

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**LIBERTARIAN PARTY OF OHIO,
et al.,**

Plaintiffs,

Case No. 2:13-cv-953

v.

Judge Michael H. Watson

HUSTED, et al.,

Defendants./

**PLAINTIFFS' REPLY TO SECRETARY'S AND OHIO'S RESPONSES TO
PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION**

I. Plaintiffs Challenge S.B. 193's Retroactive Application.

Intervenor-Defendant (hereinafter "Ohio") devotes a significant portion of its Response to arguing that S.B. 193's substantive requirements (e.g., signatures and timing) are consistent with the United States Constitution. *See* Intervenor-Defendant the State of Ohio's Memorandum Contra Plaintiffs' Second Motion for a Preliminary Injunction (hereinafter "Ohio's Response"), Doc. No. 32, at 5-13. And they may (or may not) be. Plaintiffs, however, have not challenged any prospective aspects of S.B. 193 under the federal constitution. Plaintiffs' argument under the First and Fourteenth Amendments is simply that (regardless of its application to future elections) S.B. 193 cannot constitutionally be applied retroactively to the LPO and its candidates who legally file qualifying papers and pay their filing fees before the effective date of the law.¹

¹ Plaintiffs take no position on Intervenor-Plaintiffs' claim that certain substantive aspects of S.B. 193, such as its denial of a primary, the number of signatures required, and the date by which

Plaintiffs have submitted declarations from five Libertarian ("LPO") candidates, and one Green Party candidate, who have already filed their needed paperwork and paid their required fees for Ohio's 2014 primary. Among the LPO candidates, Nelson Roe filed for local office on October 25, 2013. Doc. No. 23 (Declaration of Nelson Roe). Martin Elsass filed for local office on October 1, 2013. Doc. No. 24 (Declaration of Martin Elsass). Gregg Norris filed for local office on October 15, 2013. Doc. No. 25 (Declaration of Gregg Norris). Robert Sherwin filed for local office on November 1, 2013. Doc. No. 26 (Declaration of Robert Sherwin). Mark Noble filed for local office on October 16, 2013. Doc. No. 27 (Declaration of Mark Noble). The Green candidate, Robert Hart, filed for federal office on October 2, 2013. Doc. No. 28 (Declaration of Robert Hart). There are undoubtedly more. And more are sure to file before February 5, 2014, when S.B. 193 takes effect. Plaintiffs' claim is that revoking these candidates' filings, or those of any LPO candidates who file before February 5, 2014, violates the First and Fourteenth Amendments.

Richard Winger, the same expert relied upon by the Sixth Circuit in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), has provided a number of examples where states, recognizing the "patent unfairness" involved, "have routinely avoided retroactive application of new rules [passed] ... in the middle of, or near the end of, election cycles." Doc. No. 22 (Declaration of Richard Winger), at ¶ 4. In particular, Winger points to Ohio in 1971,

they need to filed, necessarily violate the federal constitution, even when applied in the future to elections in 2015, 2016 and beyond. Plaintiffs instead make the more narrow argument that even if S.B. 193 would be valid if applied prospectively in 2015 and beyond, it cannot constitutionally be applied retroactively to preclude or disadvantage the LPO and its candidates in 2014. Plaintiffs respectfully submit that this more narrow argument offers a better vehicle for resolving this case.

where its Secretary of State "decided that the late passage of the new law in 1971 required leaving the Socialist Labor Party on the ballot for both the primary and general [elections] in 1972." *Id.* at ¶ 5.K.

Winger also points to *Hudler v. Austin*, 419 F. Supp. 1002, 1013-14 (E.D. Mich. 1976), *summarily aff'd*, 430 U.S. 924 (1976), where Michigan passed changes to its election law in April and sought to apply them in August. Even though the changes were otherwise constitutional, the three-judge court unanimously ruled that they could not be applied to an August primary and the following November general election. The lateness of the changes, coupled with "the legislature's failure to take earlier action although fully apprised of the problem," *id.* at 1014, resulted in a violation of the Fourteenth Amendment. "The short time limits, extra expense and duplicative effort required to regenerate the support of plaintiffs' constituencies ... imposes an unnecessarily prejudicial burden on the plaintiff new parties seeking 1976 ballot status." *Id.* The Supreme Court affirmed.

The case at hand is quite similar to that presented in *Hudler*. Ohio's legislature has had several years to pass a new ballot access law. Its late passage of S.B. 193, when coupled with its "failure to take earlier action although fully apprised of the problem," is constitutionally inexcusable. Plaintiffs will experience an "unnecessarily prejudicial burden" resulting not only from the practical "duplicative effort required to regenerate the support of [their] constituencies," but also from the political disadvantage created by S.B. 193's retroactive application. As pointed out in Plaintiffs' Second Motion for Preliminary Injunction, S.B. leaves the LPO without any mechanism for registering members before the 2014 general election. *See* Plaintiffs' Second Motion for Preliminary Injunction and Attached Memorandum of Law in Support (hereinafter

"Second Motion for Preliminary Injunction"), Doc. No. 17, at 11. The major parties, in contrast, because they will continue to have primaries, will continue to enjoy the privileges of party membership.² Without the practical and legal benefits of party membership, the LPO cannot compete on a level playing field with the major parties in 2014.

II. LPO Remains a Qualified Political Party in Ohio Until S.B. 193 Takes Effect.

Senate Bill 193 "voids" several Directives previously issued by Defendant-Secretary of State (hereinafter "the Secretary") that formally inform local election boards that the LPO, and several additional minor parties, have continuing ballot access: "Directives 2009-21, 2011-01, and 2013-02 issued by the Secretary of State are hereafter void and shall not be enforced or have effect on or after the effective date of this act." *See* First Amended Complaint (Verified), Doc. No. 16, at ¶ 20; Intervenor-Defendant the State of Ohio's Answer and Affirmative Defenses to Plaintiffs' First Amendment Complaint (hereinafter "Ohio's Answer"), Doc. No. 21, ¶ 20; Defendant Ohio Secretary of State Jon Husted's Answer and Affirmative Defenses to Plaintiffs' First Amendment Complaint (hereinafter "Secretary's Answer"), Doc. No. 20, ¶ 20. The clear inference drawn from S.B. 193's revocation of these Directives is that they have continuing effect.

² Ohio attempts to minimize the practical, if not the legal, disparities imposed by S.B. 193. It points to the million-plus votes LPO candidates won in 2010 and states "it cannot be that the lack of a 2014 Libertarian Party primary will render Plaintiffs unable to locate 50 qualifying signatories who will support a state-wide candidate petition." Ohio's Response, Doc. No. 32, at 9. This argument ignores the fact that none of the one million-plus people who voted for LPO candidates in the 2010 general election will be LPO members in 2014 if S.B. 193 takes effect. The majority will become major-party members, because those are the only parties that will have primaries. Plaintiffs' point is not that they cannot or will not find support in 2014, it is that S.B. 193 will make it more difficult by discriminatorily facilitating the major parties' harvesting of LPO's supporters and members.

The Secretary (and Ohio) would have this Court believe that S.B. 193's revocation of these Directives is meaningless and unnecessary. After all, Defendants argue, the Directives were each silently revoked at the end of their respective elections. No new court order has yet been issued in 2013, and no new Directive (following the one issued in January of this year) has been released. Thus, Ohio's minor parties have, with no action at all on the part of the Secretary or the State of Ohio, been removed from the ballot: "LPO did not have ballot access for 2014 before the statutory enactment of S.B. 193." *See* Secretary of State's Memorandum Contra Plaintiffs' Second Motion for Preliminary Injunction (hereinafter "Secretary's Response"), Doc. No. 31, at 6. "No minor political party has been given ballot access for 2014." *Id.* at 7. Together they argue that the Secretary has, since 2006 when Ohio's ballot access law was stuck down, enjoyed discretion to allow, or not, minor-party access. The Secretary "allowed" the LPO ballot access in 2008, 2009, 2010, 2011, 2012 and 2013, but it has now decided--without any Directive, Advisory, letter, phone call, or anything else--to revoke access for 2014.

The initial problem with the Secretary's logic, of course, is the language of S.B. 193 itself, which voids the Secretary's prior Directives. If the minor parties have no continuing right to ballot access under the Directives (and federal court orders, *see infra*) beyond 2013, why does S.B. 193 need to void them?

More importantly, the Secretary presumptuously casts himself at center stage in this ongoing drama. He presumes to have the authority to award, or not, ballot access. As made clear in *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), he does not enjoy this authority. The LPO's right to ballot access flows not from the Secretary's Directives or discretion, but from the legislature's failure to pass a ballot access law. Directives

2009-21 and 2011-01, and those that followed, do not create the LPO's ballot access right (although they add to it). They recognize and implement what this Court ruled in *Brunner*. And what *Brunner* said was that in the absence of a legislatively-created ballot access law, the LPO has a constitutional right to ballot access. Ohio's legislatively-enacted ballot-access law does not take effect until February 5, 2014. Until that date the LPO remains a qualified political party.

The history behind the LPO's struggle to win ballot access is telling. Following *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), the Secretary in 2008 attempted to do what the legislature had not, that is, fill the void with her own requirements. These administratively-adopted restrictions were invalidated in *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), under both the First Amendment and the Articles I and II of the United States Constitution. In short, this Court ruled that the Secretary's new requirements were not much better than the old ones, and she did not have the constitutional authority to promulgate them in the first place--at least not for federal elections.

Because of the Ohio legislature's recalcitrance, Judge Sargus in *Brunner*, 462 F. Supp. 2d at 1015, ordered that the LPO be placed on Ohio's ballot:

The Constitution gives the Ohio legislature significant discretion to establish election procedures. After the state statute was held to fall outside “the boundaries established by the Constitution,” the legislature failed to act. The Court will not prescribe Constitutional election procedures for the state, but *in the absence of constitutional, ballot access standards, when the “available evidence” establishes that the party has “the requisite community support,” this Court is required to order that the candidates be placed on the ballot.* As set out above, the Court finds that the Libertarian Party has the requisite community support to be placed on the ballot in the state of Ohio.

(Emphasis added and citations omitted).

The *Brunner* Court then found that the LPO has the support needed to command ballot access. No court or administrative agency to date has ruled to the contrary, or concluded that the LPO has lost its support. Certainly it has not. Accordingly, because Ohio's new ballot access law does not take effect until February 5, 2014, Ohio's ballot access law remains "absent" and the LPO remains a qualified political party.

The Secretary in *Brunner* understood this result when she entered into a consent decree on July 30, 2009 concluding the litigation. See Attachment 1. She stated in the consent decree that her attempt at regulating Ohio's elections was withdrawn and would not be enforced in the future. She thereafter on December 31, 2009 issued Directive 2009-21,³ styled "Continued ballot access for minor political parties in Ohio," which stated that because the "General Assembly has not enacted a valid ballot access statute," *id.* at 1, she recognized the LPO's continued ballot access. On January 6, 2011 the Secretary issued Directive 2011-01,⁴ again styled "Continued Ballot Access for Minor Political Parties in Ohio," reiterating Directive 2009-21. Like Directive 2009-21, it was prefaced with "the Ohio General Assembly has not enacted a valid ballot access statute." *Id.* at 1.

The General Assembly likewise understands the meaning of *Brunner* and the Secretary's resulting Directives. S.B. 193 voids Directives 2009-21 and 2011-01 for a reason. They need to be voided because they separately create a liberty interest on the part of the LPO to continuing ballot access. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). They are not 'terminable at

³ See <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2009/Dir2009-21.pdf>.

⁴ See <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-01.pdf>.

the end of the election,' as the Secretary and Ohio belatedly argue. They guarantee continuing access so long as the legislature has not revoked them by passing a ballot-access law.

This is not the General Assembly's first attempt, of course, at revoking these Directives. In order to put in place a new (albeit unconstitutional) ballot-access law, the General Assembly first attempted their repeal in 2011 with § 5 of H.B. 194. That section of H.B. 194 stated that "Directives 2011-01 and 2009-21 ... are hereafter void and shall not be enforced or have effect." *See* 2011 Ohio Sess. Law Service 40. The attempt proved fruitless, of course, because this Court in *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sept. 7, 2011), enjoined its enforcement.⁵ H.B. 194 was later repealed and never took effect, leaving Directives 2009-21 and 2011-01 in effect.

The LPO has enjoyed continuing ballot access since 2008 because of the requirements of the First and Fourteenth Amendments. *See Brunner*. This access is assured under the federal constitution in the absence of proper ballot-access legislation. Directives 2009-21 and 2011-01 recognize and supplement this constitutional fact. Nothing to date has altered the *Brunner*

⁵ Contrary to the Secretary's claim that either court orders or Directives are needed on a yearly basis after *Brunner*, the reason another court order was needed to insure the LPO's ballot access was the passage of H.B. 194. Without H.B. 194's enactment, the LPO's continued ballot access under this Court's order in *Brunner* and Directives 2009-21 and 2011-01 would have been assured. Along these same lines, the Secretary issued Directive 2011-38 (<http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-38.pdf>), not because yearly awards of ballot access are needed, but simply to comply with Judge Marbley's decision striking down H.B. 194. Once H.B. 194 was declared invalid, the LPO automatically was entitled to ballot access. Judge Marbley's *Nunc Pro Tunc* Order, dated October 18, 2011, makes this clear. *See* Attachment 2. He did not, and did not need to, find that the LPO had sufficient support because the Court in *Brunner* had already done so. He simply ruled that his prior Order striking down H.B. 194 was meant "to ensure that the LPO appears on the ballot for the November 2011 and November 2012 elections." *Id.*

Court's conclusion. The only constitutionally relevant change comes with S.B. 193, and that does not take effect until February 5, 2014.

Coda

Plaintiffs add that even assuming that the Secretary is correct, that his Directives are truly necessary to insure continuing ballot access, his last Directive, 2013-02,⁶ stated that the LPO maintains its qualified status in 2013. The LPO ran candidates in partisan races in Ohio on November 5, 2013. *See, e.g.,* Attachment 3 (Declaration of Kendra Sheppard); <http://www.loraincounty.com/election/lorain.shtml> (listing Kendra Sheppard as a Libertarian Party candidate for city council in the November 5, 2013 general election). It thus cannot be argued that the LPO somehow abandoned its 2013 qualified-political-party status. It fully participated as a party in the 2013 elections and remains ballot-qualified, under the Secretary's logic, until the end of 2013. Any of its candidates who file by December 31, 2013 must likewise be qualified. And S.B. 193's retroactive application will violate their and the LPO's First and Fourteenth Amendments.

III. Qualifying Papers Are Effective When Filed.

The Secretary argues that the Ohio Supreme Court did not mean what it said in *State ex rel. Brown v. Summit County Board of Elections*, 545 N.E. 2d 1256, 1259 (Ohio 1989) ("the duty of the board of elections to place the name of the [candidate] on the ballot will relate back to the time [the candidate] filed his nominating petition."). Secretary's Response, Doc. No. 31, at 6.

⁶ <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2013/Dir2013-02.pdf>. Nor does this evidence a need to issue Directives on a yearly basis, as it was put in place because of Judge Marbley's Order striking down H.B. 194. *See Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012).

Yet the Secretary itself has recognized this relation-back requirement for primary candidates in its own prior Directives. Directive 2010-04, for example, states that election boards that for candidates for Ohio's primary election, "[t]he facts of qualifications of signers and circulators of the part petitions are determined **as of the date the petition was filed** in the Secretary of State's office [T]his differs from the standard used for the state issue part petitions" *See* Directive 2010-04, Petition of Jennifer Brunner for U.S. Senate, at 1 (emphasis in original).⁷

The General Assembly has also recognized the relation-back requirement for candidates. Senate Bill 47, which took effect on June 21, 2013, amends O.R.C. § 3513.263 to provide that independent candidates are subject to a window of one year when collecting signatures:⁸ "A signature on a nominating petition is not valid if it is dated more than one year before the date the nominating petition was filed." As illustrated by Directive 2010-04, the crucial date for candidates' nominating petitions is the date they file their papers--not the later dates when elections officials check their signatures and certify their candidacies.

Both the Secretary and the General Assembly understand that the key date for validating primary candidates' nominating papers is the date they are filed. They recognize this because of the Ohio Supreme Court's ruling in *State ex rel. Brown v. Summit County Board of Elections*, 545 N.E. 2d 1256, 1259 (Ohio 1989).

⁷ <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2010/Dir2010-04.pdf>.

⁸ No similar restriction applies to candidates who seek to run in party primaries. Consequently, Defendants are wrong to deny Plaintiffs' claim, *see* First Amended Complaint, Doc. No. 16, at ¶14, that Ohio law does not provide a "specific date for when candidates who seek to run in Ohio's 2014 primaries may lawfully begin collecting signatures." *See* Secretary's Answer, Doc. No. 20, at ¶ 14; Ohio's Answer, Doc. No. 21, at ¶ 14.

IV. Intervention Waives Ohio's Immunity to Properly Asserted Claims.

As explained in Plaintiffs' Second Motion for Preliminary Injunction, Doc. No. 17, at 15-16, the Supreme Court in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), ruled that Georgia's removal of an otherwise proper state-court action to federal court constituted a waiver of Georgia's Eleventh Amendment immunity. The Supreme Court explained that "[t]o adopt the State's Eleventh Amendment position would permit States to *achieve unfair tactical advantages*, if not in this case, in others." *Id.* at 621 (emphasis added and citations omitted).

Clark v. Barnard, 108 U.S. 436 (1883), a case where a state intervened in federal litigation, offers an example of how unfair it would be to allow a state to voluntarily enter federal court yet pick and choose the claims that can be asserted against it. There, Rhode Island intervened in federal court to claim an interest in a fund that formed the res of the litigation. It then attempted to defend itself from the claims of suitors by asserting the Eleventh Amendment. The Supreme Court rejected such a tactical advantage: "Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." *Id.* at 448.

Courts before and after *Lapides* have ruled that a state's waiver exposes it to counterclaims, *see Regents of the University of New Mexico v. Knight*, 321 F.3d 1111, 1125-26 (Fed. Cir. 2003), as well as to any ancillary proceedings that are needed to enforce a judgment. *See Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (holding that subsequent proceeding to enforce injunction was covered by state's initial waiver). And, contrary to Ohio's claim, *see Ohio's Response*, Doc. No. 32, at 3, courts have specifically ruled that a state's waiver

(through intervention or removal) exposes it to subsequent claims that are added, as here, under Rule 15.

In *Embury v. King*, 361 F.3d 562, 564 (9th Cir. 2004), for example, where a state had removed a state-court action to federal court, the Ninth Circuit concluded that "the rule in *Lapides* applies to federal claims as well as to state law claims *and to claims asserted after removal* as well as to those asserted before removal." (Emphasis added). It explained: "Nothing in the reasoning of *Lapides* supports limiting the waiver to the claims asserted in the original complaint, ... As for timing of the claims, the State removed the case, not the claims, and like all cases in federal court, it became subject to liberal amendment of the complaint." *Id.* at 564-65.

The Third Circuit in *Lombardo v. King*, 540 F.3d 190,197 (3d Cir. 2008), approved of this reasoning: "in *Embury*, the Court of Appeals for the Ninth Circuit determined that the waiver-by-removal rule established in *Lapides* applied to both state and federal claims, as well as to claims asserted after removal. ... We agree."

For its part, though it apparently has yet to expressly join the Third and Ninth Circuits' holdings, the Sixth Circuit has embraced *Lapides*' concerns about inconsistency and unfairness. *See, e.g., Nair v. Oakland County Community Health Authority*, 443 F.3d 469, 476 (6th Cir. 2006) ("If a State refuses to invoke its sovereign immunity as a threshold defense ..., it cannot credibly be heard to complain about the indignity of the federal courts resolving the merits of its case"). In *Ku v. State of Tennessee*, 322 F.3d 431 (6th Cir. 2003), for example, Tennessee was brought into federal court involuntarily in a § 1983 action seeking injunctive relief from its state agents. "Instead of asserting its Eleventh Amendment immunity defense," the Sixth Circuit observed, "Tennessee engaged in extensive discovery and then invited the district court to enter

judgment on the merits." *Id.* at 435. Citing *Lapides*, the Sixth Circuit rejected Tennessee's Eleventh Amendment defense, stating that "this type of clear litigation conduct creates the same kind of 'inconsistency and unfairness' the Supreme Court was concerned with in *Lapides*." *Id.*

The teaching of *Clark*, *Lapides*, *Embury*, and *Ku* is that states, following their waivers, must be held to the same fairness and consistency requirements applied to other litigants. States cannot selectively join federal litigation and seek Eleventh Amendment cover from routine, foreseeable developments, like counterclaims and amended pleadings. In the words of the Supreme Court, once a state voluntarily makes "itself a party to the litigation," it is a party "to the full extent required for its complete determination." *Clark v. Barnard*, 108 U.S. at 448.

Of course, this does not mean that states, following their waivers, are fair game for any and all charges. There are limits. Section 1367's supplemental jurisdiction, for example, requires that additional state-law claims be related to federal claims pending before the court. *See Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). And even when they are sufficiently related, § 1367(c) vests in the federal courts a wide range of discretion to dismiss them. *See, e.g., Lapides*, 535 U.S. at 624.

The Federal Rules of Civil Procedure further limit the ability of plaintiffs to add claims. Once a responsive pleading has been filed, for example, Rule 15 requires the court's approval before an amendment can be proffered.⁹ Neither Ohio nor the Secretary point to any improprieties under Rule 15.

⁹ *Faghri v. University of Connecticut*, 2010 WL 2232690 (D. Conn. 2010), cited by Ohio, *see* Ohio's Response, Doc. No. 32, at 3, proves the point. There, a § 1983 plaintiff, following removal to federal court, sought to amend his complaint (for the fifth time) to add a new claim

"Additional limits," the Supreme Court has ruled, "cannot be smuggled in under the Eleventh Amendment by barring a suit in federal court that does not violate the State's sovereign immunity." *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) (holding that a state agency can be sued in federal court by another state agency). What Ohio wants to do here is to "smuggle in" additional limitations that do not exist under federal statutes and rules. It has not pointed to any impropriety under § 1367 or the Federal Rules of Civil Procedure in this case. It instead raises the Eleventh Amendment as a red flag in an attempt to obtain an "unfair advantage," *see Lapidus*, and "smuggle in additional limits." *See Stewart*.

Ohio here has gone well beyond voluntarily joining Plaintiffs' challenge to Ohio's restriction on circulators. It first intervened. Then it passed a new law, S.B. 193, that directly and retroactively impacted the Plaintiffs' original claim. If S.B. 193's retroactive application is allowed to stand, it will render meaningless much of Plaintiffs' success in winning preliminary relief. *See* Opinion and Order of Preliminary Injunction, Doc. No. 18. "Fairness and consistency" dictate that Plaintiffs be allowed to respond to, and challenge, Ohio's action.

that "relate[d] to a set of factual circumstances distinct from the underlying suit." *Id.* at *10. The District Court refused to allow the amendment under Rule 15, notwithstanding the state's waiver of the Eleventh Amendment through removal: "permitting an amendment years after the plaintiff originally filed suit and after the discovery deadline expired based upon a different set of factual circumstances would result in significant prejudice to the defendant because it would essentially create an entirely new lawsuit." *Id.* at *8. The court accordingly distinguished the "well reasoned" opinion in *Embury*.

V. Ohio's Waiver Applies to the Secretary.

The Secretary argues that Ohio's waiver of its Eleventh Amendment immunity does not apply to him. *See* Secretary's Response, Doc. No. 31, at 9. He cites no authority for this proposition. Nor can he. The Supreme Court has established that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). A state agency, often called an "arm of the state," *see Mt. Healthy School District v. Doyle*, 429 U.S. 274, 280 (1977), derives its Eleventh Amendment from its principal, the state.

As the sovereign principal, Ohio has an absolute right to waive the derivative Eleventh Amendment immunity of its agent, the Secretary of State. In *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 308-09 (1990), for example, the Court found that New York had waived its Eleventh Amendment immunity (by statute) and that its waiver authorized suit in federal court against its agent, the Port Authority Trans-Hudson Corporation (PATHC): "[the] statutory consent to suit provision ... establishes the States' waiver of any Eleventh Amendment immunity that might otherwise bar respondents' suits against petitioner [PATHC]." A state agent cannot assert immunity that its principal, the state, has waived.

VI. Section 2721.12 is Procedural and Does Not Apply in Federal Court.

The Secretary argues that Plaintiffs' state-law claim is precluded by O.R.C. § 2721.12, which requires "service" on the Attorney General in declaratory actions challenging the constitutionality of state statutes. *See* Secretary's Response, Doc. No. 31, at 9. Both this Court

and the Northern District, however, have ruled that that § 2721.12 is procedural and inoperative in federal court.

Kammeyer v. City of Sharonville, 311 F. Supp. 2d 653 (S.D. Ohio 2003), is on all fours with the present case. There, the plaintiff pleaded both federal- and state-law claims (under Ohio's Constitution) against the City of Sharonville. The City defended against the state-constitutional claims by pointing to § 2721.12 (and *Cicco v. Stockmaster*, 728 N.E.2d 1066 (2000)). The Court rejected the defense: “*Cicco* involves a procedural requirement in the Ohio Court system that is not binding upon this Court” *Id.* at 662 (citing *Bell v. Marinko*, 235 F. Supp. 2d 772, 780 (N.D. Ohio 2002) (holding that § 2712.21 has “no effect on this court's jurisdiction or procedures, and failure to have served or joined the Ohio Attorney General likewise has no effect on this court's jurisdiction”); *Clay v. Edward J. Fisher, Jr. M.D., Inc.*, 588 F. Supp. 1363, 1365 (S.D. Ohio 1984) (“[W]e observe that § 2721.12 governs proceedings in state courts.”)). *See also Zilba v. City of Port Clinton, Ohio*, 924 F. Supp.2d 867, 884 (N.D. Ohio 2013) (holding that § 2721.12 does not apply in federal court).

VII. The Attorney General and the Defendants Have Been Properly Served.

Even assuming that § 2721.12 were applicable in federal court, the Attorney General has been properly served. Section 2721.12 does not require that the Attorney General be made a party; it only requires that he be provided a copy of the Amended Complaint. Both Defendants have been properly summoned and served, through the Attorney General, under Rules 4 and 5 of the Federal Rules of Civil Procedure. *See, e.g., Employee Painters' Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993, 999 (9th Cir. 2007) (holding that once defendant has entered appearance, amended complaint need only be served under Rule 5 rather than Rule 4). The Attorney General

has therefore been properly served with copies of the Amended Complaint. *See also Ohioans For Fair Representation, Inc. v. Taft*, 616 N.E.2d 905, 908 (Ohio 1993) ("the very apparent intent of R.C. § 2721.12 is to ensure that the Attorney General is informed of attacks on the constitutionality of the laws of this state."); *Pengov v. Ohio Department of Taxation*, 2006 WL 2022232 (Ohio App. 2006) ("The Ohio Supreme Court has held that the Attorney General is deemed served pursuant to R.C. § 2721.12 if the Attorney General undertakes representation of a party to the action early in the proceedings.").

CONCLUSION

For the foregoing reasons, Plaintiffs' Second Motion for Preliminary Injunction should be **GRANTED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Reply was filed using the Court's electronic filing system and will thereby be electronically delivered to all parties through their counsel of record.

s/Mark R. Brown
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