognized as a “political party” in Ohio.⁴⁴

This same statute also carried forward the previous process whereby associations could run independent candidates to create recognized political parties. Section 4785-61 stated that “[a] political party within the meaning of this act shall be *any group of voters* which, at the last preceding general state election, polled for its candidate for governor in the state at least ten per cent of the entire vote cast therein for governor.”⁴⁵ Independent candidates were still allowed to identify their party preferences just as before,⁴⁶ the only change being that “association” (the term used in the 1914 Primary Act) was replaced by “any group of voters.”⁴⁷ Successful groups were then free to choose their party name; it did not have to be the name used on the ballot so long as the “name or designation [was not] similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election.”⁴⁸ Both existing political parties and groups of voters that met the vote-test remained qualified until the next gubernatorial election.⁴⁹

Section 4785-91 of the General Code, meanwhile, reiterated Ohio’s path for independent candidates to appear on the ballot. It stated that an independent candidate must gather signatures “not less in number than one (1) per cent of the voters in the next preceding general election.”⁵⁰ Thus, Ohio’s political parties had three paths to the ballot at the close of the Second World War. The first was for an existing and recognized political party to win ten percent of the gubernatorial vote. This path ensured the party would remain recognized in Ohio and have ballot access during the next election. The second was for “any group of voters” to file a petition supported by signatures from voters totaling fifteen percent of the previous gubernatorial vote with the Secretary of State ninety days before the election. This petition created the party and required that it hold primaries. The third was for “any group of voters” to petition to have an independent candidate run for Governor and then win ten percent of the vote. That group would then be a recognized political party for the next election.

44. See 1932 Ohio Attorney General Opinion 4587, at 1003 (Sep. 1, 1932) (quoting § 4785-61, General Code), <https://www.ohioattorneygeneral.gov/getattachment/f1f48102-39b7-48d6-9814-db0a97b8d972/1932-4587.aspx>.

45. *Id.* (emphasis added).

46. See Winger Affidavit, *supra* note 31, at ¶ 21.

47. Section 4785-61, *supra* note 44.

48. See § 4785-61, *supra* note 44.

49. *Id.* (“When any political party fails to cast ten per cent of the total vote cast at an election for the office of governor it shall cease to be a political party within the meaning of this act.”).

50. See *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 994 (S.D. Ohio 1968) (Kinneary, J., concurring in part and dissenting in part).

Through all of this, Ohio's ballots were never cluttered with candidates. From 1914 until the close of the Second World War Ohio had only two recognized political parties, Democrats and Republicans. Meanwhile, as Judge Kinneary said in his dissent in *Socialist Labor Party v. Rhodes*, “[d]uring the fifteen year period prior to 1947, participation in the electoral process by independently nominated candidates was neither substantial nor disruptive” in Ohio.⁵¹ If anything, Ohio needed to relax its restrictions. Instead, it increased them.

B. Ballots After the Second World War

In 1946 the Socialist Labor Party petitioned to place two candidates on Ohio's ballot for statewide office: one for the U.S. Senate and the other for Governor.⁵² Spurred by the nation's Second Red Scare and a surprisingly strong performance by Socialists in Ohio in prior elections,⁵³ in 1947 the Ohio General Assembly passed legislation prohibiting independent candidates from including party labels. From that point forward, it became impossible in Ohio for a candidate to petition for ballot access and include a party preference on the ballot as a political identifier. Instead, petitioning candidates were forced to run without party labels. Groups of voters who supported these independent candidates could still gain qualified party status if their candidates won ten percent of the gubernatorial vote,⁵⁴ but this became even more difficult without party names to guide them. At the same time, Ohio's legislature prohibited independent presidential petitions altogether,⁵⁵ meaning that only Democrats and Republicans could compete in Ohio for the White House.

Notwithstanding Ohio's ban on minor presidential candidates, in 1948 Henry Wallace won a ruling from the Ohio Supreme Court in *State ex rel. Beck v. Hummel*⁵⁶ that placed his campaign, if not his name, on Ohio's ballot.⁵⁷ The court ruled that Wallace could use Ohio's one percent petitioning process for independent candidates,⁵⁸ since he was petitioning to have his slate of electors placed on the ballot rather than both his and his running mate's names. Consequently, Henry Wallace's slate of electors appeared on Ohio's 1948 ballot, but it was unable to either label itself “Progressive” or

51. *Id.* at 994 (Kinneary, J., concurring in part and dissenting in part).

52. Winger Article, *supra* note 26, at 90.

53. *Id.* at 90-91.

54. Winger Affidavit, *supra* note 31, at ¶ 22.

55. Winger Article, *supra* note 26, at 90.

56. 80 N.E.2d 899 (Ohio 1948).

57. *See* Winger Article, *supra* note 26, at 92.

58. *Id.*

even state that it was pledged to Wallace.⁵⁹ Truman's and Dewey's names, meanwhile, were included on Ohio's ballot with their political parties, the Democratic and Republican Parties, respectively.⁶⁰ Wallace understandably underperformed in the Buckeye State given these strange limitations.

In 1951 the General Assembly overrode Wallace's technical victory by prohibiting independent petitions for presidential electors, too.⁶¹ It also raised the independent petition threshold from one percent to seven percent of the prior voter for Governor, and prohibited candidates from labeling themselves as "independents" on their ballot lines.⁶² A generation later, Judge Kinneary stated in blunt terms in his partial dissent in *Socialist Labor Party v. Rhodes* that "[t]he immediate effect—as well as the obvious purpose—of this statutory scheme is the elimination of third party and independent candidates from Ohio elections."⁶³

From 1915 until 1967, the Democratic and Republican Parties were the only political parties and/or "groups of voters" in Ohio whose candidates won ten percent of the vote for Governor.⁶⁴ They were thus the only recognized political parties guaranteed ballot access space in Ohio and required to hold primaries.⁶⁵ Meanwhile, from 1929 until 1967 no "group of voters" successfully petitioned to become a political party in Ohio using Ohio's alternative petition procedure.⁶⁶ After 1951, no independent presidential candidates were even allowed on Ohio's ballots. Ohio's ballots had become an electoral wasteland. None of this would change until the Warren Court's intervention during the turbulent 1960s.

C. The United States' Ballot Revolution

By 1968 the language in section 3517.01 of Ohio's modern Revised Code remained virtually identical to that found in section 4785-61 of its old General Code. Section 3517.01 then stated that "[a] political party within the meaning of Title XXXV of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state at least ten per cent of the entire vote cast for

59. *Id.*

60. *Id.*

61. *Id.*

62. See Winger Article, *supra* note 26, at 92. This prohibition was ruled unconstitutional in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992).

63. 290 F. Supp. 983, 995 (S.D. Ohio 1968) (Kinneary, J., concurring in part and dissenting in part).

64. Winger Affidavit, *supra* note 31, *supra*, at ¶ 23.

65. *Id.*

66. *Id.* at ¶ 24.

governor.”⁶⁷ Alternatively, section 3517.01 allowed a “group of voters” that had “filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election” to become a recognized political party.⁶⁸ Consequently, Ohio’s three paths to ballot access remained in place following the modern codification of its election laws.

It was at this historic juncture in American politics that George Wallace and his American Independent Party found themselves excluded from Ohio’s presidential ballot.⁶⁹ The American Independent Party sued only to be brushed aside by a three-judge district court⁷⁰ that felt write-in relief was constitutionally sufficient. Judge Kinneary, one of Ohio’s more renowned jurists, dissented on this point, arguing that write-in space was not sufficient and that Wallace should be placed on Ohio’s ballot.⁷¹ The United States Supreme Court in *Williams v. Rhodes*⁷² agreed and ordered that Wallace’s name be included.⁷³

In 1969, in response to *Williams v. Rhodes*, Ohio amended its ballot laws to allow presidential candidates to use its petition procedure for ballot access.⁷⁴ It also lowered from seven to four percent of the last gubernatorial vote the number of voters’ signatures required for independent candidates, and reduced from fifteen to seven percent of the last gubernatorial vote the number of voters’ signatures for full-party access.⁷⁵

The following year, the Socialist Labor Party challenged this seven percent requirement for party access in federal court,⁷⁶ while the Socialist Workers Party challenged the new four percent requirement for independent candidates.⁷⁷ Judge Kinneary ruled that both requirements were unconstitutional because they both still required too many signatures.⁷⁸ Accordingly, he ordered that the “Socialist Labor Party by name, and its candidate for

67. Rhodes, 290 F. Supp. at 986 n.1 (quoting Ohio Rev. Code § 3501.17).

68. *Id.*

69. Winger Article, *supra* note 26, at 93.

70. Rhodes, 290 F. Supp. at 985.

71. *Id.* at 994 (Kinneary, J., dissenting).

72. 393 U.S. 23 (1968).

73. Winger Article, *supra* note 26, at 93.

74. *Id.*

75. *Id.*

76. *See Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970). *See also* Winger Article, *supra* note 26, at 93.

77. *Id.*

78. Rhodes, 318 F. Supp. at 1274.

Governor, Joseph Pirincin, and its candidate for United States Senator, John O'Neill, all be placed upon the ballot for the 1970 Ohio general election."⁷⁹

Ohio's General Assembly responded once again by reducing the number of signatures needed for party qualification to one percent of the last gubernatorial vote,⁸⁰ and reducing the number for independent candidates to that same one percent figure, or 5,000 signatures, whichever was less.⁸¹ Ohio's vote test for "any group of voters" to become a recognized political party was likewise reduced at this time, from ten percent of the prior gubernatorial vote to five percent of the total vote for either Governor or President.⁸² Thus, as Richard Winger has explained, "[b]y 1972, all of the anti-third party and independent candidates laws passed by the 1947 and 1951 sessions of the Ohio legislature had been reversed, except for the provision on partisan labels."⁸³ Minor candidates for president "enjoyed moderate petition requirements starting in 1972, providing they used the independent candidate petition procedure consisting of 5,000 signatures, about one-tenth of one percent of the number of registered voters."⁸⁴

Between 1970 and 1980 only the American Party (in 1976) was able to successfully petition for ballot access in Ohio.⁸⁵ No "group of voters" that had nominated independent candidates, meanwhile, had ever met Ohio's 5% vote test to be recognized as political parties.⁸⁶ This meant that in 1980 the two major political parties once again had Ohio's ballots to themselves.

John Anderson announced his candidacy for President on April 24, 1980.⁸⁷ Because his candidacy and collection of over 14,000 voters' signatures (more than the 5,000 required) to run as an independent in Ohio came only after Ohio's March 20 filing deadline had passed, however, Ohio's Republican Secretary of State rejected his candidacy.⁸⁸ Anderson sued in federal court and quickly won an order in his favor directing that his name be placed on Ohio's ballot.⁸⁹ Ohio's filing deadline for independent

79. *Id.*

80. Winger Article, *supra* note 26, at 93.

81. *Id.* For statewide offices, Ohio Revised Code § 3513.257(A) now simply states that 5,000 signatures are needed for independent candidates in Ohio. Candidates in districts with more than 5,000 voters in the last gubernatorial election still need 1% of that vote under § 3513.257(C). Where there were fewer than 5,000 votes for governor in the last election in a district, only 25 signatures or 5% of the vote, whichever is less, are needed under § 3513.257(B) for district-wide candidates.

82. Winger Affidavit, *supra* note 31, at ¶ 27.

83. Winger Article, *supra* note 25, at 94.

84. *Id.*

85. *Id.* at 95.

86. Winger Affidavit, *supra* note 31, at ¶ 28.

87. *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983).

88. *Id.* at 782-83.

89. *Id.* at 784, n.3.

presidential candidates, the district court observed, antedated the deadlines for the two major parties by several months, thus violating the First and Fourteenth Amendments.⁹⁰ Neither the Court of Appeals nor the Supreme Court saw fit to intervene, and Anderson accordingly appeared as an independent candidate for President in Ohio in 1980. He even won more than five percent of Ohio's presidential vote.⁹¹

The Supreme Court later in the famous ballot access case of *Anderson v. Celebrezze*⁹² ruled that Ohio's discriminatory early-filing deadline for independent presidential candidates was not supported by a sufficient State interest and thereby violated the First and Fourteenth Amendments.⁹³ The major parties' candidates, after all, would not be nominated until later that summer and were not required to participate in Ohio's primary (which had provided the yardstick for Ohio's independent-candidate filings).⁹⁴ Requiring that independent presidential candidates qualify months before the major parties' candidates was not only patently discriminatory, it was wholly unnecessary.

Following the Supreme Court's decision in *Anderson*, Ohio moved its qualifying deadline for independent presidential candidates to early August (90 days before the November election),⁹⁵ thus achieving some semblance of equal temporal treatment relative to the two major parties. Their candidates, after all, are ordinarily nominated in the summers of presidential election years. By way of contrast, Ohio continued its practice of requiring all other independent candidates to file their nominating papers and supporting signatures "by 4:00 p.m. on the day before the primary election immediately preceding the general election at which the candidacy is to be voted on by the voters."⁹⁶ Ohio generally holds its primaries in March during presidential election years, thus requiring that independent candidates for non-presidential offices file by the same date ruled unconstitutional in *Anderson*. Still, the Sixth Circuit, in *Lawrence v. Blackwell*⁹⁷ sustained this deadline for non-presidential independent candidates. Unlike Ohio's early presidential filing

90. See *Anderson v. Celebrezze*, 499 F. Supp. 121, 139 (S.D. Ohio 1980), rev'd, 664 F.2d 554 (6th Cir. 1981), rev'd, 460 U.S. 780 (1983).

91. See *Anderson*, 460 U.S. at 784.

92. 460 U.S. 780 (1983).

93. *Id.* at 800–01.

94. *Id.* at 799–800.

95. See OHIO REV. CODE § 3513.257.

96. *Lawrence v. Blackwell*, 430 F.3d 368, 370 (6th Cir. 2005) (quoting OHIO REV. CODE § 3513.257).

97. 430 F.3d 368 (6th Cir. 2005).

deadline, the Court ruled, “[h]ere the burden imposed by Ohio’s early deadline is nondiscriminatory.”⁹⁸

Even though John Anderson had met Ohio’s five percent vote test, neither he nor his supporters attempted to use Ohio’s “any group of voters” alternative to become a recognized political party.⁹⁹ Thus, no political party emerged in Ohio as a result of John Anderson’s presidential run. After 1980, the two major parties alone remained recognized in Ohio.

D. The Close of the Millennium

The next serious independent candidate for President in Ohio was Ross Perot in 1992. He qualified by petition (submitting 5,000 signatures 90 days before the general election using Ohio’s litigation-relaxed standards) and, like John Anderson before him, won more than five percent of Ohio’s vote.¹⁰⁰ Also like Anderson before him, he expressed no interest in forming a political party at that time, and his “group of voters” did not attempt to exercise their right to act as a political party in Ohio following the 1992 election.¹⁰¹

Perot created his Reform Party during the next presidential election cycle and submitted its party petition in November 1995 to Ohio’s Republican Secretary of State.¹⁰² At that time, Ohio required that political parties qualify 120 days before the primaries by submitting signatures from a number of voters equal to one percent of the prior gubernatorial vote.¹⁰³ Though Perot’s minor-party petition was timely, Ohio’s Republican Secretary of State concluded that it lacked the requisite number of supporting signatures.¹⁰⁴ The Natural Law Party, in contrast, had filed enough signatures and gained ballot access.¹⁰⁵

In an unprecedented twist, Ohio’s Secretary of State allowed Perot’s Reform Party to collect additional signatures in order to support his presidential candidacy (along with his running mate), though not the down-ticket candidacies of any other Reform Party candidates.¹⁰⁶ Perot succeeded in collecting the needed signatures and on April 16, 1996, Ohio’s Secretary of

98. *Id.* at 373.

99. Winger Affidavit, *supra* note 31, at ¶ 30.

100. Winger Affidavit, *supra* note 31, at ¶ 31.

101. *Id.*

102. Winger Affidavit, *supra* note 31, at ¶ 32.

103. See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 583 (6th Cir. 2006) (explaining that the minor-party petitions are due in November because presidential primaries are held in March).

104. Winger Affidavit, *supra* note 31, at ¶ 32.

105. Winger Article, *supra* note 26, at 95.

106. Winger Affidavit, *supra* note 31, at ¶ 33.

State recognized the Reform Party for the sole purpose of running Perot for President.¹⁰⁷

Proceeding under this unique agreement, Perot won more than five percent of the vote for President and the Reform Party became a recognized political party in Ohio.¹⁰⁸ In 1998, it ran John Mitchel for Governor,¹⁰⁹ but because he did not receive five percent of the vote the Reform Party fell off the ballot in Ohio. As the millennium closed, no newly created party that used Ohio's petitioning process, and no "group of voters" that ran independent candidates for Governor or President (other than Anderson and Perot), had won enough votes in Ohio to meet Ohio's five percent vote test.¹¹⁰

During the fifty-year time frame ending with the close of the Millennium, "the normal route to the Ohio ballot for minor parties [was] the independent candidate petition method."¹¹¹ "On forty-one different occasions since 1947," Richard Winger counted, "a minor political party petitioned to put its candidates on the ballot for statewide office in Ohio. On thirty-seven of those occasions, the minor party used the independent candidate procedure and on four occasions the minor party used the fully-qualified new party procedure."¹¹² The reason for this disparity is simple: it is much easier to collect 5,000 signatures and submit them 90 days before the general election than to collect signatures equal to one percent of the number of votes cast at the last presidential or gubernatorial election and submit them 120 days before Ohio's primaries. At the end of the Millennium, Ohio had thus succeeded in funneling minor parties into independent candidacies without party labels, something that Winger found to be a significant impediment to their success.¹¹³

E. The New Millennium

At the beginning of the new millennium, Ohio's ballot access laws still allowed unaffiliated, independent statewide candidates to petition for ballot access by gathering 5,000 signatures and filing the day before the corresponding Democratic and Republican party primaries, usually in the late winter or early spring of the general election year.¹¹⁴ These unaffiliated,

107. *Id.*

108. *Id.* at ¶ 34.

109. See letter from John R. Mitchel, Candidate for Ohio Governor, to U.S. Representatives and Senators of Ohio (Aug. 31, 1998) (on file at http://www.smart-voter.org/1998nov/oh/hm/vote/mitchel_j/paper2.html (self-identifying himself as Reform Party candidate for Ohio governor)).

110. Winger Affidavit, *supra* note 31, at ¶ 34.

111. Winger Article, *supra* note 26, at 95.

112. *Id.*

113. *Id.* at 97–98.

114. See *supra* notes 81–82 and accompanying text.

independent candidates still could not identify themselves with any political party, a restriction that was first put in place in 1947.¹¹⁵ Independent presidential candidates, meanwhile, could still gain ballot access by filing petitions with 5,000 supporting signatures 90 days before the November election,¹¹⁶ though they too were prohibited from identifying with any political party.

Political parties seeking to obtain ballot access, meanwhile, could still either file petitions with supporting signatures from a number of voters equal to one percent of the most recent prior vote for Governor or President 120 days before the scheduled primaries,¹¹⁷ or petition to run as an independent candidate for Governor or President and try to win five percent of the vote under section 3517.01.¹¹⁸ However, both approaches for party access were highly restrictive and seldom satisfied,¹¹⁹ and only the former allowed a new party to immediately gain access to Ohio's ballot and participate in Ohio's primaries. Using the vote-test technique, after all, only allowed a "group of voters" to be recognized as a political party during the next election cycle.

This was the state of Ohio's ballot laws in 2004 when the Libertarian Party attempted to gain full party access using Ohio's party-petitioning alternative. For various technical reasons, Ohio's Republican Secretary of State rejected the Libertarian Party's papers,¹²⁰ and by the time of its rejection the Libertarian Party had missed Ohio's deadline. It was therefore left with no choice but to seek relief in federal court.¹²¹ The Libertarian Party's constitutional argument in this ensuing federal action focused on Ohio's combination of a significant signature requirement (one percent of the previous gubernatorial/presidential vote) and an extremely early filing deadline (one year in advance of presidential elections). The Sixth Circuit in *Libertarian Party of Ohio v. Blackwell*¹²² agreed with the Libertarians in an opinion by Judge Julia Gibbons, a Republican from Memphis, Tennessee with a well-earned nonpartisan, no-nonsense reputation.

Judge Gibbons first noted that "[t]he evidence in the record shows that in Ohio, elections have indeed been monopolized by two parties."¹²³

115. See *supra* notes 53–54 and accompanying text.

116. See *supra* note 81 and accompanying text.

117. See *supra* notes 80 and 103 and accompanying text.

118. See *supra* note 82 and accompanying text.

119. See Winger Article, *supra* note 26, at 95.

120. See *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 583 (6th Cir. 2006).

121. *Id.*

122. 462 F.3d 579 (6th Cir. 2006).

123. *Id.* at 589.

Applying what was by then known as the *Anderson-Burdick* balancing formula,¹²⁴ Judge Gibbons ruled that the combination of Ohio's early filing deadline and large signature collection requirement severely burdened the Libertarian Party's rights.¹²⁵ Ohio's petition alternative for immediate ballot access was therefore subject to strict scrutiny under *Anderson-Burdick*.¹²⁶

Because Ohio "made no clear argument regarding the precise interests it feels are protected by the regulations at issue in the case,"¹²⁷ Judge Gibbons had little trouble concluding that its law could not pass strict scrutiny. "Reliance on suppositions and speculative interests," Judge Gibbons found, "is not sufficient to justify a severe burden on First Amendment rights."¹²⁸ She observed that "[o]ver the last twenty-five years the primary date in Ohio in presidential election years has moved from the first Tuesday in June to the first Tuesday in March."¹²⁹ Because of this, "the date by which a political party must file to qualify for the primary also has moved, from the end of March in the year of the election to the beginning of November in the preceding year."¹³⁰ No convincing explanation was proffered by Ohio for these changes.

Importantly, as will be seen later,¹³¹ the Sixth Circuit was not asked to say anything about the validity of Ohio's vote-test alternative for "group[s] of voters" found in section 3517.01. Nor did it speak to the legality of that alternative. The Libertarian Party was not seeking access under that alternative, after all, and did not challenge it. Ohio's vote-test alternative, moreover, is different in kind from Ohio's party-petition mechanism. The latter affords ballot access to impending elections, something that is absolutely required by Supreme Court precedent. The former allows groups to qualify

124. Derived from *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), Judge Gibbons aptly described the analysis as first requiring that a court, "look[] at the 'character and magnitude of the asserted injury' to [the challenger's] constitutional rights. The court must then 'identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.' If [the challenger's] rights are subjected to 'severe' restrictions, 'the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But if the state law imposes only 'reasonable, nondiscriminatory restrictions' upon the protected rights, then the interests of the state in regulating elections is 'generally sufficient to justify' the restrictions." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585–86 (6th Cir. 2006) (citations omitted).

125. *Id.* at 591.

126. *Id.*

127. *Id.* at 593.

128. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 593.

129. *Id.* at 582 (citations omitted).

130. *Id.*

131. See *infra* notes 483–86 and accompanying text (discussing the Ohio Supreme Court's conclusion that the Sixth Circuit invalidated Ohio's vote-test alternative for groups of voters along with Ohio's early-petitioning alternative for new parties).

for future elections, something that by itself is not constitutionally sufficient nor even constitutionally required.

Following the *Blackwell* decision, Ohio was in constitutional default because it had no acceptable mechanism for immediate new-political-party ballot access. All that was available was its vote test option under Ohio Revised Code section 3517.01 for “groups of voters,” and that would only allow a resulting new party access to future elections.

II. Post-*Blackwell* Litigation

For five years after the Sixth Circuit ruled that Ohio’s petition alternative was unconstitutional, Ohio’s legislature did nothing.¹³² It did not correct the deficiencies Judge Gibbons identified in its old law and did not create a new petitioning alternative. It left new parties in the lurch, with no mechanism for obtaining ballot access to upcoming elections. All prospective new parties could do was run independent candidates and attempt to win enough votes to obtain future recognition.¹³³

Ohio’s Democratic Secretary of State in 2007, to her credit, attempted to fill Ohio’s unconstitutional void by issuing a Directive allowing new parties to gain access by petition.¹³⁴ The twin requirements spelled out in that Directive, however, were not much better than the legislatively-imposed requirements invalidated in 2006 in *Blackwell*. The Directive required new political party petitions to include signatures equal to one-half of one percent of the prior vote for Governor and to be submitted 100 days before Ohio’s primaries. This meant that a new party still needed to file in November of the year before the general election in order to gain access to Ohio’s ballot.¹³⁵

Gary Sinawski,¹³⁶ a Brooklyn-based attorney who had previously handled the Libertarian Party’s 2006 *Blackwell* litigation, once again filed suit on its behalf to challenge this new Directive. At the time, I was handling a parallel suit on behalf of the Socialist Party in an ultimately successful effort to enjoin enforcement of Ohio’s residency requirement for circulators of candidates’ petitions.¹³⁷ Mr. Sinawski and I essentially (though not technically) consolidated the Libertarian and Socialist Party suits (after obtaining waivers

132. See *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1009 (S.D. Ohio 2008).

133. See *supra* note 131 and accompanying text.

134. See *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1010.

135. *Id.*

136. Gary passed away in September 2014 after years of successful ballot litigation on behalf of minor parties. See *Gary Sinawski, Veteran Ball Access Attorney, Dies*, BALLOT ACCESS NEWS (Sept. 23, 2014), <https://ballot-access.org/2014/09/23/gary-sinawski-veteran-ballot-access-attorney-dies/>. Gary was a gentleman as well as a fine lawyer. It was an honor and pleasure to work with him for six years on cases not only in Ohio but also in Michigan.

137. See *Moore v. Brunner*, 2008 WL 2323530 (S.D. Ohio June 2, 2008).

from the two parties) into a single challenge directed at the Secretary's new Directive.¹³⁸ From that point on I was hooked and would, along with my former student, Mark Kafantaris, represent the Libertarian Party for the next ten years.

The Libertarians and Socialists argued that Ohio's new Directive was no better in terms of ballot access than the prior law that was invalidated in *Blackwell* in 2006. The District Court, Judge Edmund Sargus, agreed. No federal court has upheld a ballot restriction requiring minor parties to file party petitions more than eleven months in advance of a general election. Moreover, in 1968, the Supreme Court specifically rejected Ohio's February filing deadline for minor parties.¹³⁹ The only real question was whether the two parties had "the requisite community support" to justify the Court's ordering them onto Ohio's ballot.¹⁴⁰ Judge Sargus found both parties did and directed the Secretary to include their candidates, with party labels, on the 2008 general election ballot.¹⁴¹ Because Ohio's primaries had already been held, neither participated in Ohio's primaries that year.

Ohio's Democratic Secretary of State (Jennifer Brunner) complied,¹⁴² and even went so far as to issue a Directive that also named the Constitution and Green parties as ballot-qualified in Ohio.¹⁴³ The Constitution Party had already filed suit to achieve this result,¹⁴⁴ and the Green Party was prepared to. Rather than needlessly litigate their qualifications (as Republican Secretaries of States in Ohio had done and would continue to do), Secretary Brunner properly placed both parties' candidates on Ohio's ballot.

None of these parties would ever win the required five percent of the vote needed to guarantee continued party recognition in Ohio, and Ohio's legislature continued to sit on its hands and ignore the Constitution. For this reason, and to avoid what she understandably believed to be additional needless litigation, Secretary Brunner in 2009 again recognized the Libertarian, Socialist, Constitution, and Green parties in Ohio.¹⁴⁵ All four conducted

138. See *Moore v. Brunner*, 2008 WL 3887639 (S.D. Ohio Aug. 21, 2008).

139. *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d at 1014.

140. *Id.* at 1015 (quoting *McCarthy v. Briscoe*, 429 U.S. 1317 (1976)).

141. 567 F. Supp. 2d at 1016; *Moore*, 2008 WL 3887639, at *5.

142. See Memorandum from Jennifer Brunner to County Boards of Elections, Secretary of State Advisory 2008-17 (Aug. 14, 2008), <https://www.ohiosos.gov/globalassets/elections/advisories/2008/adv2008-17.pdf>.

143. See Memorandum from Jennifer Brunner to County Boards of Elections, Secretary of State Directive 2011-01 (Jan. 6, 2011), <https://www.ohiosos.gov/globalassets/elections/directives/2011/dir2011-01.pdf>.

144. See *Constitution Party of Ohio v. Brunner*, No. 2:08-cv-666, 2009 WL 723156, *1 (S.D. Ohio Mar. 16, 2009).

145. See Memorandum from Jennifer Brunner to County Boards of Elections, Secretary of State Directive 2009-21, <https://www.ohiosos.gov/globalassets/elections/directives/2009/dir2009-21.pdf>.

primaries and ran candidates in the 2010 general election.¹⁴⁶ In the ensuing odd-year 2011 election cycle, Secretary Brunner extended ballot access again to all four minor parties.¹⁴⁷

A. Ohio's Republican Legislature Finally Acts

On July 1, 2011, Ohio's Republican Governor, John Kasich, signed Republican-sponsored legislation that essentially re-enacted the same one percent signature-collection requirement and early-filing deadline that had been invalidated by the Sixth Circuit in 2006. Acting pursuant to this legislation, the new Republican Secretary of State, Jon Husted, informed the Libertarian Party that previous Directives recognizing it as a political party were "void."¹⁴⁸ As federal Judge Algenon Marbley would explain in the course of the ensuing litigation, the Republicans' effort "did little to change the rules governing ballot access."¹⁴⁹ "The Legislature," Judge Marbley observed, "amended the filing requirement by a mere 30 days, and did nothing to the signature requirement."¹⁵⁰ He added that "[a]ll that is different is that the party must file these signatures, not 120 days, but 90 days before the May primary."¹⁵¹ Judge Marbley thus had little difficulty preliminarily enjoining application of the law to the 2011 odd-year elections.¹⁵² A few weeks later, on October 18, 2011, he extended the injunction to cover the 2012 election cycle as well.¹⁵³

Meanwhile, Democratic opposition to the Republican omnibus election package that included the ballot access law enjoined by Judge Marbley resulted in the filing of a referendum to repeal it.¹⁵⁴ Rather than face this

146. See *Constitution Party May 4, 2010 Primary Results*, <https://www.boe.ohio.gov/licking/c/electres/20100504cp.pdf> (listing Constitution candidate); *2010 Ohio Gubernatorial Election*, WIKIPEDIA, https://en.wikipedia.org/wiki/2010_Ohio_gubernatorial_election (listing Green, Libertarian candidates) (last visited Apr. 2, 2023); *2010 U.S. Senate Election in Ohio*, https://en.wikipedia.org/wiki/2010_United_States_Senate_election_in_Ohio (listing Constitution and Socialist candidates).

147. See Memorandum from Jennifer Brunner to County Boards of Elections, Secretary of State Directive 2011-01 (Jan. 6, 2011), <https://www.ohiosos.gov/globalassets/elections/directives/2011/dir2011-01.pdf>.

148. *Libertarian Party of Ohio v. Husted*, 2011 WL 3957259, *21 (S.D. Ohio Sept. 7, 2011).

149. *Id.* at *1.

150. *Id.*

151. *Id.*

152. *Libertarian Party of Ohio v. Husted*, 2011 WL 3957259, at *1.

153. See *Libertarian Party of Ohio v. Husted*, 2013 WL 4833033, *1 (S.D. Ohio Sept. 11, 2013) (explaining that in October 2011 "this Court also ordered Defendant Husted to put LPO on the 2012 ballot.").

154. See *Libertarian Party of Ohio v. Husted*, 497 Fed. Appx. 581, 582 (6th Cir. 2012). Democrats did not specifically challenge the ballot access provision in the omnibus law but disagreed with other aspects of it.

referendum at the ballot box, Ohio's Republican-controlled General Assembly on May 15, 2012 repealed the whole omnibus package, including the previously enjoined ballot access provisions.¹⁵⁵ The repeal took effect on August 15, 2012.¹⁵⁶

While this was unfolding, Husted on November 1, 2011 issued a Directive stating that "[c]onsistent with the Federal District Court's order on October 18, 2011," the Libertarian Party was restored to "Ohio's 2012 primary and general election ballots."¹⁵⁷ His Directive extended the same relief to "the Americans Elect Party, the Constitution Party, the Green Party, and the Socialist Party."¹⁵⁸ The Americans Elect Party ended up withdrawing before the 2012 election, but the others all participated.¹⁵⁹ None won enough votes to meet Ohio's vote test for continuing ballot access. All accordingly relied on the Secretary's continuing compliance with existing federal court orders for their ongoing ballot access.

B. Second Wave of Republican Legislation

On June 21, 2013, Ohio's Republican-controlled General Assembly (with Republican Governor Kasich's support) passed a new law that required circulators of political parties' and candidates' petitions to be residents of Ohio.¹⁶⁰ Ohio's old residence restriction had been invalidated by the Sixth Circuit in *Nader v. Blackwell*,¹⁶¹ and had been enjoined by Judge Sargus in *Moore v. Brunner*,¹⁶² even before that, but Ohio's Republicans apparently felt strongly about making it more difficult to qualify minor candidates. Because this new legislation also covered initiative circulators, it was immediately challenged by a non-profit ballot issue political action committee.¹⁶³ The Libertarian Party soon added a challenge of its own,¹⁶⁴ and the two cases were effectively (though not technically) consolidated. The Libertarian

155. See Husted, 497 Fed. Appx. at 582.

156. *Id.*

157. See *Libertarian Party of Ohio v. Husted*, 2013 WL 4833033, at *1 (quoting Memorandum from Jon Husted to County Boards of Elections, Secretary of State Directive 2011-38 (Nov. 1, 2011), <https://www.ohiosos.gov/globalassets/elections/directives/2011/dir2011-38.pdf>).

158. Memorandum from Jon Husted to County Boards of Elections, Secretary of State Directive 2011-38 (Nov. 1, 2011), <https://www.ohiosos.gov/globalassets/elections/directives/2011/dir2011-38.pdf>.

159. See *2012 U.S. Presidential Election in Ohio*, WIKIPEDIA, https://en.wikipedia.org/wiki/2012_United_States_presidential_election_in_Ohio.

160. See *Citizens in Charge v. Husted*, 2013 WL 11310689, at *2 (S.D. Ohio Nov. 13, 2013).

161. 545 F.3d 459 (6th Cir. 2008).

162. 2008 WL 2323530 (S.D. Ohio 2008).

163. Husted, 2013 WL 11310689, at *1.

164. Although the cases were not formally consolidated, the Court treated them together. See *Citizens in Charge v. Husted*, 2013 WL 11310689, *1 (S.D. Ohio Nov. 13, 2013).

Party's concern was that Ohio's new residence law would make it more difficult for its primary candidates to collect signatures, a realistic fear given that professional signature collectors tend to travel from place to place.

While the residency requirement challenges were pending, Ohio's General Assembly on November 6, 2013 passed another ballot access law, S.B. 193, that was scheduled to take effect on February 5, 2014.¹⁶⁵ February 5, 2014 was coincidentally (not!) the deadline for candidates to file for Ohio's primaries. Because Secretary Husted had issued another Directive recognizing the Libertarian, Green, Constitution and Socialist parties in Ohio,¹⁶⁶ several minor candidates had already filed the required paperwork and paid the fees necessary to run in Ohio's minor party primaries. The new Republican legislation ignored all this and retroactively revoked their filings, along with all previous Directives that had recognized minor parties.¹⁶⁷ The new law required that Ohio's minor parties "start from scratch"¹⁶⁸ by re-qualifying themselves using a newly enacted petition method.¹⁶⁹ It also required that their candidates qualify by petition (including collecting signatures) rather than through Ohio's primaries.¹⁷⁰

Under this new ballot access requirement, a political party that had not won three percent of the vote for governor or president in the previous election¹⁷¹ (that is, every party except the Democrats and Republicans) would have to petition for access by filing 126 days before the general election.¹⁷² The required paperwork included voters' signatures totaling one-half of one percent of the total votes for president in 2012 (28,166 signatures).¹⁷³ The number of signatures required increased to one percent of the total votes cast in the most recent gubernatorial or presidential election after 2014,¹⁷⁴ with the added requirement that at least 500 voters from each of at least one half of Ohio's congressional districts be included.¹⁷⁵ Assuming a newly recognized party then in 2014 won two percent of the gubernatorial vote, it would be recognized for four years.¹⁷⁶ During this four-year period, it would then

165. See *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, *2 (S.D. Ohio Jan. 7, 2014).

166. *Id.*

167. *Id.*

168. *Id.*

169. See OHIO REV. CODE § 3517.012(A).

170. See *id.* § 3517.012(B).

171. See *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, at *3.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

have two chances to win three percent of the presidential or gubernatorial vote in order to remain qualified.¹⁷⁷

The Libertarian Party amended its challenge to Ohio's residency requirement to include a challenge to this new ballot access law. It argued that S.B. 193's belated revocation of its status as a recognized political party retroactively stripped it of ballot access in violation of due process.¹⁷⁸ The Libertarians also argued that S.B. 193's denying primaries to new parties, while affording primaries to the major parties, violated the First and Fourteenth Amendments.¹⁷⁹ Because the Ohio General Assembly had previously intervened in the case to separately defend its new residency requirement for circulators, the Libertarian Party also added Ohio constitutional claims challenging S.B. 193's denial of primaries to new political parties.¹⁸⁰

Both the Green Party and the Constitution Party intervened to join the Libertarian Party as plaintiffs, making similar but distinct constitutional claims.¹⁸¹ Judge Michael Watson, a Republican, on January 7, 2014 issued a preliminary injunction prohibiting Ohio from belatedly stripping the Libertarian, Green and Constitution Parties of their ballot access.¹⁸² He agreed with the minor parties that Ohio unconstitutionally "moved the proverbial goalpost in the midst of the game,"¹⁸³ in violation of due process, if not the First Amendment.¹⁸⁴ "Stripping Plaintiffs of the opportunity to participate in the 2014 primary in these circumstances," Judge Watson concluded, "would be patently unfair."¹⁸⁵

Because Judge Watson enjoined application of S.B. 193 based on its impermissible retroactivity under the due process clause, he postponed ruling on whether S.B. 193's demands violated the First and Fourteenth Amendments going forward.¹⁸⁶ He also postponed addressing whether Ohio's denial of primaries to new parties violated Ohio's Constitution.¹⁸⁷ Judge Watson would eventually dismiss the Ohio constitutional claims under

177. See *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, at *3.

178. See *infra* notes 182–85 and accompanying text.

179. See *infra* note 184 and accompanying text.

180. See *infra* notes 187–88 and accompanying text. Without the General Assembly's earlier intervention in the case, the Eleventh Amendment would have foreclosed filing any Ohio constitutional claims in federal court. With the intervention, a federal court arguably could entertain them. See *infra* note 388.

181. See *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569, at *1.

182. *Id.* at *10.

183. *Id.* at *7.

184. Judge Watson did not resolve the First Amendment issue at this time, finding it unnecessary. *Id.* at *10.

185. *Id.*

186. *Id.* at *10.

187. *Id.*

the Eleventh Amendment,¹⁸⁸ while ruling that S.B. 193 did not otherwise violate the federal Constitution.¹⁸⁹ It therefore could be (and is still) applied after the 2014 election.¹⁹⁰

Because S.B. 193 could not constitutionally be applied in 2014, the Libertarian Party immediately began qualifying its candidates for its upcoming primary. Time was tight because candidate petitions and supporting signatures were due by February 5, 2014, less than four weeks away. Still, notwithstanding the short interval provided to collect signatures, several Libertarian candidates qualified for their primaries unopposed, including Charlie Earl for Governor and Steve Linnabary for Attorney General.

Earl was the Libertarian Party's most important candidate because he was needed to win two percent of the gubernatorial vote (per S.B. 193's temporary requirement) in order to re-qualify the Libertarian Party for ballot access. Earl was polling close to six percent at that time,¹⁹¹ so his winning two percent seemed like a pretty good bet. Ohio's Republican Party noticed this, too, as did its gubernatorial candidate, incumbent Governor John Kasich.

C. Ohio's Employer Statement Rule

As soon as Earl submitted his papers and supporting signatures to elections officials in Republican Secretary of State Jon Husted's office, Republican operatives (with assistance from inside Husted's office) began picking through them.¹⁹² To their chagrin they learned that Earl had more than enough signatures. Still, they discovered something that might be useful: the principal circulator of Earl's part-petitions (and Linnabary's part-petitions, too) had been paid by the Libertarian Party.

There is nothing wrong with paying circulators in Ohio to collect signatures. Circulators for minor candidates are, in fact, often paid. Nor is there anything wrong with political parties paying candidates' circulators, so long as the expenses are properly reported to the Secretary of State. For its part, the Libertarian Party followed all the reporting rules and disclosed to the Secretary of State that it had paid Earl's and Linnabary's circulators, which is how the Republican Party knew they had been paid.

But Republicans, including the manager and deputy manager of Governor Kasich's re-election campaign, found one problem with Earl's and Linnabary's principal circulator's paperwork. He did not identify anyone as his

188. See *infra* note 388. These claims were then re-filed in state court, where they were ultimately rejected. See *infra* notes 492-523 and accompanying text.

189. See *infra* notes 385-95 and accompanying text.

190. See *infra* note 520 and accompanying text.

191. See Charlie Earl, BALLOTEDIA, https://ballotpedia.org/Charlie_Earl (last visited Apr. 2, 2023).

192. See *infra* notes 429-35 and accompanying text.

employer on the part-petitions he submitted.¹⁹³ Ohio Revised Code section 3501.38(E)(1), Ohio's "employer statement rule," requires that "[o]n the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate . . . the circulator shall identify . . . the person employing the circulator to circulate the petition, if any."¹⁹⁴ Because Earl's and Linnabary's circulator obviously was not employed by the Libertarian Party, Republicans accordingly concocted an argument that even independent contractors are "employees" for purposes of section 3501.38(E)(1).¹⁹⁵ Earl's and Linnabary's primary circulator, they would claim, therefore violated the disclosure requirement in section 3501.38(E)(1).

It would be discovered months later (with the assistance of several court orders) that the Ohio Republican Party had invested over a half-million dollars in its project to remove Earl and Linnabary from Ohio's ballot.¹⁹⁶ But to make it work Republicans first needed to find voters who were members of the Libertarian Party to file the charges. Ohio law allows only party members to protest primary candidates.¹⁹⁷ Through the joint efforts of a

193. Earl's circulator claimed that he had been paid to collect signatures across Ohio for many years and had never identified the paying parties as his employers. *See* Libertarian Party of Ohio v. Husted, 751 F.3d 403, 408 (6th Cir. 2014). He had never had a problem arise under this statute according to his sworn testimony. *See* Libertarian Party of Ohio v. Husted, No.2:13-cv-953, Doc. No. 63-1, at PageID# 1327. He considered himself an independent contractor, *id.* at PageID# 1329, and was never formally "employed" by those who paid him. *Id.* at PageID# 1331. Thus, the circulator left the "employer" line blank on Earl's and Linnabary's part-petitions, just as he always had. *Id.*

194. OHIO REV. CODE § 3501.38(E)(1).

195. Ohio's employer statement rule was passed in the wake of the 2004 presidential election, ostensibly because Ralph Nader's independent campaign had used a significant number of fraudulently collected signatures by paid circulators. *See* Libertarian Party of Ohio v. Husted, 2014 WL 11515570, at *2. As the Sixth Circuit explained in striking down Ohio's unconstitutional residence requirement, however, Nader was disqualified not because of fraud but because "1701 signatures [were rejected based on their] circulators . . . not [being] Ohio residents and electors." Nader v. Blackwell, 545 F.3d at 466. Ohio basically conflated finding that circulators were not residents with their having committed fraud, something that the Sixth Circuit rejected. *See* Mark R. Brown, *Petitioning Privately is Not a Problem*, COLUMBUS DISPATCH (Apr. 10, 2010), <https://www.dispatch.com/story/opinion/cartoons/2010/04/10/petitioning-privately-is-not-a-problem/23455110007/> ("Ohio presented very little, if any, evidence of election fraud in Nader's submission, [and the Sixth Circuit] also ruled that requiring that circulators reside and vote in Ohio has very little, if anything, to do with election fraud."). While it is true that the Nader campaign was defrauded by some of its paid circulators, *see* Nader v. Blackwell, 545 F.3d at 466 n.1, he was not removed from the ballot because of this fraud. Nevertheless, Ohio's two major parties joined together to charge Nader with fraud, pass a requirement that circulators identify their "employers" because of that fraud, and act as if this would somehow prevent fraud in the future.

196. *See* Earl v. Ohio Elections Commission, No. 16AP-161, 2016 WL 5637037, *3 (Ohio App. Sept. 29, 2016).

197. *See* OHIO REV. CODE § 3513.05; *see also* State ex rel. Linnabary v. Husted, 8 N.E.3d 940 (Ohio 2014).

Republican operative named Terry Casey, officers inside Kasich's campaign for Governor, and a law firm named Zeiger, Tigges & Little, Republicans were able to find a Libertarian, Gregory Felsoci, to protest Earl just before the deadline for protests closed.¹⁹⁸ Judge Watson would later describe Felsoci as a "guileless dupe,"¹⁹⁹ with the Sixth Circuit agreeing that he was nothing more than a "tool of the Republican Party."²⁰⁰ Felsoci's handlers, including his lawyers at Zeiger, Tigges & Little, went to great lengths to ensure both descriptions were accurate. They kept Felsoci in the dark about everything, including who was paying his bills.²⁰¹

Meanwhile, the DeWine campaign, which was responsible for challenging Linnabary,²⁰² was only able to locate an unaffiliated voter to front its protest. Still, the Republican Party retained and paid this unaffiliated voter's lawyers,²⁰³ just as it did for Felsoci.²⁰⁴ Whether this unaffiliated protestor was kept as clueless as Felsoci was never established, but the result was the same. Linnabary and Earl were both removed from the ballot and neither the Libertarians nor the reviewing courts were fully apprised of the hidden conflicts of interest that permeated the protests.

Rather than remove Earl and Linnabary himself or have a subordinate do it, Husted opted for political cover and chose to appoint an ostensibly impartial (Republican) hearing officer to decide the two cases.²⁰⁵ Bradley

198. *Earl*, 2016 WL 5637037, at *1.

199. *Libertarian Party of Ohio v. Husted*, 2014 WL 11515570, *1 (S.D. Ohio March 19, 2014).

200. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 409 (6th Cir. 2014).

201. *See* *Libertarian Party of Ohio v. Husted*, 2016 WL 447566, *4 (S.D. Ohio Feb. 5, 2016) (commenting that "[t]he overall conduct of discovery in this case, especially on the part of Mr. Felsoci's and Mr. Casey's counsel, demonstrates a pattern of technical and begrudging responses and objections to discovery requests, which pattern was clearly designed to delay or obstruct the Plaintiffs' ability to learn that the Ohio Republican Party was involved in the effort to keep Libertarian Party candidates off the ballot"). The Court earlier had concluded that the Zeiger law firm's failure to disclose who was paying their bills to Felsoci was dubious under Ohio's ethical rules, which created an enforceable right on behalf of Felsoci to both know who was paying his lawyers and to also see any billing invoices (none of which had been revealed to him). *See* *Libertarian Party of Ohio v. Husted*, 2014 WL 3928293, *2 - *4 (S.D. Ohio Aug. 12, 2014). It thus ordered the firm to produce billing records pursuant to a discovery request made by the Libertarian Party. *Id.* Unfortunately, these records only indicated that Casey was financially responsible. It took additional discovery to trace the money back to the Ohio Republican Party.

202. *See infra* notes 280-81 and accompanying text.

203. *See infra* notes 282-89 and accompanying text.

204. Even though this unaffiliated protestor likely lacked standing, *see* *State ex rel. Bender v. Franklin County Board of Elections*, 132 N.E.3d 664, 668-69 (Ohio 2019) (holding that unaffiliated protestor must at least identify with and claim to be member of the party), the hearing officer (Smith) ruled he did. Secretary Husted agreed, and the Ohio Supreme Court ruled the circulator's standing was irrelevant given the Secretary's authority to remove Linnabary once he learned of the circulator's violation. *See* *State ex rel. Linnabary v. Husted*, 8 N.E.3d 940, 944 (Ohio 2014).

205. Husted's Republican successor, Frank LaRose, would later unsuccessfully attempt the same deception eight years later. *See* *State ex rel. Maras v. LaRose*, 189 N.E.3d 777 (Ohio 2022)

Smith, a respected law professor (and colleague of mine at Capital University) accepted the appointment.²⁰⁶ Smith was, at that time, widely active in Republican circles throughout Ohio and across the nation. He had served as a Republican member and later chair of the Federal Election Commission,²⁰⁷ was active in Republican circles supporting litigation that furthered Republican interests,²⁰⁸ and (as it was later discovered) even personally represented Ohio's Republican Attorney General, Mike DeWine, in unrelated litigation at the same time the two Libertarian candidates were being protested.²⁰⁹ Smith was (and remains today) entwined with Republican positions and politics.²¹⁰

(reversing decision by former Republican Ohio Supreme Court Justice appointed by Secretary LaRose to decide whether to remove an independent candidate who was challenging LaRose); accord Mark R. Brown, *How Ohio Stacks the System Against Independent and Minor Candidates*, CLEVELAND.COM (Sept. 11, 2022), <https://www.cleveland.com/opinion/2022/09/how-ohio-stacks-the-system-against-independent-and-minor-party-candidates-mark-r-brown.html> (criticizing LaRose for his decision and stating that "Ohio's biased protest process has produced a number of minor party victims over the last few years.").

206. See *Libertarian Party of Ohio v. Husted*, 2:13-cv-953, Doc. No. 221-1, at PageID# 4909 (S.D. Ohio) (Dep. of Bradley Smith). Smith was paid the modest sum of \$250 per hour and reported that his final bill was approximately \$15,000. *Id.*

207. See FEDERAL ELECTION COMMISSION (F.T.C.), *All Commissioners: Biography: Bradley Smith*, <https://www.fec.gov/about/leadership-and-structure/commissioners/>.

208. For instance, Smith's Center for Competitive Politics, which was later re-named the Institute for Free Speech, was co-counsel for the challengers in *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010), which facilitated the creation of so-called Super PACs.

209. See *infra* notes 264-67 and accompanying text. Smith filed an amicus curiae brief on behalf of DeWine in a case pending before the U.S. Supreme Court. See Susan B. Anthony v. Driehaus, No. 13-193, Brief Amicus Curiae of Ohio Attorney General Michael DeWine in support of Neither Party (U.S., Mar. 3, 2014), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-193.htm>. The Libertarians learned of Smith's representation of DeWine on March 13, 2014, one week after Smith and Secretary Husted had removed them from the ballot. See *Husted*, 2:13-cv-953, Doc. No. 252, at PageID# 6748 (S.D. Ohio) (transcript of hearing).

210. Illustrative of Professor Smith's continuing alignment with established Republican interests is his recent unsupportable claim that "[d]espite relentless media repetition that claims of a stolen election were ... 'without evidence,'" that claim "is not true." Bradley A. Smith, *Crisis and Disconnect: Electoral Legitimacy and Proposals for Election Reform*, 24 U. PENN. J. CONST. L. 1053, 1055 (2022). He cites only a paper by John Lott, an economist who worked in the Trump administration, to support his charge. *Id.* at 1055 n.3 (citing John R. Lott, *Simple Tests for the Extent of Vote Fraud with Absentee and Provisional Ballots in the 2020 US Presidential Election*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756988). Like many of his studies, however, Lott's "proof" of voter fraud in the Georgia and Pennsylvania elections had been long-ago thoroughly refuted by statistical experts. See, e.g., Andrew C. Eggers et al., *Comment on "A Simple Test for the Extent of Voter Fraud with Absentee Ballots in the 2020 Presidential Election,"* 10 (2021), https://www.hoover.org/sites/default/files/research/docs/comment_voterfraud_grimmer_garro_eggers.pdf ("Lott (2020)'s claims of election fraud in Georgia and Pennsylvania have no basis in fact."). Smith's peddling of Lott's debunked proof can only be understood as support for today's majority in the Republican Party, which includes Ohio's current Attorney General, Dave Yost, who made the specious claim before the Supreme Court that "vulnerabilities" placed the 2020 presidential election in doubt. See Mark R. Brown, *Texas and Trump: The Case of Ohio's Attorney*

Not only did the Libertarians not know of the Smith-DeWine connection until after the administrative hearing was completed, they did not learn until even later that DeWine's campaign was secretly behind the protest of Linnabary.²¹¹

Months after Secretary Husted removed the Libertarian Party candidates, moreover, it would be discovered that Professor Smith had initially ruled in their favor.²¹² On March 7, 2014, when Smith's Report and Recommendation ruling in favor of the protestors was released by Secretary Husted, the Libertarians had no idea that just hours before Professor Smith had reached a contrary conclusion, one that made a 180-degree turn overnight. Knowledge of DeWine's involvement in the protest, Smith's potential conflict of interest, and Smith's change of heart, however, would have to wait. No one outside Husted's office,²¹³ DeWine's office and the Republican Party was to know any of this when Smith and Husted rendered their decision against the Libertarians.

1. *Smith's (Undisclosed) Initial Report*

Ohio's employer statement rule, section 3501.38(E), was relatively new and rarely enforced; only two cases, both involving initiatives as opposed to candidates, had ever interpreted it. In the second of these two cases, *Rothenberg v. Husted*,²¹⁴ the Ohio Supreme Court addressed an initiative where independent-contractor-circulators had listed as their "employer" another independent contractor that had hired them. Their disclosure was challenged as violating section 3501.38(E) with hopes of having all the signatures they collected, along with the initiative itself, deemed invalid.

The Ohio Supreme Court in a short opinion stated that "[p]art-petitions of compensated circulators are not improperly verified and subject to invalidation simply because the circulators, who might actually be independent contractors, listed the entity or individual engaging or paying them to circulate the petition as "the person employing them."²¹⁵ The opinion did not elaborate on the meaning of section 3501.38(E).

General David Yost, JURIST (Dec. 18, 2020), <https://www.jurist.org/commentary/2020/12/mark-brown-yost-trump/>.

211. See *infra* notes 277–78 and accompanying text.

212. See *Libertarian Party of Ohio v. Husted*, 2014 WL 12647019, *5 (S.D. Ohio 2014).

213. Jack Christopher, Husted's general counsel, admitted that he and others in his office knew no later than March 3, 2014, the day before the administrative hearing, that Smith was still representing Mike DeWine before the U.S. Supreme Court. See *Husted*, 2:13-cv-953, Doc. No. 252, at PageID# 6805 (testimony of Jack Christopher).

214. 953 N.E.2d 327 (Ohio 2011).

215. *Id.* at 328.

Smith, in his initial Report and Recommendation,²¹⁶ which was later introduced into evidence during the federal proceedings and remains on file with the author, interpreted the Ohio Supreme Court's short holding in *Rothenberg* to not require that independent contractors disclose whoever paid them:

Had the Court meant ... that independent contractors were required to complete the employer information box with the name of the person employing them, then the filings would have been obviously correct, and there would have been no question at all of improper verification.²¹⁷

Smith reasoned that “[t]he Court’s suggestion [is] that independent contractors completing the employer box might not have been required to . . .”²¹⁸ The Court’s holding, Smith added, appeared to mean that independent contractors have no “obligation to complete the employer information box, or, at a minimum it considered the issue a questionable one that needn’t be decided.”²¹⁹

The case that presented “controlling authority,”²²⁰ according to Smith in his initial Report and Recommendation, was *In re Protest of Evans*²²¹ from the Ohio Court of Appeals. There, a non-profit (the American Cancer Society or ACS) had hired a professional signature collection firm to gather signatures for an initiative,²²² and the circulators working for that firm then listed the American Cancer Society as their employer under section 3501.38(E).²²³ The Court of Appeals ruled that listing the American Cancer Society, which had hired the independent contractor that had hired the circulators, as an employer violated section 3501.38(E)(1).²²⁴ It also ruled that this violation invalidated all the signatures those circulators had collected.²²⁵

In reaching this conclusion, the Court of Appeals stated that it “discern[ed] no meaningful difference between ‘the employer who is employing

216. On file with author [hereinafter “Smith Report and Recommendation I”]. See also Husted, 2:13-cv-953, Doc. No, 252, at PageID# 6733-36 & Ex. 17 (testimony of Bradley Smith) (discussing this initial Report and Recommendation which was introduced as an exhibit but not made part of the electronic record).

217. Smith Report and Recommendation I at 15.

218. *Id.*

219. *Id.*

220. *Id.*

221. 2006-Ohio-4690, 2006 WL 2590613 (Ct. App. 2006).

222. Evans, 2006 WL 2590613, at *1.

223. *Id.* at *2.

224. *Id.* at *11

225. *Id.*

that person[.]’ as used in R.C. 3503.14(A) [which speaks to voter registration efforts], and ‘the person employing the circulator[.]’ as used in R.C. 3501.38(E)(1).²²⁶ Quoting from state and federal tax laws, the latter of which defines “‘employment’ [to] mean[] ‘any service * * * performed * * * by an employee for the person employing him,’”²²⁷ the Court of Appeals reasoned that section 3501.38(E)(1) “refers to a typical employment relationship.”²²⁸ Thus the description of section 3501.38(E) as Ohio’s “employer” statement rule.

Turning to the “question whether ACS was the person employing the affected circulators,” the Ohio Court of Appeals then “look[ed] to those decisions distinguishing between employees and independent contractors.”²²⁹ “The key factual determination is who had the right to control the manner or means of doing the work.”²³⁰ Applying this age-old distinction between employers and independent contractors, the Court of Appeals ruled that “ACS did not employ the affected circulators.”²³¹ Section 3501.38(E)(1), the Court of Appeals ruled, “requir[es] the disclosure of the entity that not only directly controls the manner and means of the circulator’s work, but also directly pays the circulator.”²³² It accordingly rejected the Secretary’s interpretation because it conflicted “with the clear and unambiguous statutory directive that circulators must disclose the ‘person employing’ them.”²³³ “[I]t is not reasonable,” the Court stated, “to conclude that ACS is the person employing the affected circulators.”²³⁴

Interpreting this opinion, Professor Smith concluded “that ‘employer’, as used in section 3501.38(E), meant a ‘typical employment relationship.’”²³⁵ The Court of Appeals, after all, cited examples “pertaining to statutory employees, not independent contractors.”²³⁶ “[T]he clear implication,” Smith concluded, was “that section 3501.38(E) did not apply to the latter.”²³⁷ While he observed that “*Evans* provides a solid rationale for why one might

226. *Id.* at *3 (citations omitted).

227. *Evans*, 2006 WL 2590613, at *3. Note that although the court correctly cited 26 U.S.C. § 3121(b) for the federal definition of employment under the Federal Insurances Contributions Act, the counterpart definition in 26 U.S.C. §3306 under the Federal Unemployment Tax Act is found instead in §3306(c), not (b) as written in the opinion.

228. *Evans*, 2006 WL 2590613, at *3.

229. *Id.*

230. *Id.*

231. *Id.* at *4.

232. *Id.* at *6.

233. *Evans*, 2006 WL 2590613, at *6.

234. *Id.*

235. Smith Report and Recommendation I at 15–16.

236. *Id.* at 16.

237. *Id.*

wish to interpret the employer disclosure provision of section 3501.38(E) as applying to independent contractors, its actual holding appears to be much more limited — only employees, and not independent contractors, are required to complete the employer disclosure information.”²³⁸

Moreover, Smith explained, the Secretary of State had previously issued two formal directives (in 2006 and 2007) advising local election boards not to invalidate part-petitions that did not include an employer’s name as required by section 3501.38(E). “[A]n Ohio citizen searching for guidance on the Secretary’s web page, and finding these Directives, might be unduly surprised to then find signatures invalidated on these grounds. ‘Election-law precedent should not be conducted as an elaborate trap for the unwary.’”²³⁹ Smith concluded that the protests against Earl and Linnabary were “not well-taken, and recommend[ed] that the challenged part petitions and all signatures thereon be counted toward fulfilling the required number of signatures for the Candidates.”²⁴⁰

2. *Smith’s Second Report*

Smith’s initial interpretations of both *Rothenberg* and *Evans* appear solid. *Evans* expressly stated that section 3501.38(E) was meant only to apply to “employers,” applied the traditional distinction between independent contractors and employers, and then ruled that notwithstanding the fact that ACS paid the circulators it was not covered by section 3501.38(E). It had paid the circulators but did not control the manner of circulation. They were thus not ACS’s employees. Because the Libertarian Party was not an employer within the traditional sense of the term and did not control the manner of Earl’s and Linnabary’s circulation, its paying them would thus not implicate section 3501.38(E) either. Smith’s initial opinion was perfectly reasonable.

But it was not what officials in Secretary Husted’s office and the Republican Party wanted to hear, let alone accept. Smith appreciated and anticipated the latter possibility in his email to Jack Christopher, General Counsel and Deputy Assistant Secretary to Husted, which he sent at 9:06 pm the evening before his report was due. Smith’s email stated, “Done. I know this will anger and disappoint a bunch of people but I am recommending that the protests be dismissed.”²⁴¹

238. *Id.*

239. Smith Report and Recommendation I at 17.

240. *Id.*

241. See Husted, 2014 WL 12647019, at *3. At trial, Smith explained that “I didn’t have anybody in particular in mind, as I’ve expressed previously. It doesn’t take a genius to know that in any kind of high profile political case there will be certain people who will be upset.” Husted, 2:13-cv-953, Doc. No. 252, at PageID# 6730 (testimony of Bradley Smith).

Smith's email apparently shocked Christopher so deeply that Christopher spent that entire night in his office developing a response.²⁴² Christopher had phoned Smith from his colleague's (Matt Damschroder's) downtown office at 5:53 pm and spoke to him for over half an hour just before Smith sent him the email.²⁴³ Whether they spoke again is unclear, but early the following morning, at 3:30 am, Christopher emailed Smith an "extensive" explanation of why Smith was wrong about the *Evans* case.²⁴⁴ "I don't think the court [in *Evans*] meant [as an] Independent Contractor you do not have to disclose anyone,"²⁴⁵ Christopher argued. He added that "it makes sense that the legislature would have focused its efforts on requiring the disclosure of paying a circulator."²⁴⁶ Policy supported forcing independent contractors to report, he argued, since "the 'person employing' provision is all about informing election officials about the entity that hired the circulator."²⁴⁷

At 10:55 a.m. that morning, just half a day after he had delivered his initial Report that stated he was "done," Professor Smith submitted a revised Report.²⁴⁸ "[B]y the time I was up that morning I had already decided that I was going to have to be rewriting the report," Smith explained at trial.²⁴⁹ This revised Report appeared to incorporate Christopher's early-morning thoughts while re-interpreting what the courts in *Rothenberg* and *Evans* had said and meant. Smith now concluded in his new, revised Report that "the clear underlying assumption of *Evans* was that paid circulators would disclose *some* person as the employer."²⁵⁰ The Secretary eagerly accepted it.²⁵¹

"*Evans* is not so simple,"²⁵² Smith now wrote. "The basis for the protest in *Evans* was not that circulators had listed ACS as the 'employer' when, as independent contractors, they should have listed no one (or perhaps

242. See Husted, 2:13-cv-953, Doc. No. 252, at PageID# 6820 (testimony of Jack Christopher).

243. Husted, 2014 WL 12647019, at *4.

244. *Id.* at *5.

245. See Husted, 2:13-cv-953, Doc. No. 222-1, Ex. 2, at PageID# 4928-29 (deposition of Bradley Smith).

246. *Id.*

247. *Id.*

248. See *State ex rel. Linnabary v. Husted*, No. 2014-0359, Relator's Evidence, Ex. B (Ohio, Mar. 17, 2014), https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=742902.pdf&subdirectory=2014-0359\DocketItems&source=DL_Clerk (hereinafter "Smith Report and Recommendation II").

249. Husted, 2:13-cv-953, Doc. No. 252, at PageID # 6751 (Testimony of Bradley Smith).

250. Smith Report and Recommendation II at 15 (emphasis original).

251. See Chrissie Thompson, *Libertarians Denied Spots on Ohio Governor's, Attorney General's Ballot*, CINCINNATI ENQUIRER (Mar. 7, 2014), <https://www.cincinnati.com/story/news/politics/ohio%20government/2014/03/07/husted-earl-governor-election-ohio/6180677/> (reporting that Secretary Husted adopted Smith's Report).

252. Smith Report and Recommendation II at 14.

themselves), a claim that would be similar to that later brought in *Rothenberg v. Husted, infra*.²⁵³ “Rather,” Smith explained, “the protest was that ‘some of the circulators identified their employer as the American Cancer Society, rather than the professional petition-circulating company that actually employed them.’”²⁵⁴ It was the “[f]ailure to disclose the *correct* employer”²⁵⁵ that violated Ohio’s employer statement rule, according to Smith.

Smith added that “[t]o exempt independent contractors from the disclosure provisions would allow disclosure of paid petitioning to be avoided by the simple expedient of using independent contractors rather than employees.”²⁵⁶ Smith thus in his revision of the Report and Recommendation turned from the plain language of *Evans* to what he now considered its underlying assumptions and the policies these assumptions might advance.

Meanwhile, the Ohio Supreme Court’s decision in *Rothenberg* was not inconsistent with this reading of *Evans*, Smith claimed. *Rothenberg* may have either been “a case of ‘no harm, no foul’— the circulators included information that was not required but would not have misled voters,” or one that placed “a duty . . . [on] independent contractors to disclose who contracted for the work.”²⁵⁷ “In either case,” Smith observed, “*Rothenberg* does not contradict or overrule *Evans*.”²⁵⁸

As for the Secretary’s Directives, Smith changed his mind to say that those Directives were limited to the matters at hand, and “expired with the ballot issues to which they were directed.”²⁵⁹ “Furthermore, while Directives may inform the public, they are binding only on the local boards to whom they are addressed, and may not override provisions of the Revised Code.”²⁶⁰

Smith then added an argument that was not mentioned in his first Report: “the *current legal position* of the Secretary . . . was set forth nearly 30 months ago in the *Rothenberg* litigation.”²⁶¹ There the Secretary argued that “[a]n ‘employer’ may ‘employ’ an employee, an independent contractor, or any person by simply giving work to that person and paying them for it.”²⁶² Because Secretary Husted was not a party to the proceeding at hand, but was instead supposed to be the judge, he had not (at least not publicly) stated his “current” legal position. This ostensibly explains why Smith was brought in

253. *Id.*

254. *Id.* (emphasis original).

255. *Id.* (emphasis original).

256. *Id.*

257. *Id.* at 16.

258. Smith Report and Recommendation II at 16.

259. *Id.*

260. *Id.* at 16–17.

261. *Id.* at 17 (emphasis added).

262. *Id.*

to hear the case: to afford it an air of impartiality. Smith's statement that he understood the Secretary's "current legal position" corroborates the fact that Christopher's comments influenced him. Christopher (or someone in the Secretary's office) must have informed Smith, off-the-record, of the Secretary's "current legal position." That is the only way Smith could have known; he obviously did not know just a few hours earlier when he submitted his initial Report.

Not only had Smith changed his mind within hours of sending in his initial Report and Recommendation, his new interpretations of *Rothenberg* and *Evans* were objectively strained. *Evans* never expressed an assumption that "paid circulators would disclose some person as the employer." The Court of Appeals had merely described the arguments that were made by the parties and the decision rendered below. Given *Evans*' use of the employer-versus-independent contractor distinction, moreover, and its focus on whether a payor directed how circulation occurred, it is doubtful that it implicitly meant that any payor at all must be disclosed.

3. *Smith's Representation of DeWine*

If Smith had stuck to his initial Report, stomached the "anger and disappointment" he was causing a "bunch of people," and ignored the Secretary's off-the-record communications about his "current legal position," the Secretary could have simply rejected his Report. But Smith knew this from the beginning,²⁶³ so it would not necessarily explain why he told Christopher he was ruling for the Libertarians only to change his mind just hours later. An equally plausible explanation rests in Smith's concern for DeWine. Sticking with his initial Report and ruling for the Libertarians would not have been in DeWine's best interest. And Smith was DeWine's lawyer.

Smith was not DeWine's lawyer in the protest proceeding, of course, but he was DeWine's lawyer in another case. While he was removing Linnabary (who was threatening to take votes away from DeWine in the Attorney General's race), Smith was counsel-of-record for DeWine as an amicus curiae in *Susan B. Anthony v. Driehaus*,²⁶⁴ which was being argued before the United States Supreme Court. The protests against the Libertarian candidates had been filed on February 21, 2014,²⁶⁵ with Professor Smith being appointed no later than February 27, 2014²⁶⁶ to hear the matters. On that

263. Smith admitted this possibility at trial: "obviously there's a possibility that he would not adopt the final recommendation." Husted, No. 2:13-cv-953, Doc. No. 252, at PageID# 6732 (testimony of Smith).

264. 573 U.S. 149 (2014).

265. See Husted, No. 2014-0359, *supra* note 248, Respt's Evid., vol. II, Ex. B-1 (2014).

266. Proof that Professor Smith was the hearing officer no later than February 27, 2014 is found in the Secretary's own internal documentation (subsequently produced in discovery) whereby Professor Smith discusses his ruling on a motion to dismiss filed by Linnabary (based on his protestor's

day, Smith informed officials in Husted's office that he was denying a motion filed by Linnabary to dismiss the protest. Linnabary credibly argued that the unaffiliated voter who protested him lacked standing because he was not a Libertarian. Smith emailed Jack Christopher that he was going to deny the motion.²⁶⁷ Smith thus acted in the Linnabary matter to benefit DeWine while he was writing DeWine's amicus brief in *Driehaus*.

The Libertarians did not know of Smith's continuing representation of DeWine until March 13, 2014,²⁶⁸ one week after Smith removed them from the ballot. Officials in Secretary Husted's office, meanwhile, knew no later than March 3, 2014 that Smith represented DeWine, the day before the evidentiary hearing began.²⁶⁹ On that day, Smith had filed his amicus brief on behalf of DeWine in the *Driehaus* case with the Clerk of the Supreme Court.²⁷⁰ According to the Attorney General's office, Smith's involvement in the case had lasted from February 27, 2014 until June 30, 2014,²⁷¹ dates that Smith did not contest.²⁷² That Smith was representing Mike DeWine at the same time he was making decisions about DeWine's challenger, Linnabary, cannot be disputed.

Because removing Linnabary from the ballot stood to immediately benefit DeWine (Smith's client), Smith's conflict was arguably debilitating. Although not technically covered by Ohio's Code of Judicial Conduct (since he was not acting as a "lawyer who is authorized to perform judicial

not having standing). On February 27, 2014, Professor Smith informed Jack Christopher, Matt Damschroeder and others in the Secretary's office that he was going to deny the motion. (Documents on file with author.)

267. See *Bender*, 132 N.E.3d at 668 (stating that being unaffiliated does not mean a voter may legally file a protest against a party candidate in a primary). Even the Ohio Supreme Court's holding against Linnabary failed to endorse Smith's ruling on standing. Subsequently discovered documents, moreover, show that Gretchen Quinn, a career official in the Secretary of State's office, advised Jack Christopher and others in the Secretary of State's office on February 21, 2014 that the Linnabary protestor's statement that he was "'not affiliated with any political party' [] evidences that he is ineligible to protest a candidate seeking the nomination of the Libertarian Party." (On file with author). Whether this was conveyed by Christopher to Smith is not known.

268. See *Husted*, 2:13-cv-953, Doc. No. 252, at PageID# 6748 (statement of Mark Brown).

269. Jack Christopher, Husted's general counsel, admitted that he and others in his office knew no later than March 3, 2014, the day before the administrative hearing, that Smith was representing Mike DeWine before the U.S. Supreme Court. See *Husted*, 2:13-cv-953, Doc. No. 252, at PageID# 6805 (S.D. Ohio) (testimony of Jack Christopher).

270. See *Susan B. Anthony v. Driehaus*, No. 13-193, Brief Amicus Curiae of Ohio Attorney General Michael DeWine in support of Neither Party (U.S., Mar. 3, 2014), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-193.htm>.

271. *Ohioans Tossed Off Ballot Eye Ties to GOP*, SENTINEL-TRIBUNE (Mar. 11, 2022), <https://www.sent-trib.com/2022/03/11/ohioans-tossed-off-ballot-eye-ties-to-gop/> ("DeWine's office confirmed Smith held an appointment from Feb. 27, five days before the Libertarians' hearing, through June 30.").

272. See *Husted*, 2:13-cv-953, Doc. No. 252, at PageID # 6744 (testimony of Bradley Smith).

functions *within a court*”),²⁷³ Smith was acting in a quasi-judicial capacity. In resisting discovery, the Secretary insisted (and the District Court later agreed) that Smith enjoyed a “judicial mental process privilege” that protected him.²⁷⁴ Whether Smith knew it or not — and the answer to this is far from clear — the Secretary believed that Smith was acting in a quasi-judicial capacity and was expected to be impartial. At least that was what the Secretary sought to portray. One can argue that Smith’s participation in the protest as the hearing officer was accordingly improper — it could, after all, “reasonably be questioned.”²⁷⁵ Smith should have at bare minimum fully disclosed his potential conflict before taking action that he must have known would benefit DeWine.²⁷⁶

4. *DeWine’s Representation of Husted*

Regardless of Smith’s potential conflict, DeWine’s secret participation in the protests presents a much larger problem. Documents uncovered in the subsequent months of federal litigation following Earl’s removal established that DeWine’s campaign had orchestrated the protest against Linnabary.²⁷⁷ DeWine was effectively a party to the administrative proceeding,²⁷⁸ although he had said nothing about it to the Libertarians or anyone else outside his campaign, Husted’s campaign, Kasich’s campaign, and the Ohio Republican Party.

273. See Jud.Cond.R., I.(B) Application (2020) (emphasis added).

274. Libertarian Party of Ohio v. Husted, 33 F. Supp.3d 914, 924 (S.D. Ohio), aff’d, 2014 WL 12648252 (S.D. Ohio July 24, 2014).

275. See Jud.Cond.R., Rule 2.11(A), Disqualification (2020).

276. Smith explained at trial that he did not recognize any conflict because “[t]he Attorney General was not a party to the protest.” Husted, 2:13-cv-953, Doc. No. 252, at PageID# 6745 (testimony of Bradley Smith). Smith also claimed that he “didn’t know he was running for re-election.” *Id.*

277. Only during the discovery phase of the federal litigation that ensued did the Libertarians uncover the DeWine campaign’s extensive involvement — it had provided the protestor, paid the lawyers, and delivered the papers to Husted’s office. See Complaint filed by Mark Brown against Mike DeWine with Ohio Ethics Commission, Apr. 27, 2018 (describing and documenting DeWine campaign’s involvement) (on file with author). The Ohio Ethics Commission concluded that because there was no direct evidence that DeWine, as opposed to lawyers in his office, “personally participated in the matter,” that is, litigating in defense of Smith’s Report, DeWine did not violate Ohio’s ethics laws. See Ohio Ethics Commission Letter to Mark R. Brown, July 6, 2018 (on file with author).

278. It is not clear whether DeWine’s involvement by itself violated Ohio’s Rules of Professional Conduct. See Ohio Prof. Cond. R. 1.12(b), Former Judge, Arbitrator, Mediator Or Other Third-party Neutral (2021) (“A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially* as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral.”) (emphasis original).

DeWine's secret involvement was not only an ethical problem, it could be considered criminal, too.²⁷⁹ Documents that were produced by Secretary Husted's office in August of 2014 (pursuant to a court order since Husted would not offer them voluntarily)²⁸⁰ revealed that DeWine's re-election campaign was the driving force behind the protest against Linnabary.²⁸¹ Officials in the DeWine campaign located the unaffiliated protestor, had him sign the protest, physically walked his protest over to Husted's office, hired his lawyers, and ensured that those lawyers would be paid.

The principal incriminating documents consisted of text messages exchanged by Matthew Damschroder, then chief election officer for Secretary Husted, and Avi Zaffini, the then-campaign manager for Secretary Husted's re-election campaign. The text messages were exchanged on the afternoon of February 21, 2014, just before the 4:00 pm deadline closed for filing protests against Earl and Linnabary. At 3:50 pm on February 21, 2014, Zaffini texted Damschroder, Halle Pelger, Assistant Secretary of State, and Jack Christopher, chief legal counsel in the Secretary of State's office, to "[b]e ready looks like AG campaign, Preisse and co. are coming over with a protest for libertarian."²⁸² Damschroder later responded, "AG just filed. Time stamp 3:57."²⁸³ Because the protest just made it under the deadline, a prior order that Damschroder has issued to keep the office open thus proved unnecessary.

On August 26, 2014, Damschroder authenticated under oath the texts and explained the exchange. Damschroder testified that he knew Zaffini, texted him on a regular basis, knew him to be "a very reliable person," and believed he was correct about who was bringing the protest: "I've not had many experiences where Avi [Zaffini] was wrong about things he was telling me."²⁸⁴ Damschroder also testified that that he presumed the challenge Zaffini described was being filed against "the Libertarian candidate for Attorney General."²⁸⁵

279. DeWine arguably violated OHIO REV. CODE § 102.03 (2014), which is a first-degree misdemeanor. See OHIO REV. CODE § 102.99(B) (2014) ("Whoever violates division (D) of section 102.02 or section 102.021, 102.03, 102.04, or 102.07 of the Revised Code is guilty of a misdemeanor of the first degree.")

280. See Husted, 33 F. Supp.3d 914, 918 (S.D. Ohio 2014) (rejecting Secretary's argument that there should be no discovery because "there are no reasons here to impose a blanket prohibition on, or a stay of, discovery").

281. See *infra* notes 282-89 and accompanying text.

282. Husted, 2:13-cv-953, Doc. No. 227-1, at PageID# 5525 (deposition of Matthew Damschroder).

283. *Id.*

284. *Id.* at 5351, 5355.

285. *Id.* at 5355-56.

Meanwhile, the protestor's lawyers were most certainly paid by the Republican party. Matt Borges,²⁸⁶ who was then the chair of the Ohio Republican Party, admitted this during his own deposition. This was "standard practice" Borges stated,²⁸⁷ since "the Ohio Republican Party provides legal services to all of our candidates and campaigns."²⁸⁸ Borges further testified that Republican statewide candidates, like DeWine, "are . . . familiar with our practices" of picking up their legal bills.²⁸⁹

No Ohio law prohibits this sort of clandestine activity by itself, but section 102.03(D) of the Ohio Revised Code bars public officials from "us[ing] . . . the authority or influence of office . . . to secure anything of value . . . that is of such a character as to manifest a substantial and improper influence upon the public official . . . with respect to that person's duties."²⁹⁰ The concern, according to Ohio's Ethics Commission, is that "a public official [not use] his or her authority or influence to secure anything of value where the thing of value could impair the official's objectivity and independence of judgment."²⁹¹ "The beneficial or detrimental economic impact of a regulatory or other decision by a public body," the Ethics Commission has concluded, "is a thing of value."²⁹² Consequently, DeWine was precluded by section 102.03(D) from using his position as Attorney General to secure or

286. Borges's reluctance to disclose the Ohio Republican Party's involvement in the Earl and Linnabary protests, and the extent he was willing to go to protect the Ohio Republican Party, the Kasich campaign, and the DeWine campaign, proves that he (and others) knew their actions were nefarious. Just after the protests were filed Borges admitted to news media that "We're the ones who filed that complaint." Husted, 2:13-cv-953, trial testimony of Matt Borges, at 4 (S.D. Ohio) (not electronically on file with court but on file with author). He then retracted that admission under oath, testifying that he was mistaken, he had corrected himself in front of the reporters, and that the Republican Party was not involved. *Id.* at 4-7. He further testified that no money from the Ohio Republican Party was used to finance the operation. *Id.* at 7. Several months later it was discovered that the Ohio Republican Party had paid several hundred thousand dollars to Felsoci's lawyers to cover the costs of Earl's protest, *see supra* note 196 and accompanying text, and that several Republicans (including those directing Kasich's re-election campaign) were involved. *See infra* notes 423-40 and accompanying text. Borges was thus covering up the truth to say the least, if not perjurying himself. Borges was later convicted of bribery (which he also denied) in an unrelated, high-profile federal prosecution and now faces up to twenty years in prison. *See Jury convicts former Ohio House Speaker, former chair of Ohio Republican Party of participating in racketeering conspiracy*, U.S. DEPT. JUST. (Mar. 9, 2023), <https://www.justice.gov/usao-sdoh/pr/jury-convicts-former-ohio-house-speaker-former-chair-ohio-republican-party>.

287. *See* Husted, 2:13-cv-953, Doc. No. 335-11, at PageID# 8604, 8607 (deposition of Matt Borges).

288. *Id.* at 8604-05.

289. *Id.* at 8607.

290. OHIO REV. CODE § 102.03(D).

291. Ohio Ethics Comm., Info. Sheet: Advisory Op. No. 2009-04, Official Seeking or Accepting Benefit Available to Citizens, at 2.

292. Ohio Ethics Comm., Info. Sheet: Advisory Op. No. 2009-02. *See also* Advisory Ops. No. 85-012; 90-002; 90-012.

influence a “decision by a public body” in his favor. DeWine did just that when he defended Secretary Husted’s removal of his Libertarian challenger, Linnabary, before the Ohio Supreme Court. DeWine never disclosed his personal stake in the case to the Ohio Supreme Court, even though his campaign had secretly filed the protest against Linnabary. Even if he did, he still would have been precluded by section 102.03(D) from defending Husted’s decision before the Ohio Supreme Court.²⁹³ Husted’s office, meanwhile, knew that DeWine was involved, yet Husted stayed quiet, too.

DeWine, of course, had to have personally known that he was vested in the success of Linnabary’s protest. Even if he did not, “[a] candidate who does not control his or her own campaign is nonetheless responsible for that campaign and everything that the campaign disseminates in the candidate’s name.”²⁹⁴ While DeWine was free to use Ohio’s administrative process just like any other citizen, he was precluded by section 102.03(D) from pursuing the protest²⁹⁵ and then using his official position, “formally or informally,” to defend it before the Ohio Supreme Court.²⁹⁶ DeWine’s secrecy only compounded the wrong.²⁹⁷

293. The Ohio Ethics Commission, for example, has advised an elected commissioner that a pending taxpayer suit filed by him as a private citizen precluded him from participating in any commission decisions potentially impacting the merits of his suit. *State ex rel. Portune v. Natl. Football League*, 800 N.E.2d 1188, 1189 (Ohio App. 2003) (“The Ohio Ethics Commission advised that because of the potential economic benefit to Commissioner Portune through recovery of costs and attorney fees if he was successful in his taxpayer’s suit, R.C. 102.03(D) and (E) prohibited him from participating as a commissioner in the decision to appoint special counsel to determine the merits of the Hamilton County Board of Commissioners’ becoming a party to his taxpayer’s suit or from soliciting from the board any benefits related to his taxpayer’s action.”). The Ohio Ethics Commission “further advised that Commissioner Portune was prohibited ‘from voting, discussing, deliberating about, formally or informally lobbying, or taking other official action, in his role as a County commissioner, with respect to any future motions on the claims.’” *Id.*

294. *In re Jud. Campaign Complaint Against Burick*, 95 Ohio Misc.2d 1, 13 (Ohio Comm’n of Judges 1999). *See also* *Blankenship v. Blackwell*, 429 F.3d 254, 259 n.3 (6th Cir. 2015) (noting that under Ohio law candidates are responsible for the acts of their agents).

295. Ohio Ethics Comm., Info. Sheet: Advisory Op. No. 2009-04, *supra* note 291, at 3 (“Programs that offer benefits to citizens, or allow citizens to pursue remedies to grievances against the government, fall within the definition of anything of value.”).

296. *See* *State ex rel. Portune*, 800 N.E.2d at 1189.

297. After being presented with these facts, the Ohio Ethics Commission dismissed my formal complaint against DeWine claiming that there was no evidence that DeWine had personally participated in the litigation before the Ohio Supreme Court. Ohio Ethics Commission letter to Mark R. Brown, July 6, 2018 (on file with author). That informal resolution, however, contradicts a prior official opinion rendered by the Ethics Commission that states personal participation is not required. In its published Advisory Opinion 2009-04, *supra* note 291, at 2, the Commission stated that an “official cannot make a decision that affects his or her own interests, and cannot delegate his or her decision-making authority on the matter to a subordinate official or employee.” Thus, the fact that General DeWine’s subordinates were primarily or even solely involved in defending the Secretary’s action before the Ohio Supreme Court should not have necessarily absolved DeWine of his ethical responsibilities under § 102.03(D). A more thorough investigation was in order. If Ohio law presently allows this sort of obvious conflict of interest, it simply must be corrected.

5. *Libertarians' Blind Challenges*

Once Secretary Husted accepted Smith's second Report and removed the Libertarian Party candidates from the ballot, the Libertarians filed challenges in state and federal court. Earl challenged Husted's ruling in federal court by having the Libertarian Party amend its existing complaint, where he argued that Smith's interpretation of Ohio's employer statement rule violated the First and Fourteenth Amendments.²⁹⁸ Linnabary challenged his removal by filing an original mandamus action in the Ohio Supreme Court and arguing that Smith misinterpreted Ohio's employer statement rule and incorrectly ruled that his protestor had standing.²⁹⁹

At this point, no one (other than those in Husted's office, Smith, possibly Kasich, and probably those working with DeWine) knew that Smith had first ruled for the Libertarians. Although Smith had by this time filed his brief with the Supreme Court on behalf of DeWine, making his involvement public, and the Libertarians had, on March 13, 2014, become aware of Smith's conflict, they had no knowledge of the Republican Party's having recruited Felsoci, DeWine's clandestine involvement in protesting Linnabary, Jack Christopher's email to Smith, nor Smith's belated change of heart. Nor were they aware that Jack Christopher, Matthew Damschroder, and a host of individuals in the Kasich re-election campaign were constantly communicating with Terry Casey—who was managing Felsoci's protest—about Earl's removal from the ballot. The Libertarians were basically flying blind in state and federal court, which is what the Republicans wanted and went to great lengths to ensure.³⁰⁰

This information would have been extremely useful in the state and federal challenges that followed. Knowing specifically that Smith had been influenced by officials in Husted's office who were working with secret protesters and that he had changed his mind at the last second would have cast considerable doubt on Smith's final, official interpretation of Ohio's employer statement rule. As it was, both the federal court and the Ohio Supreme Court assumed that Smith was an impartial expert whose interpretation of

298. See generally *Libertarian Party of Ohio v. Husted*, 2014 WL 11515570 (S.D. Ohio March 14, 2014), *aff'd*, 751 F.3d 403 (6th Cir. 2014).

299. See generally *State ex rel. Linnabary v. Husted*, 8 N.E.3d 940 (Ohio 2014).

300. At the close of discovery in federal court, Magistrate Judge Kemp ruled that the attorneys who represented Felsoci, Casey and ultimately the Republican Party had been "unduly oppositional and blatantly disrespectful during discovery," and that their "underlying motive for some of that conduct is, as was apparently the case here, not so much a firmly-held belief that the discovery in question is objectionable, but an effort not to disclose information which could ultimately prove embarrassing to someone not even a party to the litigation at issue." *Libertarian Party of Ohio v. Husted*, 2017 WL 2544084, *2 (S.D. Ohio June 12, 2017). The attorneys were accordingly sanctioned and ordered to pay the Libertarians' attorneys \$1500.00. *Id.* at *6. The award was affirmed by the District Court and increased to \$4362.50. See *Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953, Doc. No. 412, at PageID# 9663 (S.D. Ohio 2018) (Order).

Ohio's election law was beyond question. Judge Watson, who was hearing Earl's challenge in federal court, went so far as to point to Smith's Report and opine that "[t]he notion that independent contractors are exempt from the disclosure requirement appears to be little more than urban legend based on a misreading of *Rothenberg*."³⁰¹

Ohio's Supreme Court then not only deferred to Secretary Husted's (i.e., Smith's) interpretation of Ohio's employer statement rule, it also embraced Judge Watson's description.³⁰² Quoting Judge Watson's "urban legend" analogy,³⁰³ the Ohio Supreme Court concluded that "no prior case law—especially *Evans* and *Rothenberg*—adopted Linnabary's proposed interpretation of the statute."³⁰⁴ The court added that "Husted's interpretation of R.C. 3501(E)(1) is, at a minimum, reasonable and is therefore entitled to judicial deference."³⁰⁵ Smith's official, unquestioned report thus had a domino effect in the federal and state courts. Had those courts known that Smith questioned his own report and was influenced by officials in Husted's office—officials who themselves had conspired with agents of the Republican Party—and that DeWine and Kasich were secretly behind the protests, those courts might not have been so deferential to Smith's opinion.

Smith's undisclosed first Report makes clear that a more limited interpretation of Ohio's employer statement rule was far from an "urban legend." Arguably, if Smith is to be believed, *Evans* itself appears to have insulated independent contractors from the reach of section 3501.38(E). Of course, one can only speculate about whether full knowledge of the facts surrounding Smith's change of heart would have altered the outcomes in the federal and state court proceedings, but the facts surrounding Smith's initial report and belated change of heart certainly might have made a difference if known beforehand.

Judge Watson, for his part, was not impressed by these subsequently uncovered facts. He dismissed both Smith's potential conflict of interest and Smith's change of heart as irrelevancies. Smith's "pro bono representation of DeWine," Watson ruled, "had concluded *before* Smith served as the hearing officer in the protests."³⁰⁶ Further, "Smith testified that he had no contact with Attorney General DeWine during his representation of him in the *Susan B. Anthony List* case."³⁰⁷ Judge Watson thus concluded that he was "hard

301. *Libertarian Party of Ohio v. Husted*, 2014 WL 11515570, *11 (S.D. Ohio Mar. 19, 2014), *aff'd*, 751 F.3d 403 (6th Cir. 2014).

302. *State ex rel. Linnabary*, 8 N.E.3d at 946.

303. *Id.*

304. *Id.*

305. *Id.* at 945.

306. *Libertarian Party of Ohio v. Husted*, 2014 WL 12647019, *11 (S.D. Ohio Oct. 17, 2014).

307. *Id.*

pressed to find that Smith had a significant interest in the outcome of the protests vis á vis his work on the *Susan B. Anthony List* case.”³⁰⁸

Watson may have been correct that Smith’s work for DeWine afforded Smith no “significant interest” in the case, but Watson was wrong to hold that Smith’s representation of DeWine had concluded before Smith heard the protests. Smith, after all, had decided on February 27, 2014 (one week before he filed the amicus brief for DeWine) that he was rejecting Linnabary’s motion to dismiss.³⁰⁹ Smith’s representation of DeWine in *Driehaus*—even assuming it concluded with the filing of the amicus brief—had thus not ended before he took adverse action against Linnabary. Smith’s formal contract with DeWine even extended to June 30, 2014, well after his March 7, 2014 Report and Recommendation was filed.³¹⁰

Moreover, Smith’s client (DeWine) was significantly interested in the case, both because he would benefit from Linnabary’s removal and because DeWine’s campaign had secretly procured the protest. Since his client was significantly interested, Professor Smith (given his fiduciary connection to his client) would seemingly have had an interest, too.

Perhaps recognizing the difficulties with his analysis, Judge Watson turned to waiver as a better reason to excuse Smith’s potential conflict. He concluded that Linnabary, through his counsel (me), had known of Smith’s conflict of interest during the administrative proceedings and thereby waived any objection he might have had. Judge Watson stated that “Plaintiffs’ counsel knew of Smith’s pro bono participation in the *Susan B. Anthony List* case because he asked Smith a question about it during a break in the protest hearing.”³¹¹ Unfortunately, Judge Watson’s portrayal of my knowledge is not accurate, as my sworn statement makes clear.³¹² I had asked Smith on March

308. *Id.*

309. *See supra* notes 264–67 and accompanying text.

310. *See supra* notes 271–72 and accompanying text.

311. Husted, 2014 WL 12647019, at *11.

312. My sworn statement filed on September 19, 2014 stated the following:

On the morning of March 4, 2014 I sent to the faculty of the Capital University Law School an e-mail commenting on Ohio’s apparent concession in a case before the Supreme Court (the Susan B. Anthony litigation) that its false political statements law was unconstitutional. That e-mail included a link to Ballot Access News, which reported the development. The Ballot Access News report did not [name] Bradley Smith. ... On the afternoon of March 4, 2014, either after the hearing or during a break in the protest hearing against Earl and Linnabary, I bumped into Professor Smith in the hallway outside the hearing room. Not knowing that he had written the brief, I asked Professor Smith if [he] had heard about Ohio’s concession in the Susan B. Anthony litigation. Professor Smith responded that he had because he had ‘worked on the case,’ or words to that effect. My meeting in the hallway with Professor Smith lasted one or two minutes. ... I did not understand Professor Smith’s comment on March 4, 2014 to mean that he was representing DeWine or had written a brief on DeWine’s behalf.

4, 2014, during a break in the hearing, if he had seen a news report about DeWine's amicus brief in *Driehaus*. I had no idea that Smith had been involved, let alone that he was acting as counsel for DeWine, thus necessitating my question. Smith responded that he had seen it and that he had "worked on the case," or words to that effect. Nothing more was said. Smith never informed me that he represented DeWine, did not tell me he was on the brief, and did not explain how he worked on the matter. I did not ask. I did not learn of Smith's representation of DeWine until March 13, 2014, one week after the Libertarians were removed from the ballot.

Judge Watson likewise rationalized Jack Christopher's documented efforts to change Smith's mind as being ineffective and immaterial. Judge Watson stated that, "Professor Smith is unquestionably capable of properly interpreting the scope of the *Evans* decision without anyone else's assistance."³¹³ He added "[t]hat Professor Smith reached a different conclusion earlier while under the pressure to promptly issue his report," and that this did "nothing to detract from the Court's conclusion that his final recommendation was the result of his own, independent analysis."³¹⁴ Smith's "momentary lapse in his analysis of the *Evans* decision and the Secretary's earlier directives,"³¹⁵ Judge Watson explained, was a result of "tremendous pressure to issue a report within a short period of time."³¹⁶ Professor Smith could hardly be faulted given this pressure for having "briefly entertained an erroneous conclusion about *Evans*."³¹⁷

Justice Frankfurter once said that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."³¹⁸ The same might be said of facts. Nevertheless, the Libertarians remained off the ballot.

6. *Challenges to Ohio's Employer Statement Rule*

Having relied on Smith's expertise just six months before to reject the Libertarians' argument as "little more than urban legend,"³¹⁹ Judge Watson was not receptive to belatedly undermining Smith's credibility. That left the Libertarians with their First Amendment challenge to Smith's interpretation

Husted, No. 2:13-cv-953, Doc. No. 214-2, at PageID# 4557-59 (declaration of Brown) (paragraph numbers omitted).

313. Husted, 2014 WL 12647019, at *7.

314. *Id.*

315. *Id.* at *10.

316. *Id.*

317. *Id.*

318. *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

319. *See supra* note 301 and accompanying text.

of Ohio's employer statement rule. Two Supreme Court cases seemed promising.

First, the Supreme Court ruled in *McIntyre v. Ohio Elections Commission*³²⁰ that Ohio's ban on anonymous leafleting violated the First Amendment. Second, in *Buckley v. American Constitutional Law Foundation*³²¹ it ruled that petition circulators could not be made to wear name badges. The First Amendment had thus been used twice to invalidate disclosure requirements in the context of grassroots organizing. Forcing minor-candidate circulators to disclose everyone who paid them a dime seemed to push the First Amendment envelope quite a bit.³²²

Judge Watson disagreed. Applying a deferential form of intermediate scrutiny requiring only a "substantial relation" between means and ends,³²³ Judge Watson ruled that Smith's interpretation of Ohio's employer statement rule was not overbroad under the First Amendment. His holding was then sustained on emergency interlocutory appeal by three Republican judges on the Sixth Circuit using this same "substantially related" test. Like Watson, Sixth Circuit Judge Julia Gibbons, a well-respected Republican on the Sixth Circuit who had ruled in the Libertarian Party's favor in the *Blackwell* case,³²⁴ refused to employ strict scrutiny.³²⁵ In the context of elections, under the *Anderson-Burdick* framework, she explained:

[A]lthough disclosure requirements may burden speech protected by the First Amendment, they are not automatically subject to strict judicial scrutiny. Rather, the Supreme Court has reviewed First Amendment challenges to disclosure requirements in the electoral context under what it has termed "exacting scrutiny."³²⁶

Judge Gibbons concluded that Ohio's burden on anonymity "is . . . insufficiently serious to require strict scrutiny of the statutory provision."³²⁷

320. 514 U.S. 334, 357 (1995).

321. 525 U.S. 182, 187 (1999).

322. Disclosure requirements have often been sustained in the context of campaigns and campaign finance, making predictions uncertain. If there were any certainty in 2014, it was that Republicans tended to argue against disclosure rules while Democrats favored them. It was thus somewhat ironic that a Republican Secretary of State would be so eager to require full disclosure by anyone and everyone.

323. *Libertarian Party of Ohio v. Husted*, 2014 WL 11515570, *9 (S.D. Ohio Mar. 19, 2014), *aff'd*, 751 F.3d 403 (6th Cir. 2014) ("the challenged statute is substantially related to Ohio's significant interest in deterring and preventing fraud in the candidate petition process").

324. *See supra* notes 122-32 and accompanying text.

325. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 418 (6th Cir. 2014).

326. *Id.* at 413.

327. *Id.* at 418.

Although certainly plausible at the time, with the aid of hindsight it now appears that Judges Watson and Gibbons applied the wrong test. In *Americans for Prosperity Foundation v. Bonta*³²⁸ the Supreme Court ruled that a California law that required charitable organizations to disclose their major donors was facially overbroad in violation of the First Amendment. All the Republicans on the Court joined most of the Chief Justice's holding. Borrowing from "electoral" cases like *American Constitutional Law Foundation v. Buckley*, which the Libertarians had relied upon, the Chief Justice explained that "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny," and that this exacting standard is demanding.³²⁹

In particular, the *Bonta* Court concluded that this form of scrutiny requires no less than that a "disclosure requirement [must] be narrowly tailored to the interest it promotes."³³⁰ States must therefore employ the least restrictive alternative: they must show a "need for universal production in light of any less intrusive alternatives."³³¹ Importantly, "a substantial relation between the disclosure requirement and a sufficiently important governmental interest,"³³² the Chief Justice explained, "is not enough to save a disclosure regime that is insufficiently tailored."³³³ Because the Ninth Circuit in *Bonta* had demanded only a "substantial relation"³³⁴ and not "less intrusive alternatives," it had erred. "[P]roperly applied, the narrow tailoring requirement is not satisfied by the disclosure regime."³³⁵

Ohio's employer-statement rule, as interpreted by Smith and the Secretary, goes well beyond the disclosure of "major" payors. It requires the disclosure of any payor. It would accordingly seem difficult to justify constitutionally under the logic of *Bonta*. Like it or not, anonymity is constitutionally protected. The Sixth Circuit in *Libertarian Party v. Husted*, like the Ninth Circuit in *Bonta*, would thus appear to have erred by holding that the relevant "standard 'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'"³³⁶

The Sixth Circuit also erred by insisting that the Libertarians needed to present evidence that the speech of circulators, preferably that of its own circulators, was chilled by the disclosure requirement. The Sixth Circuit

328. 141 S. Ct. 2373, 2389 (2021).

329. *Id.* at 2383.

330. *Id.* at 2385.

331. *Id.* at 2386.

332. *Id.* at 2385.

333. *Id.* at 2384.

334. *Bonta*, 141 S. Ct. at 2385.

335. *Id.*

336. 751 F.3d at 414 (6th Cir. 2014) (citation omitted).

noted that “the relevant evidence of chill—whether to paid circulators generally or to those who circulate on behalf of minor party candidates—can best be described as scant.”³³⁷ It added that “[t]here is no record of any harassment or other efforts to dissuade circulators from circulating petitions.”³³⁸

The Supreme Court in *Bonta*, however, ruled that factual proof of chilling or harassment is not needed with overbreadth challenges: “[e]xacting scrutiny is triggered by ‘state action which *may* have the effect of curtailing the freedom to associate,’ and by the ‘*possible* deterrent effect’ of disclosure.”³³⁹ “It is irrelevant, moreover, that some donors might not mind—or might even prefer—the disclosure of their identities to the State.”³⁴⁰ “Every demand that might chill association therefore fails exacting scrutiny.”³⁴¹

The Libertarian Party also added a due process challenge to their First Amendment argument; this is where a fuller knowledge of the Ohio Republican Party’s involvement, Smith’s continuing representation of DeWine, DeWine’s secret involvement, and the circumstances surrounding Smith’s about-face could have made a significant constitutional difference. In the context of First Amendment rights, due process requires greater clarity. Abrupt changes in legal interpretations are frowned upon. The Libertarian Party thus argued that Smith’s interpretation marked an unexpected development under Ohio law that could not be applied retroactively.

The Libertarian Party’s argument proceeded along two related lines. First, Smith’s broad interpretation of Ohio’s employer statement rule could not be retroactively applied given that rule’s more narrow application in the past. In *Bouie v. City of Columbia*,³⁴² the Supreme Court ruled that a court’s more expansive interpretation of a law punishing speech cannot, consistent with due process, be retroactively applied. The Court explained:

When a statute on its face is narrow and precise, . . . it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.³⁴³

337. *Id.* at 416.

338. *Id.*

339. *Bonta*, 141 S. Ct. at 2388 (citations omitted).

340. *Id.*

341. *Id.* at 2387.

342. 378 U.S. 347, 352 (1964).

343. *Id.*

The Libertarians argued that Smith's interpretation of Ohio's employer statement rule in section 3501.38(E) perfectly fit the *Bouie* bill.

Next, the Libertarians argued that the Secretary's prior assurances in its Directives that the employer statement rule would not be used against circulators, coupled with the Secretary's failure to ever enforce it against candidates, precluded the Secretary from changing course without prior notice. The Supreme Court in *Federal Communications Commission v. Fox Television Stations*³⁴⁴ ruled that "abrupt" regulatory changes may not be used to punish speech without adequate prior notice. The Court noted "[t]his would be true with respect to a regulatory change this abrupt on any subject, but it is surely the case when applied to the regulations in question, regulations that touch upon "sensitive areas of basic First Amendment freedoms."³⁴⁵ There the FCC had informed broadcasters that it would not punish fleeting profanities on air, only to then change its policy and do just that.

Had Smith's first Report been known, along with the secret participations of Kasich, DeWine, the Republican Party and officials in Husted's office, a stronger argument would have been made that the Libertarians' belief that the rule did not apply to independent contractors was perfectly reasonable. It would then be a shorter step to holding that Smith's broader interpretation ought not be applied to Earl and Linnabary. "[S]ensitive areas of basic First Amendment freedoms"³⁴⁶ were plainly at stake, and unmasking the many Republican machinations in the case would have rendered Smith's interpretation in his second Report more vulnerable.

Judge Watson, for example, likely could not have credibly stated the Libertarians' interpretation of Ohio's employer statement rule was "little more than urban legend"³⁴⁷ had he known of the circumstances behind Smith's change. Smith, after all, is a respected election law expert. Even if one rationalizes (as Watson later did) that officials in the Secretary's office did not help him change his mind, Smith's initial interpretation would have added credence to the Libertarians' argument for a narrower interpretation of the law.

The Sixth Circuit might also have thought twice about the clarity of Ohio's employer statement rule had it known what transpired. By the time the Sixth Circuit rendered its decision, the Ohio Supreme Court had deferred to Professor Smith's second Report, which had been rubber-stamped by Secretary Husted. The Sixth Circuit then deferred to the Ohio Supreme Court, which had deferred to Smith. These dominoes might have fallen differently

344. 567 U.S. 239, 254 (2012).

345. *Id.* (citations omitted).

346. *Id.*

347. *Libertarian Party of Ohio v. Husted*, 2014 WL 11515570, *11 (S.D. Ohio Mar. 19, 2014), *aff'd*, 751 F.3d 403 (6th Cir. 2014).

with full disclosure of Smith's potential conflict of interest and the facts surrounding the rewriting of his initial Report.

B. Renewed Federal Challenges

Following Earl's and Linnabary's removals from the primary ballot and the denial of relief in federal and state court, respectively, the Libertarians turned their efforts to discovering who was behind their protests. Because of Husted's and the Ohio Republican Party's recalcitrance, multiple court orders³⁴⁸ were needed to unlock the involvements of the Kasich campaign, the Ohio Republican Party, and officials inside Husted's office. These orders also led to the discovery of Smith's change of heart and DeWine's secret involvement. By September of 2014 the Libertarian Party had discovered not only the facts surrounding Smith's about-face,³⁴⁹ they had also learned that officials in Husted's office had counseled Smith to change his mind,³⁵⁰ Kasich's campaign had assisted the protest,³⁵¹ DeWine's campaign had filed Linnabary's protest, and the Ohio Republican Party was footing everyone's bill.³⁵²

Armed with this information, the Libertarians renewed their motion for preliminary relief in federal court in order to restore Earl to the general election ballot.³⁵³ In sum, they argued that Ohio's employer statement rule was being selectively enforced for political reasons in violation of the First Amendment in order to remove them from the ballot.

Judge Watson was not impressed. He ruled that although the Libertarians' selective enforcement theory was sound,³⁵⁴ it was not supported by the evidence. In particular, he concluded that the Libertarian Party had failed to prove that "Secretary Husted's decision was influenced or controlled by Casey, members of Governor Kasich's campaign, or any other source of improper political animus."³⁵⁵ As explained above, Judge Watson had not been

348. See e.g., *Libertarian Party of Ohio v. Husted*, 2014 WL 3792727 (S.D. Ohio July 31, 2014); *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472 (S.D. Ohio 2014); *Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 (S.D. Ohio Aug. 12, 2014). See also *Libertarian Party of Ohio v. Husted*, 2016 WL 447566 (S.D. Ohio Feb. 5, 2016).

349. See *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 398 (6th Cir. 2016).

350. *Id.*

351. See *Earl v. Ohio Elections Comm'n*, No. 16AP-161, 2016 WL 5637037, *1 (Ohio Ct. App. 2016); *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 391 (6th Cir. 2016).

352. *Earl*, 2016 WL 5637037, *2.

353. Libertarians focused on Earl because he was the gubernatorial candidate needed to meet Ohio's vote test. Without a gubernatorial candidate, they could not meet Ohio's vote test and would fall off the Ohio ballot.

354. *Libertarian Party of Ohio v. Husted*, 2014 WL 12647019, *6 (S.D. Ohio Oct. 17, 2014).

355. *Id.* at *7.

convinced that Jack Christopher influenced Smith, either.³⁵⁶ Based on this flawed “no harm, no foul” analysis, Judge Watson ruled that the Libertarians were not entitled to emergency relief.

Judge Watson also rejected the Libertarians’ argument that the Ohio Republican Party’s involvement constituted state action.³⁵⁷ He recognized that “a trail of emails and text messages” connected the protest against Earl with officials in Husted’s office, and that “a few of the communications might read as showing political bias” on the part of the Husted officials involved.³⁵⁸ But he decided that “an equally plausible inference is that they demonstrate a shared interest in political matters in general.”³⁵⁹ Judge Watson then erroneously emphasized (without citing any relevant authority) that “[t]hose communications have little, if any, significance, however, in the absence of evidence that they actually influenced or controlled the *decision making process* in the subject protests.”³⁶⁰

Judge Watson made several critical mistakes in reaching these conclusions, particularly in his ruling that the “decision making process” had to have been compromised for the Libertarians to succeed. He also gave short shrift to the Libertarians’ claim that the Ohio Republican Party had engaged in state action. Because the opinion came out on October 17, 2014, just three weeks before the election and after voting had already begun, time was too short to take an immediate, interlocutory appeal. The Libertarians therefore decided to forego the 2014 election and focus on returning to the ballot in 2016. To do this, they decided to wait until Judge Watson issued his final judgment to appeal.

C. Final Judgment

Final judgment against the Libertarian Party was a foregone conclusion, but it would provide an opportunity to test Judge Watson’s conclusions in the Sixth Circuit under a more appellant-friendly standard.³⁶¹ The appeal, moreover, would proceed with full knowledge of Smith’s initial report, as well as the involvements of Kasich’s campaign, DeWine’s campaign, the Ohio Republican Party, and officials in Secretary Husted’s office. Further, while awaiting final judgment, the Libertarians had learned that the Ohio

356. *Id.* See also *supra* notes 313-17 and accompanying text.

357. *Id.* at *9.

358. *Id.* at *7.

359. *Id.*

360. *Id.*

361. Appeals from denials of preliminary injunctions are judged on appeal under an abuse of discretion standard. *See, e.g.,* Mason Cnty. Med. Ass’n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). Appeals from final judgments result in *de novo* challenges of legal conclusions. *See, e.g.,* Frazier v. Life Ins. Co. of N. Am., 725 F.3d 560, 564–66 (6th Cir. 2013).

Republican Party paid over a half million dollars to the lawyers who handled Earl's protest.³⁶² It was thus clear that significant Republican resources were devoted to removing the Libertarian Party from Ohio's ballot.

The trove of emails connecting the Kasich campaign, Terry Casey, the Ohio Republican Party, and elections officials in Husted's office to Earl's protest was used by the Libertarian Party to support final judgment in its favor.³⁶³ In their motion, the Libertarians not only challenged the selective enforcement of Ohio's employer statement rule, they also asserted that Ohio's new ballot access law, S.B. 193, discriminated against new political parties in violation of the First and Fourteenth Amendments.

This second argument was narrower than targeting Ohio's new ballot access law in a vacuum. The Libertarians argued that even if S.B. 193's combination of a one percent signature requirement and later filing deadline

362. Felsoci, Earl's protestor, had from the beginning claimed that he not only did not know who was paying his lawyers, he did not want to know. Still, the Libertarians were able in late August 2014 to force Zeiger, Tigges & Little (who represented Felsoci) to produce an invoice from the Felsoci litigation. *See* Libertarian Party of Ohio v. Husted, 2014 WL 3928293, *4 (S.D. Ohio Aug. 12, 2014). The Libertarians learned from the invoice that Terry Casey, a Republican member of Ohio's Personnel Review Board and personal friend of John Kasich, was in charge of paying Felsoci's legal bills. The Libertarians then deposed Casey only to have him repeatedly obfuscate, hem and haw about who would pay the (extremely large) legal bills. Casey claimed that only he was responsible for the bills, though he also admitted he might in the future seek contributions from others. Doubting this was true, the Libertarians accepted it and filed a campaign finance complaint against Casey with the Ohio Elections Commission. *See* Earl v. Ohio Elections Comm'n, 2016 WL 5637037, *1 (Ohio Ct. App. 2016). The invoice produced by the Zeiger firm was not only well-over Ohio's individual contribution limit for candidates, after all, but the Libertarians had also discovered a trove of emails proving that Casey, his lawyers, and officials in Kasich's campaign had worked together on Earl's protest. Given the coordinated activity with Kasich's campaign, the Libertarians argued that Casey's expenditures for Felsoci's lawyers constituted excessive contributions to Kasich's campaign. *Id.* Lo and behold, Casey defended himself before the Ohio Elections Commission by claiming it was the Ohio Republican Party that was paying Felsoci's lawyers. *Id.* at *2. The documentation Casey supplied to the Commission proved that the amounts paid had steadily grown to almost \$600,000. *Id.* at *3.

363. *See* Libertarian Party of Ohio v. Husted, 2015 WL 12967768, *1-*4 (S.D. Ohio March 16, 2015). Judge Watson's disposition of the case following his October 17, 2014 denial of a preliminary injunction was piecemeal. On March 16, 2015, he ruled that Ohio's new ballot access law was not unconstitutional on its face, a claim that was pressed by the Green Party but not by the Libertarians. The Libertarians chose not to make the same argument because of the difficulty in proving without factual evidence that a state's ballot access law violated the so-called *Anderson-Burdick* standard. Ohio's law requiring signatures from voters equal to one percent of the prior presidential or gubernatorial vote was not relatively oppressive when measured by its later filing date. It might very well be unconstitutional, but proof of the difficulties parties experienced under it would be required. Judge Watson on October 14, 2015 then dismissed the Libertarians' claims under Ohio's Constitution because of the Eleventh Amendment, *see* Libertarian Party of Ohio v. Husted, 2015 WL 11120519, *11-*12 (S.D. Ohio Oct. 14, 2015), while ruling against the Libertarians' First and Fourteenth Amendment equal protection challenge to S.B. 193's stripping the Libertarians of their primary. *Id.* Judge Watson also rejected their challenges to Smith under the due process clause. *Id.* At that time, he reserved ruling on the Libertarians' selective enforcement claim because of emerging discovery matters, and then on May 20, 2016 rendered his final rejection of that last claim, too. *See* Libertarian Party of Ohio v. Husted, 188 F. Supp.3d 665 (S.D. Ohio 2016).

proved constitutional, it still denied to new political parties perks that established parties enjoyed. In particular, by denying new parties primaries, S.B. 193 denied them members that are otherwise “wedded” to parties by having voted in those primaries. This wedding has several legal consequences. For example, one who votes in an Ohio party primary cannot protest, circulate, or sign the nominating papers of another party’s candidate.³⁶⁴ Nor can that individual circulate the nominating petition of a new party seeking to gain access under S.B. 193,³⁶⁵ or run as either an independent or new-party candidate.³⁶⁶ Further, for a new-party candidate’s nominating petitions to comply with S.B. 193, the petition must be supported by voters who are not members of another political party.³⁶⁷ This means that one who votes in a primary cannot sign a new-party candidate’s nominating petition either.

Next, the Libertarians pointed out that established parties are rewarded with official lists of members by way of the primaries. These state-created membership lists facilitate party-building, party-planning, and fund-raising endeavors. New parties are denied not only official members but also government-generated membership lists that would help them build and fund party programs.

Lower courts have applied the egalitarian logic behind the Libertarians’ claim in a variety of contexts. For example, in *Reform Party of Allegheny County v. Allegheny County Department of Elections*,³⁶⁸ the Third Circuit ruled that although anti-fusion laws do not themselves violate the First Amendment, Pennsylvania’s denying fusion to minor parties while allowing it for major parties violated the Fourteenth Amendment’s equal protection clause.

Fulani v. Krivanek,³⁶⁹ out of the Eleventh Circuit, offers another example. There, Florida required that minor party candidates for President submit signatures and pay signature-verification fees to access the ballot. Neither the signature collection requirement nor the verification fees were unconstitutional.³⁷⁰ Both had been upheld by the Eleventh Circuit. Since the signature-verification fee was waived for major-party candidates, the Eleventh Circuit found the discriminatory treatment unconstitutional under the *Anderson-Burdick* test. It explained that “[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. It

364. See OHIO REV. CODE § 3513.05.

365. See OHIO REV. CODE § 3517.012(B)(2)(a).

366. See *Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006).

367. OHIO REV. CODE § 3517.012(B)(2)(a).

368. 174 F.3d 305, 315 (3d Cir. 1999) (*en banc*).

369. 973 F.2d 1539, 1542 (11th Cir. 1992).

370. *Id.* at 1540.

discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.”³⁷¹

Courts, including the Supreme Court, have applied this same logic to party membership and membership lists. The Second Circuit in *Green Party of New York State v. New York State Board of Elections*³⁷² blocked enforcement of a New York membership law distinguishing between “political parties” (which had won at least 50,000 votes in the last gubernatorial election) and “political organizations” (which had not). Both could run candidates, but “[a] number of unique benefits accrue[d] to a Party [that had won more than 50,000 votes],”³⁷³ including the availability of a primary. The primary was important because it provided a membership enrollment mechanism that resulted in publicly available lists.³⁷⁴ Unlike parties, political organizations in New York had no state-created membership lists.

Finding these lists crucial to “identifying new voters, processing voter information, organizing and mobilizing Party members, fundraising, and other activities that influence the political process,”³⁷⁵ the Second Circuit ruled New York’s disparate treatment unconstitutional under *Anderson-Burdick*: “We think the burdens imposed on plaintiffs’ associational rights are severe. . . . Parties use these lists for a number of different activities essential to their exercise of First Amendment rights.”³⁷⁶ It added that “such limitation of opportunity for independent voters reduces diversity and competition in the marketplace of ideas.”³⁷⁷

This same result was reached in *Baer v. Meyer*,³⁷⁸ where the Tenth Circuit invalidated a Colorado law allowing members of the two major political parties to “designate their party affiliation by name on the[ir] voter registration form.” In contrast, minor party members were “required to register as ‘unaffiliated.’”³⁷⁹ The Tenth Circuit quoted from *Anderson* to invalidate the disparate membership registration procedure, stating that “[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.”³⁸⁰

371. *Id.* (emphasis original).

372. 389 F.3d 411, 422 (2d Cir. 2004).

373. *Id.* at 415.

374. *Id.* at 415–16 (citations omitted).

375. *Id.*

376. *Id.* at 420.

377. *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983)).

378. 728 F.2d 471, 475 (10th Cir. 1984).

379. *Id.*

380. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983)).

Finally, the Supreme Court in *Socialist Workers Party v. Rockefeller*³⁸¹ summarily affirmed a three-judge District Court decision invalidating New York's preference for established political parties in the context of membership lists. New York's law "provid[ed] that lists of registered voters be delivered free of charge to the county chairmen of each political party polling at least 50,000 votes for governor in the last preceding gubernatorial election."³⁸² Minor parties, in contrast, had to pay. The District Court concluded "that the effect of these provisions, when considered with other sections of the Election Law, is to deny independent or minority parties which have succeeded in gaining a position on the ballot but which have not polled 50,000 votes for governor in the last preceding gubernatorial election an equal opportunity to win the votes of the electorate."³⁸³ The Second Circuit later re-affirmed this result in *Schulz v. Williams*³⁸⁴ after New York re-enacted essentially the same law.

Judge Watson rejected the Libertarians' equal-treatment argument out-of-hand,³⁸⁵ asserting that it was no different (it was) from the Green Party's straight-up First Amendment challenge to S.B. 193,³⁸⁶ a challenge the Libertarians had not joined. The Libertarians, Judge Watson claimed, "fail to cogently explain how their as-applied challenge to S.B. 193 differs from Intervening Plaintiffs' [the Green Party's] facial challenge."³⁸⁷

Judge Watson, as expected, also rejected the Libertarians' selective enforcement challenge to Husted's use of Ohio's employer statement rule.³⁸⁸ Thus, on May 20, 2016 after he had finally disposed of all elements of the case, the Libertarians filed an immediate appeal and requested expedited briefing. The Sixth Circuit so ordered on June 7, 2016, and on July 29, 2016 it rendered its decision.

The Libertarians were fortunate to draw a top-drawer panel of three Democrats to hear the case.³⁸⁹ Judges Moore, Clay, and Donald are all highly

381. 314 F. Supp. 984, 997 (S.D.N.Y.), *aff'd*, 400 U.S. 806 (1970).

382. *Id.* at 995.

383. *Id.*

384. 44 F.3d 48, 61 (2d Cir. 1994).

385. *Libertarian Party of Ohio v. Husted*, 2015 WL 11120519, *6 (S.D. Ohio Oct. 14, 2015).

386. *Id.*

387. *Id.*

388. *Libertarian Party of Ohio v. Husted*, 188 F. Supp.3d 665 (S.D. Ohio 2016). He also dismissed under the Eleventh Amendment the Libertarians' claim that the Ohio Constitution guaranteed all qualified political parties a right to primaries. *See* *Libertarian Party of Ohio v. Husted*, 2015 WL 11120519, *11-12 (S.D. Ohio Oct. 14, 2015). The Libertarian Party was left to take this claim to state court, where the Ohio Court of Appeals ultimately ruled, relying heavily on Judge Watson's *Anderson-Burdick* analysis, that Ohio's Constitution did not require that all political parties proceed through primaries. *See* *Libertarian Party of Ohio v. Husted*, 97 N.E.3d 1083, 1088 (Ohio Ct. App. 2017). *See infra* notes 491-523 and accompanying text.

389. *See* *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 386 (6th Cir. 2016).

regarded. Short of drawing non-partisan judges (an impossibility with the Sixth Circuit) this panel was about as good as it gets. Still the Libertarians lost.

Judge Karen Moore's opinion for the Court did a thorough and accurate job of reporting (for posterity) the remarkable "cast of characters relevant to" the case.³⁹⁰ After concluding (contrary to the Secretary's wishes) that the case was not moot,³⁹¹ however, her empathy for the plight of the Libertarian Party faded. She concluded that although the burdens placed on minor parties by Ohio's disparate primary system are "not non-existent,"³⁹² and that "casting a party ballot during a primary" may have "some expressionist value,"³⁹³ neither are severe within the meaning of *Anderson-Burdick*.³⁹⁴ She accordingly eschewed strict scrutiny in favor of a simple balancing test, one that she found favored Ohio.³⁹⁵ Judge Moore also concluded that no state actors had conspired with Felsoci, Casey, and their lawyers to selectively enforce Ohio's employer statement rule, and that the Ohio Republican Party was not itself engaged in state action when it did so.

All three conclusions on the merits were disappointing, but the last is probably most important. Holding the two major parties to constitutional norms while challenging minor candidates would have been a significant and worthy development. The Supreme Court in a trio of cases, *Smith v. Allwright*,³⁹⁶ *Terry v. Adams*,³⁹⁷ and *Morse v. Republican Party of Virginia*,³⁹⁸ recognized that because the two major parties play a unique and dominant role in America's electoral process they sometimes qualify as "state actors" subject to constitutional norms. In *Allwright*, the Court concluded the Democratic Party of Texas was engaged in state action when it forbade African Americans from voting in its primary.³⁹⁹ *Terry* reaffirmed this principle in the context of racial discrimination by the Democratic Jaybird Party, which was a subset of the Texas Democratic Party. *Morse* borrowed from *Allwright* and *Terry* to hold that section 5 of the Voting Rights Act applies to major party nominating conventions. Justice Stevens, writing for a plurality in that most recent holding in *Morse* focused on the "host of special

390. *Id.* at 391.

391. *Id.* at 394.

392. *Id.* at 403.

393. *Id.*

394. *Id.*

395. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 405.

396. 321 U.S. 649, 665 (1944).

397. 345 U.S. 461, 467–68 (1953) (plurality).

398. 517 U.S. 186, 223 (1996) (plurality).

399. *Allwright*, 321 U.S. at 664.

privileges [Virginia gave] to the major parties....”⁴⁰⁰ “It is perfectly natural, therefore, to hold that [Virginia] seeks to advance the ends of both the major parties.”⁴⁰¹ Justice Breyer, together with Justices O’Connor and Souter, joined Justice Stevens’ judgment to form a majority.⁴⁰² Justice Breyer agreed that because the Republican Party used “a nominating convention that resembles a primary about as closely as one could imagine,”⁴⁰³ and “avail[ed] itself of special state-law preferences, in terms of ballot access and position,”⁴⁰⁴ it was a state actor.

Lower courts have relied on these precedents to hold that a major party’s removal of a candidate from its own primary ballot, or its rejection of the candidate in the first instance, constitutes state action. In *Texas Democratic Party v. Benkiser*,⁴⁰⁵ for example, where the Texas Republican Party attempted to remove its candidate (who had won its primary) from the general election ballot, the Fifth Circuit stated: “There is no dispute that when Benkiser [the Texas Republican Party chair] applied the ineligibility statute to DeLay [the candidate] she did so as a state actor.”⁴⁰⁶ In *Wilson v. Hosemann*,⁴⁰⁷ where a Democratic candidate’s presidential papers were mistakenly rejected by the Mississippi Democratic Party,⁴⁰⁸ the Mississippi Supreme Court likewise had little difficulty ruling that the party engaged in state action.⁴⁰⁹ If a major political party’s misfeasance in its own primaries constitutes state action, then certainly a major party’s malfeasance in another party’s primary can, too.

None of this convinced Judge Moore. The Ohio Republican Party, she concluded, had “not been assigned an ‘integral part’ in the election process’ that is usually performed by the state.”⁴¹⁰ “[A]ny private citizen with standing,” Judge Moore offered, “is authorized by Ohio law to file a protest against a candidate’s nominating petition.”⁴¹¹ Thus, she concluded that the

400. 517 U.S. at 224.

401. *Id.*

402. *Id.* at 235 (Breyer, J., concurring).

403. *Id.*

404. *Id.*

405. 459 F.3d 582, 595 (5th Cir. 2006).

406. *Id.* at 589 (citing *Smith v. Allwright*, 321 U.S. at 663); see also *Rice v. Elmore*, 165 F.2d 387, 391 (4th Cir. 1947) (“When these [party] officials participate in what is a part of the state’s election machinery, they are election officers of the state.”).

407. 185 So.3d 370, 371 (Miss. 2016).

408. *Id.* at 371, 373.

409. *Id.* at 375; see also *Bentman v. Seventh Ward Democratic Exec. Comm.*, 218 A.2d 261 (Pa. 1966) (holding that party’s conduct was state action).

410. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 396.

411. *Id.*

Supreme Court's decisions in *Allwright* and *Terry*, were "meaningfully different from the case at hand."⁴¹²

Judge Moore's suggestion that the Republican Party was merely doing what "any citizen" might do is plainly wrong, since the major parties do not possess standing under Ohio law to challenge minor-party candidates. That is why the Republican Party needed to recruit dupes to do its dirty work. Her rigid requirement that the major parties be assigned an "integral part" in the electoral process in order to be considered state actors incorrectly limits that status to their internal affairs. Because courts have long assumed that major parties enjoy their own constitutional protections internally,⁴¹³ Judge Moore's logic has the potential to squeeze the Supreme Court's public function holdings in *Allwright*, *Terry*, and *Morse* into a veritable null set. For *Allwright*, *Terry*, and *Morse* to have full meaning, they must apply to all actions by the major parties, not just their internal actions affecting their own voters and candidates.

I have pursued this argument in some detail before⁴¹⁴ and do not wish to create that same wheel here. Suffice it to say I believe a credible argument can be made that the two major parties engage in state action when they sabotage minor political parties. While it is true that the plurality in *Terry* used an "integral part" analysis to support its state action conclusion,⁴¹⁵ the Court more recently in *Morse* spoke in broader terms by stating that where a "host of special privileges [has been given] to the major parties"⁴¹⁶ they may be considered state actors. "It is perfectly natural," given these privileges, "to hold that [a state] seeks to advance the ends of both the major parties."⁴¹⁷ The question after *Morse*, then, should be not only whether a major party has been delegated an "integral part" in a state's electoral scheme but also whether it has been afforded enough "special privileges" by that state to justify holding it to constitutional norms.⁴¹⁸ Delegations are certainly relevant, and perhaps sufficient, but so are political privileges. In Ohio, for example, both the Republican and Democratic Parties enjoy exclusive, special privileges, including primaries paid for by the state,⁴¹⁹ membership lists paid for

412. *Id.* at 395.

413. *See, e.g.,* *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008). *See* *Brown*, *supra* note 1, at 230.

414. *Id.* at 223–31.

415. 345 U.S. at 469.

416. 517 U.S. at 224.

417. *Id.*

418. *See* *Brown*, *supra* note 1, at 223–31.

419. *See* *supra* notes 364–67 and accompanying text.

by Ohio taxpayers,⁴²⁰ exclusive membership on the Ohio Elections Commission⁴²¹ (which enforces Ohio's campaign finance laws and allows the two major parties to hold exclusive debates),⁴²² and so much more. It certainly seems that Ohio law is intent on "advanc[ing] the ends of both the major parties." Having availed themselves of these privileges, it hardly seems unfair to hold the major parties to a constitutional pledge not to use the state's resources to bully their unprivileged competitors.

Judge Moore's dismissal of the Libertarian Party's claim that several individuals involved in the scheme were, in fact, state agents is also troubling. Officials from Kasich's campaign, Judge Moore ruled, had not been proven to "act on behalf of the Kasich Campaign team in their discussions with Casey [Earl's secret protestor], let alone that they acted on behalf of the governor's office."⁴²³ One can only wonder what they were up to if they weren't trying to help Kasich (the Governor). It is hard to believe they were assisting Casey without any thought of the candidate (Kasich) they worked for. It would seem an obvious inference to draw from the email trail that high-ranking officials within Kasich's campaign sought to assist Casey to benefit Kasich. Whether this necessarily translates to state action is a harder question, but it seems plain that these people were acting on Kasich's behalf.

Casey, meanwhile, was plainly a public official because he sat on Ohio's Personnel Board of Review. Even public officials, of course, have private lives,⁴²⁴ so Casey's organization of the protest cannot automatically be deemed state action. Still, Judge Moore's conclusion that Casey's use of his personal email account⁴²⁵ meant he "was acting out of his 'private interest' in protesting Earl" is unsettling.⁴²⁶ If that were true, any corrupt government official could find cover by using public payphones (assuming they still exist).

Judge Moore's argument that Casey "would have been in the same position [to coordinate Felsoci's protest of Earl] even if he had not been a member of Ohio's Board of Personnel Review,"⁴²⁷ meanwhile, is pure surmise. Nothing in the record supports such a conclusion, and it is just as likely that his high-level position afforded him special access to those in Secretary

420. See Ohio Secretary of State, *Voter Files Download Page*, <http://www6.ohiosos.gov/ords/f?p=VOTERFTP:STWD:::stwdVtrFiles> (providing voter registration information with party affiliation measured by vote cast in last primary).

421. See *Libertarian Party of Ohio v. Wilhelm*, 988 F.3d 274, 279 (6th Cir. 2021).

422. See Mark R. Brown, *Candidate Debates in Ohio: Can Corporations Fund the Major Parties?*, 83 OHIO ST. L.J. ONLINE 160, 170 (2022).

423. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 396.

424. See, e.g., *Almand v. Dekalb Cnty.*, 103 F.3d 1510, 1515 (11th Cir. 1997).

425. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 397.

426. *Id.*

427. *Id.*

Husted's office. His regular and free use of that special access in pursuit of Earl, as documented by communications with officials inside the Secretary's office,⁴²⁸ can reasonably lead one to conclude that his status as a public official had something to do with it. No one else, after all, was shown to have that sort of access.

Casey's access was therefore special. The election official in Husted's office who supplied Casey red rug treatment was Matt Damschroder, Ohio's Deputy Assistant Secretary of State/Director of Elections and a long-time confidante of Casey.⁴²⁹ The documented evidence established that Casey was in constant contact with Damschroder about the protest before, during, and after its filing.⁴³⁰ Knowing that protests against the Libertarians were physically on the way, for instance, Damschroder informed his office staff to accept them even if filed late.⁴³¹

Judge Moore's seriatim characterization of everything Damschroder did for Casey as something he would "have given to anyone else"⁴³² is naïve and unsupported by the record. Damschroder not only gave repeated advice to Casey and kept his office open late to receive protests against Earl and Linnabary⁴³³ (something he admitted "isn't normal"),⁴³⁴ he also "cheered" with Jack Christopher through text messages for Casey's success.⁴³⁵ Alone, each incident falls short, but together they demonstrate that Damschroder knew that Casey, the Kasich campaign, the DeWine campaign, and the Republican Party were secretly behind the protests and that he intended to help. If he didn't, after all, why would he have gone to such lengths to keep everything secret? An honest chief election officer who is aware of potentially corrupt election challenges will, one hopes, document and publicly disclose them. Damschroder did not. A reasonable explanation is that he supported Casey's plan.

If that were not enough, Jack Christopher, Ohio's General Counsel and Deputy Assistant Secretary of State, not only cheered with Damschroder for Casey's success, but also sent a crucial email to Smith "discussing [his] legal interpretation of the Ohio decision at issue"⁴³⁶ in order to change

428. See *Libertarian Party of Ohio v. Husted*, 831 F.3d at 398; *Libertarian Party of Ohio v. Husted*, 188 F. Supp.3d at 668–69.

429. See *Libertarian Party of Ohio v. Husted*, 188 F. Supp.3d at 668–69.

430. *Id.*

431. *Id.*

432. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 397.

433. *Id.* at 398.

434. *Libertarian Party of Ohio v. Husted*, 2:13-cv-953, Doc. No. 227-1, at PageID # 5458 (Deposition of Matthew Damschroder).

435. *Libertarian Party of Ohio v. Husted*, 831 F.3d at 398–99.

436. *Id.* at 398.

Smith's mind.⁴³⁷ Judge Moore's dismissal of this overt act as no harm no foul is baffling. All she could offer was Smith's explanation "that 'by that point in time . . . [he] had already decided that [he] was going to have to be rewriting the report."⁴³⁸

Conspiracy theory, however, does not rely on success, and selective enforcement claims assume that charges are otherwise correct and lawful. A police officer who makes a racially motivated traffic stop, for example, violates the Constitution notwithstanding that probable cause existed and traffic laws were violated.⁴³⁹ The conspiracy between Casey, his Republican confederates, Damschroder and Christopher constituted unconstitutional selective enforcement regardless of whether the Libertarian candidates violated Ohio's employer statement rule and irrespective of Smith's decision to remove them from the ballot.⁴⁴⁰

Here, had the conspirators not protested Smith could not have exercised his judgment, could not have changed his mind, and could not have had the Libertarians removed. This causal chain is not broken even if Smith himself were wholly innocent. The Supreme Court made this clear in *Staub v. Proctor Hospital*,⁴⁴¹ where it explained that "it is axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent's action [and hence the earlier agent's discriminatory animus] from being the proximate cause of the harm."⁴⁴² The conspirators' discriminatory animus here thus remained the proximate cause of the candidates' removal regardless of Smith's innocence. Judge Moore's and Judge Watson's rulings to the contrary contradict conspiracy theory, the constitutional tort of selective enforcement, and common understandings of causation.

437. Christopher had also failed to deliver to Professor Smith the Libertarians' brief before the administrative hearing, even though he made sure Smith had the briefs filed by the protestors. The Libertarians delivered their brief to Christopher, at Christopher's direction, the Sunday before the Tuesday hearing just like the others. Smith notified the Libertarians that they had failed to file a brief the day of the hearing, and they were only then able to provide him a copy. *See Husted*, 2:13-cv-953, Doc. No. 252, at PageID# 1260 (transcript of administrative hearing). But perhaps this, too, was coincidence.

438. *Id.*

439. *See* M. BROWN & K. KINPORTS, CONSTITUTIONAL LITIGATION UNDER § 1983 315 (3d ed. 2013).

440. *See, e.g.,* Vakilian v. Shaw, 335 F.3d 509, 521 (6th Cir. 2003).

441. 562 U.S. 411, 419 (2011).

442. *Id.*

III. Post-Removal State Law Challenges

A. “Any Group of Voters”

After losing in the district court, Libertarians began circulating nominating petitions for an independent presidential ticket in 2016. Under Ohio law, 5,000 signatures are needed along with the nomination petition,⁴⁴³ and all of this must be filed 90 days before the November election.⁴⁴⁴ In part because the national Libertarian Party would not hold its convention until the end of May, and in part to avoid Secretary Husted’s potential shenanigans should the Libertarian Party be returned to Ohio’s ballot by the Sixth Circuit, local Libertarians chose to proceed with two “placeholders” on their petitions rather than the expected Gary Johnson/Bill Weld ticket.⁴⁴⁵ Using placeholders in this fashion is authorized by Ohio law⁴⁴⁶ and has been practiced in the past. Legally speaking, it seemed to present no issues.

Gary Johnson was nominated by the national convention for President, with Bill Weld as his second, on May 30, 2016.⁴⁴⁷ After the Sixth Circuit ruled against restoring the Libertarian Party to the ballot on July 29, 2016, the Libertarians filed the needed paperwork with Secretary Husted to replace their placeholders with the Johnson/Weld ticket. Secretary Husted, as predicted, balked. His spokesman “said it’s unclear whether Ohio law allows presidential candidates to be swapped out like that. [He] said he can’t think of a precedent for such an action.”⁴⁴⁸

On August 1, 2016, the Libertarians moved to stay the Sixth Circuit’s judgment and signaled their intent to seek emergency relief from the Supreme Court. As soon as the Sixth Circuit refused the Libertarians’ motion, the Libertarians then on August 23, 2016 filed their emergency application with the Supreme Court. In doing so, they fully appraised the Court of not only the Sixth Circuit’s decision but also Husted’s threat to refuse to recognize Johnson/Weld as an independent presidential ticket.⁴⁴⁹

443. See OHIO REV. CODE § 3513.257.

444. *Id.*

445. See Jeremy Pelzer, *Ohio’s Libertarians push surprise presidential candidate: Charlie Earl*, CLEVELAND.COM (Aug. 9, 2016), https://www.cleveland.com/open/2016/08/ohio_libertarians_push_surpris.html. There was concern that if the Libertarian Party were to be returned to the ballot by the Sixth Circuit, Husted might concoct an argument that the Libertarian ticket was already running independently and thereby precluded. *Id.*

446. See OHIO REV. CODE § 3513.31(F).

447. See *2016 Libertarian National Convention*, WIKIPEDIA, https://en.wikipedia.org/wiki/2016_Libertarian_National_Convention.

448. See Pelzer, *supra* note 460.

449. See *Libertarian Party of Ohio v. Husted*, No. 16A181, Petitioners’ Application for Stay and Emergency Injunction Addressed to Justice Kagan 3–4 (U.S., Aug. 23, 2016).

Recognizing that this was looking bad in the eyes of the Supreme Court—the Court had ordered a response to the emergency application—Husted changed course and on August 24, 2016 certified the independent Johnson/Weld ticket.⁴⁵⁰ In his opposition to the Supreme Court application filed the next day he explained that “Johnson’s independent candidacy”⁴⁵¹ would likely be allowed to proceed unimpeded because “[n]o protests are pending.”⁴⁵²

Husted’s tactic apparently worked, since the Supreme Court denied relief to the Libertarian Party on August 29, 2016. But while their party was not restored to the ballot, the Libertarians still succeeded in ensuring their presidential ticket was, albeit without their party label. Even without the party’s label, they believed winning three percent of the presidential vote under Ohio law would allow Johnson’s “group of voters” to become a recognized political party in Ohio. Secretary Husted, however, had other ideas.

Because the Johnson/Weld ticket won more than 3% of the presidential vote in Ohio,⁴⁵³ the five voters who formally sponsored its nomination in Ohio notified Secretary Husted they intended to form a recognized political party and call it the Libertarian Party of Ohio. On December 2, 2016 they requested, in writing, that Secretary Husted recognize their political party under Ohio Revenue Code section 3517.01(A)(1)(a).⁴⁵⁴ They included with their written request a letter from the no-longer-recognized Libertarian Party of Ohio supporting their right to form a new political party and consenting to their use of the “Libertarian Party of Ohio” label.⁴⁵⁵

Husted on December 16, 2016 delivered to Johnson’s group of voters his written refusal to recognize their party.⁴⁵⁶ In his written response, Husted cited no legal authority, but instead proffered two justifications for rejecting the group’s requested party status: (1) a press release that expressed his willingness to recognize Johnson and Weld as an independent presidential ticket, and (2) a claim that I, as the attorney for the Libertarian Party in the federal

450. See *Libertarian Party of Ohio v. Husted*, No. 16A181, Respondent’s Opposition to Stay and Emergency Injunction 12 (U.S., Aug. 25, 2016).

451. *Id.*

452. *Id.*

453. See Ohio Secretary of State, 2016 Official Election Results, General Election, Nov. 8, 2016.

454. See *State ex rel. Fockler v. Husted*, No. 2016-1863, Relators’ Verified Complaint in Original Action for Writ of Mandamus, Ex. B, Dec. 19, 2016, https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=811222.pdf&subdirectory=2016-1863\DocketItems&source=DL_Clerk.

455. *Id.*

456. See *State ex rel. Fockler v. Husted*, No. 2016-1863, Relators’ Verified Complaint in Original Action for Writ of Mandamus, Ex. D, Dec. 19, 2016, https://www.supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=811222.pdf&subdirectory=2016-1863\DocketItems&source=DL_Clerk.

litigation against Secretary Husted, had somehow “agreed” that the group of voters supporting Johnson would not be recognized as a political party.⁴⁵⁷

The second reason was preposterous on its face since I had never agreed to any such thing.⁴⁵⁸ Nor could I if I had wanted to since I was not the group’s lawyer when I allegedly entered into the agreement. Husted’s prior press release, meanwhile, merely anticipated that Johnson’s group would seek party status if Johnson won enough votes and stated he would not allow it.⁴⁵⁹ Neither reason was credible.

Johnson’s “group of voters,” whom I subsequently agreed to represent, were thus forced to file an original action in the Ohio Supreme Court challenging Husted’s decision. Section 3517.01(A)(1) of Ohio’s Revised Code, as its ancestors had for one hundred years, continued to state that “any group of voters” becomes a “political party” in Ohio when the group’s candidates for President and Vice-President poll a sufficient percentage of the vote cast for that office. This path to party status had long supplemented the party petition mechanism found in O.R.C. section 3517.01(A)(1)(b) and its ancestors. Only Secretary Husted’s press release and formal refusal claimed to the contrary.

As outlined above,⁴⁶⁰ Ohio’s history makes clear that the “group of voters” vote-test path was meant to apply to non-party groups who sponsored independent candidates.⁴⁶¹ Section 3517.01(A)(1)(a) had been on Ohio’s books in one form or another for one hundred years. It first appeared in Ohio following the Ohio’s Constitutional Convention’s adoption in 1912 of a

457. *Id.*

458. DeWine’s office was so angered by the group’s argument and my taking their case that it accused me in writing of violating Ohio’s Rules of Professional Conduct and stated that my action was a “serious issue that is potentially sanctionable.” Email from Halli Watson to Mark Brown, Dec. 20, 2016 (on file with author). It added that if I did not withdraw the group’s emergency filing in the Ohio Supreme Court seeking party recognition its attorneys would be “exploring our reporting obligations under the Rules of Professional Conduct.” *Id.* Suffice it to say that I had done nothing wrong and was never charged with anything, but it was a bit disconcerting to be notified by the state’s Attorney General that he was considering disciplinary proceedings against me in the state’s Supreme Court. The threat itself, ironically, was potentially subject to sanctions. *See* OHIO R. PROF’L CONDUCT 1.2(e). Such was the arrogance of Mike DeWine, a man who would use the power of his office to defend his re-election campaign’s secret interference in the Libertarians’ primary and then threaten their lawyer with baseless disciplinary charges.

459. *See supra* note 456.

460. *See supra* notes 36-42 and accompanying text.

461. Ohio’s vote test for groups of voters is not unique or peculiar. At least six States have similar statutory provisions recognizing that political groups, associations, and supporters of independent candidates can meet vote tests and, thereby, create recognized political parties capable of running candidates in subsequent elections. *See, e.g.,* ALASKA STAT. ANN. 15.80.010(27); GA. CODE ANN. § 21-2-180(2); N.H. REV. STAT. § 652:11; N.D. STAT. ANN. § 16.1-11-30; R.I. GEN. LAWS § 17-1-2(9) WIS. STAT. ANN. § 5.62(b).

primary requirement for political parties.⁴⁶² With the adoption of Article V, section 7, Ohio passed the 1914 Primary Act, which implemented the terms of that constitutional provision. Under section 4949 of that Act, groups of voters whose gubernatorial candidates won ten percent of the vote were considered political parties and thereafter had to run their candidates through primaries.⁴⁶³ Indeed, from at least 1914 until 1929, this “any group of voters” vote-test was the only way new political parties could gain recognition in Ohio.⁴⁶⁴

Only in 1929 did Ohio finally create a separate petitioning process for new political parties, providing that “those political associations that presented nominating petitions supported by signatures from voters equal in number to 15% of the total vote for Governor in the preceding election”⁴⁶⁵ would be recognized and would themselves have to conduct primaries. Following this addition, section 4785-61 of the Code stated that “political parties could either be formed by ‘any group of voters’ presenting a petition supported by signatures equal in number to 15% of the total vote cast for Governor in the preceding election or by ‘any group of voters’ running a candidate for Governor who won more than 10% of the gubernatorial vote.”⁴⁶⁶ Just as today, Ohio used the same “group of voters” language to describe who could use the party nominating petition procedure and who could use Ohio’s vote test.

In 1947, although Ohio made it more difficult for independent candidates to poll votes for public office by “prohibit[ing] candidates who used the independent candidate petition procedure from identifying themselves with a ‘party or principle,’”⁴⁶⁷ it did not deny them the right to try. “Ohio law continued to state in § 4785-61 that ‘any group of voters’ whose candidate for Governor won more than 10% of the vote could become a recognized political party.”⁴⁶⁸ Because of the difficulty with gathering enough signatures through the petition process, minor parties in Ohio from the 1950s to the 1970s continued to use the independent candidate approach.

In 1968 section 3517.01 “continued to allow ‘any group of voters’ to establish a political party by having their candidate win 10% of the total vote

462. See *supra* notes 36–39 and accompanying text.

463. See *supra* notes 34–35 and accompanying text.

464. See *supra* notes 40–41 and accompanying text.

465. See *supra* notes 43–44 and accompanying text.

466. See 1932 Ohio Attorney General Opinion 4587, at 1003 (Sept. 1, 1932) (quoting § 4785-61, General Code), <http://www.ohioattorneygeneral.gov/getattachment/f1f48102-39b7-48d6-9814-db0a97b8d972/1932-4587.aspx>.

467. Winger Affidavit, *supra* note 31, at ¶ 32.

468. *Id.* at ¶ 22.

for Governor.”⁴⁶⁹ In 1969, following the Supreme Court’s watershed election ruling in *William v. Rhodes*,⁴⁷⁰ “Ohio amended § 3517.01 to reduce the vote test for ‘any group of voters’ to become a political party to 7% and to also include the vote total for President as well as Governor.”⁴⁷¹ In 1971 Ohio’s vote test for “any group of voters” to become a recognized political party was reduced again to five percent of the total vote for Governor or President.⁴⁷² Importantly, through each reduction the “any group of voters” vote-test mechanism remained in place. It has never been altered or repealed.

This did not change with or following the Sixth Circuit’s decision in *Libertarian Party of Ohio v. Blackwell*,⁴⁷³ which ruled that Ohio’s alternative petitioning requirement for new political parties was unconstitutional. The Sixth Circuit said nothing in that case about Ohio’s vote-test alternative, which is understandable since it was not challenged. Neither Ohio’s abandoned attempt in 2011 to add a constitutionally acceptable new-party petitioning alternative,⁴⁷⁴ nor the 2014 changes found in S.B. 193,⁴⁷⁵ pretended to repeal the existing “any group of voters” vote-test path, either.

In sum, Ohio had recognized that “associations” and “groups of voters” could use its vote-test mechanism for over one hundred years. The only changes to the test were reductions in the percentage of votes required. Since 1914, Ohio authorities had never done what Husted did in 2016—that is, reject a request by a “group of voters” whose gubernatorial or presidential candidate won enough votes to establish a political party. Husted’s action was unprecedented.

The Ohio Supreme Court, which at that time included six Republicans (including Mike DeWine’s son),⁴⁷⁶ disagreed.⁴⁷⁷ In a per curiam opinion joined by all the Republicans on the Court, the Ohio Supreme Court agreed with Husted’s press release and ruled that Ohio’s vote test “permit[s] only *established* political parties to retain ballot access if they receive at least 3 percent of the vote.”⁴⁷⁸ It reached this conclusion by focusing on Ohio’s

469. *Id.* at ¶ 25 (citing *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 986 n.1 (S.D. Ohio 1968) (which quoted OHIO REV. CODE § 3517.01)).

470. 393 U.S. 23 (1968).

471. Winger Affidavit, *supra* note 31, at ¶ 26 (citing *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262, 1264, 1269 n.11 (S.D. Ohio 1970)).

472. *See* Winger Affidavit, *supra* note 31, at ¶ 27.

473. 462 F.3d 579 (6th Cir. 2006).

474. *See supra* notes 148–56 and accompanying text.

475. *See supra* notes 166–71 and accompanying text.

476. Mike DeWine and Jon Husted would join forces to form the Republican Party’s gubernatorial ticket in Ohio in 2018. *See Ohio 2018 governor election*, WIKIPEDIA, https://en.wikipedia.org/wiki/2018_Ohio_gubernatorial_election.

477. *State ex rel. Fockler v. Husted*, 82 N.E.3d 1135 (Ohio 2017).

478. *Id.* at 1136 (emphasis added).

definition of “minor political party” found in section 3517.01(F)(1), which states that a minor political party is one that either meets Ohio’s three percent vote-test or “has filed with the secretary of state, subsequent to its failure to meet the requirements of [Ohio’s vote-test], a petition that meets the requirements of section 3517.01 of the Revised Code.”⁴⁷⁹ The court explained that Ohio’s “political-party-formation law (R.C. 3517.01) must be interpreted in concert with the election-law definitions of ‘political party’ and ‘minor political party’ (R.C. 3501.01).”⁴⁸⁰ It concluded that this combination “make[s] clear that a political group cannot obtain recognized political-party status based on votes obtained by independent candidates.”⁴⁸¹

If this was so clear, one wonders why no one noticed it for one hundred years. Ohio’s separate “group of voters” vote test, after all, has always co-existed with the definitions of existing political parties. Neither Husted nor the Ohio Supreme Court could point to any legislative changes or precedents from the 1950s to the 2000s that altered the definition of “political party” to exclude “any group of voters” from becoming one. During the one hundred years that Ohio has allowed “any group of voters” to become a political party by meeting a vote test, it has routinely distinguished “minor,” “intermediate,” and “major” political parties from one another. These definitions had never been understood to override the “any group of voters” path to Ohio’s ballot. If the Ohio Supreme Court is correct, Ohio’s alternative vote-test track for “any group of voters” must have been null and void from the beginning.⁴⁸²

Recognizing that its conclusion contradicted Ohio’s one-hundred-year-old practice, Ohio’s Supreme Court searched for an event that could mark its abandonment. The Sixth Circuit’s 2006 decision in *Libertarian Party of Ohio v. Blackwell*,⁴⁸³ it concluded, filled the bill. The court claimed *Blackwell* invalidated Ohio’s “vote-percentage process for groups of voters to establish political parties,” along with Ohio’s party-petitioning process.⁴⁸⁴ Thus, it reasoned, Ohio’s vote-test alternative “has not been in continuous effect since 1914.”⁴⁸⁵

479. *Id.* at 1137–38 (quoting OHIO. REV. CODE § 3517.01(F)(1)(b)).

480. *Id.* at 1138.

481. *Id.*

482. The Court cited to a Legislative Service Commission analysis of S.B. 193 for support, *id.* at 1138, but that analysis merely stated that S.B. 193 “[l]owers the percentage of vote required for a party to retain its status as a political party and revises the process for a new party to gain recognition by filing a party formation petition.” Ohio Legislative Service Commission, Final Analysis of Am.Sub.S.B. No. 193, as passed by the General Assembly (2014). It said nothing about whether this was meant to replace the “any group of voters” path to Ohio’s ballot.

483. 462 F.3d 579 (6th Cir. 2006).

484. *State ex rel. Fockler v. Husted*, 82 N.E.3d 1135, 1140 (Ohio 2017).

485. *Id.*

The court was presumably betting that no one would read *Blackwell*, since even a casual perusal of that opinion reveals that the Ohio Supreme Court's claim is absurd. Only Ohio's party-petitioning process was challenged and ruled invalid in the *Blackwell* case. There was no mention of Ohio's "group of voters" path to the ballot, nor could there have been because no one was challenging it. Although Ohio was left without a petitioning process for political parties after *Blackwell*,⁴⁸⁶ the "group of voters" alternative was undisturbed.

The lone dissent in *Fockler* was voiced by Justice O'Neill, a Democrat. He correctly called the majority's approach "circular" because it forced a "group of voters" to be a political party before they could become one.⁴⁸⁷ He also pointed out that the definition of "political parties" found in section 3501.01 of the Ohio Revised Code and the access mechanism for "any group of voters" in section 3717.01 could easily be read in harmony. The "umbrella section" of section 3501.01(F), he noted, defines a "political party" as "any group of voters meeting the requirements set forth in section 3517.01 of the Revised Code for the formation and existence of a political party."⁴⁸⁸ Furthermore, any inconsistency is because sections "3501.01(F)(2) and 3517.01(A)(1) defined different terms. [Husted's] interpretation would require [the] court to supplement the plain language of these statutes to make one definition subordinate to the other, which is an improper invasion of the role of the General Assembly."⁴⁸⁹

The court's decision in *Fockler* allowed Secretary Husted and General DeWine to achieve by executive fiat an unprincipled and unsupported change to Ohio's ballot access law. Husted and DeWine ignored history and the plain language of Ohio's one-hundred-year-old ballot access law in doing so. Anticipating what was fast becoming the new normal in Ohio, Husted and DeWine made plain that in terms of Ohio elections they could "kind of do what [they] want."⁴⁹⁰

B. Ohio Constitutional Challenges

The Libertarian Party first attempted to challenge S.B. 193 in federal court, but Judge Watson ultimately dismissed that attempt under the Eleventh Amendment.⁴⁹¹ The Libertarians then immediately filed suit in state court while the rest of its federal case remained pending. Two Ohio

486. See *supra* notes 133–48 and accompanying text.

487. *State ex rel. Fockler v. Husted*, 82 N.E.3d 1135, 1140 (O'Neill, J., dissenting).

488. *Id.*

489. *Id.* at 1141.

490. Douglas, *supra* note 15.

491. See *Libertarian Party of Ohio v. Husted*, 2015 WL 11120519, *8 (S.D. Ohio Oct. 14, 2015).

constitutional challenges were made. First, the Libertarian Party argued that Article V, section 7 of Ohio's Constitution requires that political parties nominate candidates by primaries. The Sixth Circuit had pointed to Article V, section 7 when it stated in *Libertarian Party of Ohio v. Blackwell*⁴⁹² that "the Ohio Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections."

Second, the Libertarian Party argued that regardless of whether a primary was required for minor parties, Ohio violated the Ohio Constitution's equal protection requirement⁴⁹³ by affording primaries and their perks to major parties while denying them to others. This argument tracked the Libertarians' equal protection argument that would be later (unfortunately) rejected by the Sixth Circuit,⁴⁹⁴ but was different in that (1) Ohio's Constitution requires primaries for at least some political parties,⁴⁹⁵ and (2) Ohio's equal protection clause has been given more teeth than its federal counterpart.⁴⁹⁶

1. Article V, § 7

Article V, § 7 states 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" This language, of course, is not terribly helpful in deciding whether political parties must use primaries. The devil, as is ordinarily true with constitutional questions, is in the details. The Ohio Supreme Court's sole foray into the meaning of Article V, section 7 in *State ex rel. Gottlieb v. Sulligan*⁴⁹⁷ resulted in the Court's only stating the obvious, that is, that statutorily political parties in Ohio are expected to hold primaries while independent candidates may use petitions. Nothing was said about whether this divide was constitutionally required.

Because constitutional text seldom provides definitive answers, Dean Erwin Chemerinsky has emphasized the importance of looking beyond constitutional language when seeking constitutional answers. "The Supreme Court has repeatedly looked to historical practices"⁴⁹⁸ according to Chemerinsky, and "[o]n countless occasions ... has stressed the importance of looking at traditions when interpreting the Constitution."⁴⁹⁹ While a

492. 462 F.3d 582 (6th Cir. 2006).

493. OHIO CONST. art. 1, § 2.

494. See *supra* notes 392-95 and accompanying text.

495. See *infra* notes 497-510 and accompanying text.

496. See *infra* notes 514-17 and accompanying text.

497. 193 N.E.2d 270, 272-73 (Ohio 1963).

498. ERWIN CHEMEKINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 171 (2022).

499. *Id.* at 173.

constitutional provision must be “interpreted” according to its text,⁵⁰⁰ it should be placed in context by considering “history, tradition, and precedent, with due regard for its purpose and function in the constitutional design.”⁵⁰¹

Ohio’s history and tradition richly inform the meaning behind Article V, section 7. In 1914 when enabling legislation was added to enforce Article V, section 7, all recognized political parties were required to conduct primaries.⁵⁰² There was no such thing as a petitioning process for political parties, let alone a petitioning process for candidates seeking to run under recognized political parties’ banners. Parties in Ohio at the time were recognized using vote tests.⁵⁰³ Candidates petitioned to run as independents in order to satisfy these vote tests and qualify their parties for future elections.⁵⁰⁴ If an independent candidate won ten percent of the gubernatorial vote, the previously unrecognized association that supported him would be qualified for the next election. Importantly, it would then have to use Ohio’s primaries to nominate its candidates.

Ohio’s law remained unchanged until 1929, when Ohio finally added a petition process for political parties.⁵⁰⁵ This process, however, was folded into Ohio’s primaries. Thus, a new political party had to petition by collecting signatures equal to fifteen percent of the last gubernatorial vote a “sufficient length of time” before the election so that it could conduct a primary.⁵⁰⁶ Once qualified, the new political party was “entitled to all privileges with respect to such primary election as are accorded under the law to political parties.”⁵⁰⁷ Ohio reduced its percentages over the years for new party

500. *Id.* at 177.

501. *Id.*

502. *See supra* notes 32–34 and accompanying text.

503. *See supra* notes 35–36 and accompanying text.

504. *See supra* notes 37–38 and accompanying text.

505. *See supra* note 44 and accompanying text.

506. The Ohio Attorney General explained in 1932:

When a political party is sought to be formed by the filing of a petition as provided in the foregoing section, the petitioners are obviously entitled to the benefit of all the provisions conferred by the election law upon political parties after having filed a petition as therein provided and after the signatures have been “examined and certified to in the same manner as is required of referendum petitions.” Section 4785–178, General Code, sets forth the method whereby these signatures shall be examined by the boards of elections of the various counties of the state and thereafter certified to the Secretary of State as chief election officer. Upon such a petition being filed with the Secretary of State and the signatures being examined and certified, all as provided in Section 4785-61, a sufficient length of time before any primary election, the group of petitioners in my opinion becomes a political party and is entitled to all privileges with respect to such primary election as are accorded under the law to political parties.

Ohio Attorney General Opinion, 1932 OAG 4587 (Sept. 1, 1932) at 1003.

507. *Id.*

petitions, but it never dispensed with primaries for these newly recognized political parties. This only changed in 2014 when S.B. 193 was passed.

The purpose and function behind Article V, section 7 further support its extension to all political parties, as opposed to its being used to benefit only Democrats and Republicans. As the Ohio Supreme Court explained in 1908 in *State ex rel. Webber v. Felton*,⁵⁰⁸ the purpose behind publicly financed primaries was not only to permit “only those who are members of the party to participate in the election and to have the result honestly ascertained and declared,” but also to “promote the public welfare by preventing fraud in the nomination of candidates for office.”⁵⁰⁹ In order to obtain these twin goals, the Ohio Supreme Court emphasized that Ohio’s primary law had to be applied equally: “The law is not restricted to any part of the state, but operates uniformly throughout the state, and operates uniformly upon all under the same conditions.”⁵¹⁰

The Ohio Court of Appeals in *Libertarian Party of Ohio v. Husted*⁵¹¹ rejected history, tradition, and the egalitarian principles described in *Felton* when it announced that Article V, section 7 allowed petitions for political-party candidates: “We are not persuaded by LPO’s contention that the history of the nomination process in Ohio is controlling over the express terms of the constitutional provision.”⁵¹² The court even agreed with Secretary Husted’s curious claim that Ohio was doing the Libertarians a favor by denying them publicly-financed primaries, state-registered members and free membership lists: “it is good public policy to not require new parties to participate in a primary system.”⁵¹³

2. *Ohio Equal Protection*

The Libertarian Party’s argument under Ohio’s version of equal protection fell equally flat in the Court of Appeals. This was not unexpected, since the argument mirrored to some extent the Libertarians’ federal equal protection argument. That claim just shortly after the filing of the state court action had been rejected by the Sixth Circuit.⁵¹⁴ Still, there were two significant differences between the arguments that the Libertarians believed made a difference. First, Ohio’s Constitution, unlike the federal Constitution, speaks directly to primaries. The Libertarians accordingly argued that because the Ohio Constitution creates primaries under Article V, section 7, denying

508. 84 N.E. 85, 87 (Ohio 1908).

509. *Id.* at 88.

510. *Id.*

511. 97 N.E.3d 1083 (Ohio Ct. App. 2017).

512. *Id.* at 1098.

513. *Id.* at 1107.

514. *See supra* notes 392-95 and accompanying text.

equal primary rights to some political parties while affording them to other parties is unconstitutional.

Second, the Ohio Supreme Court has held that Ohio's Constitution generally and its equal protection clause specifically are more protective of individual rights than the federal Constitution. The Ohio Supreme Court in *State v. Mole*⁵¹⁵ had ruled the year before that because the Ohio Constitution is a "document of independent force"⁵¹⁶ it "afford[s] our people greater rights than those secured by the federal Constitution."⁵¹⁷

The Ohio Court of Appeals demurred to giving Ohio's equal protection clause more teeth. Noting that *Mole* did not involve ballot access,⁵¹⁸ and claiming that the *Mole* court had applied the equivalent of a federal rational basis standard (it did not), the Court of Appeals concluded that *Mole* did not create "a more protective standard to employ when reviewing state equal protection challenges."⁵¹⁹ It then followed Judge Moore's rejection of the Libertarians' federal equal protection challenge in the Sixth Circuit jot-for-jot and ruled against the Libertarians.⁵²⁰

The Ohio Court of Appeals' decision was disappointing but not surprising. Ohio's judges sit for elections, meaning they can be more political than their federal counterparts. This is generally understood in the civil rights community,⁵²¹ and is even more apparent with challenges filed by new and minor political parties.⁵²² Although both state and federal judges can "fall

515. 74 N.E.3d 368 (Ohio 2016).

516. *Id.* at 373.

517. *Id.* at 375. The Ohio Supreme Court in *Mole* explained: "[W]e are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than we are confined by other states' high courts' interpretations of similar provisions in their states' constitutions." *Id.* at 376. The court in *Mole* then proceeded to apply Ohio's equal protection clause under a rational basis standard with significantly more bite than its federal counterpart. In doing so, it invalidated an Ohio law that treated police differently from others, even though police are not a suspect class and there was no fundamental right at stake. *Id.* It stated the "even if we have erred in our understanding of the federal Constitution's Equal Protection Clause, we find that the guarantees of equal protection in the Ohio Constitution independently forbid the disparate treatment of peace officers" *Id.* at 376–77.

518. *Libertarian Party of Ohio v. Husted*, 97 N.E.3d 1083, 1102 n.4 (Ohio App. 2017).

519. *Id.* at 1103.

520. *Id.* at 1105–08.

521. See, e.g., Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 89 (2009) ("structural features of judicial elections can affect electoral outcomes" because "[t]o the extent that judges want to retain their positions, they may be unable to maintain 'total indifference to the popular will' on these issues") (footnote omitted).

522. See Brown, *supra* note 1, at 179–216 (describing strained state court decisions that removed Ralph Nader from ballot).

prey to major-party politics,⁵²³ the reality is that the risk often proves greater in state court. That is why the Libertarians attempted to have their Ohio Constitution claims tried in federal court in the first place. Like it or not, Ohio's state courts historically have not proved overly concerned about the rights of minor political parties, and this particular challenge under the Ohio Constitution fell into that pattern.

Epilogue

Because Ohio's Libertarian Party had no gubernatorial candidate in the 2014 election it lost its place on Ohio's ballot. The Green Party, meanwhile, ran a gubernatorial candidate in 2014 who won more than two percent of the vote, thus entitling it to four more years of ballot access. In 2016 the Green Party ran Jill Stein for President. As explained above, the Libertarians were forced to run their candidate, Gary Johnson, as an independent presidential candidate in Ohio.⁵²⁴ No other minor political party or candidate participated in that election in Ohio.

In 2018 the Libertarians successfully petitioned under S.B. 193 to regain ballot access and ran Travis Irvine for Governor.⁵²⁵ The Greens ran Constance Gadell-Newton.⁵²⁶ Both were ignored by the corporate sponsors of several gubernatorial debates in Ohio.⁵²⁷ The Ohio Elections Commission, which by law cannot include members of minor parties,⁵²⁸ lived up to major-party expectations by summarily dismissing the Libertarians' and Greens' administrative complaints.⁵²⁹ The Libertarian and Green party candidates were not allowed to join the major-party candidates' exclusive debates, and without that exposure they had little chance of winning three percent of the gubernatorial vote. Neither did. The Green Party, which had exhausted its four-year reprieve, thus fell off Ohio's ballot.

The Libertarian Party, having used S.B. 193 to petition to gain access that year, made clear to Husted that it expected to retain its ballot line for at least two full election cycles. After all, the major parties enjoyed that privilege, and so had the Greens when they met Ohio's two percent vote-test in

523. *Id.* at 240 (observing that “courts are no panacea either, as the Oregon experience again makes clear. The Oregon Supreme Court’s deference to the Secretary’s heavy-handed behavior demonstrates that courts too can fall prey to major-party politics”) (footnote omitted).

524. *See supra* notes 443–52 and accompanying text.

525. *See Travis Irvine*, BALLOTPEDIA, https://ballotpedia.org/Travis_Irvine (last visited Apr. 2, 2023).

526. *See Constance Gadell-Newton*, BALLOTPEDIA, https://ballotpedia.org/Constance_Gadell-Newton (last visited Apr. 2, 2023).

527. *See* Mark R. Brown, *Candidate Debates in Ohio: Can Corporations Fund the Major Parties?*, 83 OHIO ST. L.J. ONLINE 160 (2022).

528. *See* Libertarian Party of Ohio v. Wilhelm, 988 F.3d 274 (6th Cir. 2021).

529. *See* Brown, *supra* note 527, at 161–62.

2014. On top of that, Ohio's new access law in S.B. 193 stated that a petitioning party remained qualified "until the time of the first election for governor or president which occurs not less than twelve months subsequent to the formation of such party."⁵³⁰ Because the next gubernatorial or presidential election that occurred more than twelve months after the Libertarians' 2018 petition was scheduled for 2020, S.B. 193's terms literally kept the Libertarians qualified through that subsequent election cycle.

Secretary Husted had other ideas. Following the 2018 election he publicly disagreed, claiming that the Libertarians "lost their ballot access because their respective candidates for governor in the Nov. 6 [. . .] election didn't get the 3 percent of the vote required under state law to remain a recognized minor party."⁵³¹ He rejected the Libertarians' reliance on Ohio's new ballot access law as "point[ing] to one sentence, but if you look at all of [the law], there's other things to take into consideration there, in the way that it's phrased."⁵³² Harkening back to his antics surrounding the *Fockler* case,⁵³³ Husted again professed his willingness to overturn plain law by executive fiat.

However, unlike in *Fockler*, this time the Ohio Supreme Court would not have the final word. Secretary Husted's flimsy interpretation of Ohio's ballot access law would thus not receive the deference it enjoyed under Ohio law. It instead would have to be given federal scrutiny. This was because three years earlier the Sixth Circuit in *Green Party of Tennessee v. Hargett*⁵³⁴ ruled that a Tennessee ballot access law that allowed major parties more time to re-qualify than minor parties violated the First and Fourteenth Amendments.⁵³⁵ Because Husted's strained interpretation of S.B. 193 achieved this same result, he would have to convince federal judges to overturn settled precedent in order to prevail. Husted quietly let the matter drop, with the result being that the Libertarian Party appeared as a recognized political party in Ohio in 2020.

530. OHIO REV. CODE § 3501.01(F)(2)(b).

531. See Jeremy Pelzer, *Ohio Libertarians may sue to keep ballot access*, CLEVELAND.COM (Nov. 13, 2018), <https://www.cleveland.com/politics/2018/11/ohio-libertarians-may-sue-to-keep-ballot-access.html>.

532. *Id.*

533. See *supra* notes 453-59 and accompanying text.

534. 791 F.3d 684 (6th Cir. 2015).

535. In *Hargett* new political parties in Tennessee had been afforded only one opportunity to meet the State's vote test, while established political parties had two. This disparate treatment was constitutionally unacceptable, the Sixth Circuit ruled: "Tennessee's access-retention system forces minor political parties to attain the *same* vote percentage as major political parties in *less* time." *Id.* at 695. "Because this statute imposes a greater burden on minor parties without a sufficient rationale put forth by the state," the Sixth Circuit concluded, "it violates the Equal Protection Clause." *Id.*

Unfortunately, the Libertarian Party's presidential candidate, Jo Jorgensen, did not win three percent of the vote in Ohio during the 2020 presidential election,⁵³⁶ which caused the Libertarians to fall off Ohio's ballot once again. No minor-party candidates appeared on Ohio's ballots in 2022, marking the first time in fifteen years the Republicans and Democrats could again enjoy their major-party monopoly in Ohio.⁵³⁷

Concluding Remarks and Recommendations

The premier lesson to be learned from the past dozen years is that the two major political parties cannot be trusted with the reins of minor-party ballot access. The question is how can they be stopped? In a perfect world, of course, the two major political parties would not be allowed to write ballot access rules in the first place. This may have worked before the widespread adoption of the Australian (secret) ballot, but with official ballots must come official rules for obtaining space. Someone must write those rules, and given the two major parties' domination of government they are sure to play a part.

Still, guardrails and speed limits can be placed on legislatures by the judiciary. To do this, however, both federal and state courts need to be more empathetic to the plight of minor parties, something that has not proven true in recent times. The *Anderson-Burdick* balancing test only works when judges realistically assess the facts on the ground. The removal of Charlie Earl from the ballot in 2014 had conspiracy and governmental action written all over it, yet both Judge Watson, a Republican, and Judge Moore, a Democrat, chose to trust the varied excuses and rationalizations offered by the 'cast of characters' involved. Without serious judicial scrutiny and a willingness to rise above one's political roots, major-party manipulation of ballot access rules is not likely to be avoided.

Preferably, specific rules would be put in place to prevent the major parties and their members from sabotaging minor-party access efforts. If major-party conspiracies do not violate the First and Fourteenth Amendments, then legislation is needed to make them illegal under state and federal law. They are plainly improper, which is why the Republican Party, DeWine's campaign and Kasich's campaign went to such lengths to keep

536. See *Jo Jorgensen*, BALLOTPEDIA, https://ballotpedia.org/Jo_Jorgensen.

537. An independent candidate for Secretary of State qualified for the ballot in 2022, but only after (Republican) Secretary of State Frank LaRose had kicked her off. See Jo Ingles, *Ohio Secretary of State hopeful is ruled ineligible for the November ballot*, STATEHOUSE NEWS BUREAU (Aug. 31, 2022), <https://www.stateneews.org/government-politics/2022-08-31/ohio-secretary-of-state-hopeful-is-ruled-ineligible-for-the-november-ballot>. LaRose used the same technique employed by his predecessor, Husted. He used an ostensibly neutral hearing officer, a retired Republican Ohio Supreme Court justice, to render the decision. See Brown, *supra* note 12. The Ohio Supreme Court, to its credit, reversed. See *State ex rel. Maras v. LaRose*, 199 N.E.3d 532 (Ohio 2022).

their involvements in the Earl and Linnabary matters secret. DeWine's secret involvement in Linnabary's protest, followed by his open defense of Husted's decision before the Ohio Supreme Court, is particularly shameful if not criminal. A principled ballot access process cannot countenance these sorts of undisclosed conflicts and surreptitious conspiracies.

Barring major-party involvement in the protest process is only a start. Targeted regulations must be designed to ensure that the major parties and their players, like Terry Casey, cannot by stealth finance efforts to destroy minor parties. Toward this end, reporting and disclosure requirements placed on protestors would be useful. Meanwhile, state enforcement agencies, including the Ohio Ethics Commission and the Ohio Elections Commission, must be made to shed their major-party biases and properly enforce existing ethics and campaign-finance laws. Local bar associations should do their parts, too, by enforcing existing rules that bar secret, undisclosed clients.

Another needed change lies in the administration of ballot access rules and procedures. The bottom line is that elected officials like Husted and DeWine simply cannot be trusted to run election machinery. There is too much political upside and too little downside. Ballot access decisions should be left with career elections officials who are insulated from political processes. To the extent this does not exist, it should be created using mechanisms akin to civil service protections. Farming out ballot access decisions to ostensibly neutral hearing officers, meanwhile, will not solve anything in the absence of similar, meaningful insulation.

Regardless of who administers ballot access laws, sunshine is essential. Government officials, no matter who they are, cannot be allowed to freely and secretly communicate about pending ballot matters with interested persons and parties. With Earl and Linnabary, officials in Husted's office—Matthew Damschroder, in particular—were constantly communicating *ex parte* and off-the-record with individuals they knew to be secretly involved. *Ex parte* communications like these are improper in any adjudicative setting. They are doubly troubling in the context of ballot access.