UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.
Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON
MAGISTRATE JUDGE KEMP

HUSTED, et al.,
Defendants.
_____/

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR FIRST MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Ohio's Constitution, Article V, § 7, has been interpreted by the Sixth Circuit to "require[] that all political parties, including minor parties, nominate their candidates at primary elections. Ohio Const. Art. V, § 7." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006). Consequently, in order to run under as an LPO candidate in a general election, one must first run in an LPO primary.

Running in primaries in Ohio requires submitting nominating petitions supported by voters' signatures. *See* O.R.C. § 3513.05; *see, e.g.*, Ohio Secretary of State Directive 2013-02 at page 2 (Jan. 31, 2013). Signatures must be gathered and witnessed by "circulators." *See* O.R.C. § 3513.05. As explained more fully in Plaintiffs' First Motion for Preliminary Injunction, Doc. No. 3, on June 21, 2013 Ohio changed its law, specifically O.R.C. § 3503.06, to require that circulators of candidates' petitions for primaries be residents of Ohio. This change was codified at

O.R.C. § 3503.06(C)(1)(a). Because candidates' nominating petitions for primaries were due on February 5, 2014, Plaintiffs on September 25, 2013 filed their initial Complaint, Doc. No. 1, challenging Ohio's residence requirement and requesting preliminary relief. *See* Doc. No. 3.

Counts One and Two of this Complaint, which are included verbatim in the now-operative Third Amended Complaint (Doc. No. 188), expressed facial and as-applied challenges to O.R.C. § 3503.06(C)(1)(a) under the First Amendment. Plaintiffs sought preliminary and permanent injunctive relief, as well as declaratory relief, preventing enforcement of O.R.C. § 3503.06(C)(1)(a). *See* Third Amended Complaint (Doc. No. 188) at ¶ 380 A.- D.

On November 6, 2013, while Plaintiffs' motion for preliminary relief was pending, Intervenor-Defendant-Ohio ("the State" or "Ohio") passed legislation, S.B. 193, voiding the Secretary's previously-issued Directives assuring Plaintiff-LPO ballot access and stripping Plaintiff-LPO of its right to participate in Ohio's primaries.

Plaintiffs amended their Complaint on November 8, 2013, *see* Doc. No. 16, to challenge S.B. 193's retroactive application to Ohio's 2014 primary. Count Three of this Complaint, which is now included verbatim as Count Three in the Third Amended Complaint (Doc. No. 188), argued that retroactive application of S.B. 193 to Plaintiff-LPO violated Due Process. Plaintiffs therefore immediately moved for a preliminary injunction to prevent S.B. 193's application to Ohio's 2014 election cycle. *See* Doc. No. 17. Plaintiffs also demanded permanent and declaratory relief. Third Amended Complaint (Doc. No. 188) at ¶ 380.E. & I.

Count Four, which is now included verbatim as Count Four of the Third Amended Complaint (Doc. No. 188), argued that S.B. 193 violated Equal Protection and the First Amendment. Specifically, Plaintiffs claimed that S.B. 193 failed to provide "any mechanism by

which [Plaintiff-LPO] can gain access to Ohio's 2014 primary and thereby enjoy the same party membership privileges afforded to the two major parties." *Id.* at ¶ 344. Consequently, "Defendant-Secretary's enforcement of S.B. 193 thereby violates the First Amendment and the Equal Protection Clause ..." *Id.* at ¶ 346. Plaintiffs sought preliminary, *see id.* ¶ 380.H., permanent, *see id.* ¶ 380.I., and declaratory relief. *See id.* ¶ 380.F. & G.

Count Five, which is now included as Count Five in the Third Amended Complaint (Doc. No. 188), challenged S.B. 193 under Ohio's Constitution. Specifically, Plaintiffs charged that Article V, § 7, of Ohio's Constitution requires that parties select their nominees through primaries. New and dissolved political parties, including Plaintiff-LPO, are not afforded primaries on an equal footing with the two major parties in violation of Article V, § 7, as well as Equal Protection. Plaintiffs sought preliminary, *see id.* ¶ 380.H., permanent, *see id.* ¶ 380.L., and declaratory relief. *See id.* ¶ 380.J.

This Court on November 13, 2013, granted Plaintiffs' request for preliminary relief and enjoined enforcement of O.R.C. § 3503.06(C)(1)(a) under the First Amendment. *See* Doc. No. 18. On January 7, 2014, it preliminarily enjoined application of S.B. 193 to the 2014 election in Ohio. *See* Doc. No. 47. The Court concluded, in sum, that retroactive application of S.B. 193 violated the federal constitution. It found it unnecessary to resolve at that time Plaintiffs' state-constitutional challenge (Count Five) or their Equal Protection challenge (Count Four).

On March 7, 2014, Plaintiff-Earl was removed from the primary ballot. Because S.B. 193 requires that a party's candidate for Governor win at least 2% (and perhaps 3%) of the gubernatorial vote to remain qualified, Earl's removal proved debilitating to the LPO. Without a gubernatorial candidate, the LPO will be dissolved by S.B. 193 after the November election.

Plaintiffs moved to amend their Complaint on March 7, 2014, *see* Doc. No. 56, to challenge Earl's removal. This Second Amended Complaint challenged in Count Six the substantive statute used to remove Earl from the primary ballot, O.R.C. 3501.38(E)(1) (Ohio's "employer-statement" rule), its application to Earl in Count Seven, and its novel interpretation in Count Eight. These three Counts are now included as Counts Six, Seven and Eight in the Third Amended Complaint (Doc. No. 188). Plaintiffs sought preliminary, *see id.* ¶ 380.N., permanent, *see id.* 380.O., and declaratory relief, *see id.* ¶ 380.O., under Count Six. They likewise sought preliminary, *see id.* ¶ 380.N., permanent, *see id.* ¶ 380.R., and declaratory relief, *see id.* ¶ 380.P. & V., under Count Seven, and preliminary, *see id.* ¶ 380.N., permanent, *see id.* ¶ 380.U., and declaratory relief, *see id.* ¶ 380.S., under Count Eight.

This Court on March 19, 2014, after rejecting from the bench Felsoci's motion to dismiss Counts Six, Seven and Eight, denied Plaintiffs' request for preliminary relief restoring Earl to the primary ballot. *See* Doc. No. 80. The Sixth Circuit affirmed. *See* Doc. No. 107. On September 11, 2014, following discovery, Plaintiffs again amended their Complaint. *See* Doc. No. 188. In this Third Amended Complaint, Plaintiffs re-stated Counts One through Eight from their Second Amended Complaint and added a new Count Nine. The Third Amended Complaint included factual allegations supporting Plaintiffs' selective application claim under Count Seven, as well as a more-detailed demand that Earl be restored to the November ballot. Defendant-Secretary moved for summary judgment on Counts Six, Seven, Eight and Nine on September 17, 2014. *See* Doc. No. 205.

Plaintiffs moved for preliminary relief based on newly discovered evidence and their Third Amended Complaint on September 15, 2014. *See* Doc. No. 192. Following a full hearing, this

Court denied that relief on October 17, 2014. *See* Doc. No. 260.

ARGUMENT

"Summary judgment is only appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting Fed. R. Civ. P. 56(c)). "The burden is generally on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by 'showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

I. Plaintiffs Are Entitled to Final Judgment Under Counts One, Two and Three.

Plaintiffs respectfully move for summary judgment under Counts One, Two, and Three of the Third Amended Complaint (Doc. No. 188) based on this Court's two preliminary injunctions establishing that (1) O.R.C. § 3503.06(C)(1)(a) (Ohio's residence requirement for circulators) violates the First Amendment, *see* Doc. No. 18, and (2) S.B. 193's retroactive application to the 2014 election cycle violates the First and Fourteenth Amendments. *See* Doc. No. 47. No genuine issues of material fact exist under Counts One, Two and Three of the Third Amended Complaint and Plaintiffs are entitled to judgment as a matter of law.

II. Plaintiffs Are Entitled to Final Judgment Under Counts Four and Five.

This Court has yet to resolve Plaintiffs' claims to prospective relief under Counts Four (arguing that S.B. 193 violates Equal Protection and the First Amendment) and Five (arguing that S.B. 193 violates the Ohio Constitution). In its award of preliminary injunctive relief entered on

January 7, 2014, the Court ruled that S.B. 193's retroactive application to the 2014 election violated Due Process. *See* Doc. No. 47 at PAGEID # 835. It reserved ruling on prospective challenges to S.B. 193 under both the federal Constitution, *see id.* at PAGEID # 834-35, and Ohio's Constitution. *See id.* at PAGEID # 836.

The Court expressed misgivings about S.B. 193's unfairness to minor parties: "the elimination of Plaintiffs from the 2014 primary ballot by retroactive application of S.B. 193 places Plaintiffs at a political disadvantage compared to the major parties regardless of whether Plaintiffs have a constitutional right to participate in primary elections." Doc. No. 47 at PAGEID # 833. As explained below, S.B. 193's "political disadvantage" carries forward to future elections and should be permanently enjoined.

A. S.B. 193 Places Dissolved Parties Like Plaintiff-LPO at a Political Disadvantage in Violation of the First Amendment and Equal Protection.

Senate Bill 193 ("S.B. 193") violates both the First Amendment and the Equal Protection Clause. It accomplishes this by placing new parties, including Plaintiff-LPO, at a political disadvantage. It leaves parties that are not recognized by Ohio, including Plaintiff-LPO after the November 2014 election, with no mechanism by which they can register party members for future general elections until at least 2017. After the passage of S.B. 193, only the two major parties will have registered party members for future general elections.

Ohio, unlike most states, registers voters with political parties through the use of its primaries. *See* Third Amended Complaint at ¶ 49. Voters do not identify their political affiliations when they register to vote; they cannot change their registrations by mailing in forms. They affiliate with parties by voting in primaries. The ACLU, which represents Intervenor-Plaintiffs in this case, is without a doubt correct when it states that "primary elections are the only occasion

for Ohio voters to select or change their party affiliation." Doc. No. 165-1 at PAGEID # 3276.

Without its primary, Plaintiff-LPO is unable to continue registering members and will lose its present members. Third Amended Complaint at ¶ 50. The two major parties, meanwhile, are able to continue registering new members, as well as keep their previous members. And among these new members there will likely be former members of minor parties, like the Plaintiff-LPO. The LPO during the 2012 primary had approximately 5,000 registered members.

Party membership carries many practical benefits. *See, e.g., Baer v. Meyer*, 577 F.S. 838, 843 (D. Colo. 1984) (stating that party registration "lists are invaluable in organizing campaigns, enlisting party workers and raising funds."). And in Ohio, party membership has legal benefits, too. For example, Ohio imposes party-membership requirements on the signers and circulators of candidates' nominating petitions. *See* O.R.C. § 3513.05; Doc. No. 165-1 at PAGEID # 3276-77 (ACLU Memorandum Supporting Motion for Summary Judgment). Even if Plaintiff-LPO were to re-qualify for Ohio's 2016 general election ballot by submitting enough signatures by July of that year, S.B. 193 still requires that its candidates for state-wide office submit additional nominating petitions "signed by at least fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years…." S.B. 193, § 1 (amending O.R.C. § 3517.012). This means that all electors who voted a partisan primary ballot in 2015 or 2016 will belong to some otheer political party -- quite likely the Republican or Democratic Party.[1] *See* Doc. No. 165-1 at

[1] That Ohio law also authorizes unaffiliated voters to circulate and sign nominating petitions not change the fact that Ohio favors the two major parties, which have primaries. Major-party candidates enjoy this same privilege to use unaffiliated voters, along with the privilege of having party members to sign and circulate. The major parties are therefore awarded a distinct advantage through being able to register party members at their primaries.

PAGEID # 3280-81 (describing how dissolved parties lose their members under S.B. 193).

This disadvantage will carry over to future election cycles. The ACLU correctly states that "S.B. 193 will then prevent ... dissolved parties [including Plaintiff-LPO] from re-forming and fielding candidates until 2016, and because these candidates will be denied access to the 2016 Primary Election, voters will be barred from affiliating with these parties until at least 2017." Doc. No. 165-1 at PAGEID # 3279; *see also id.* at PAGEID # 3283 (ACLU Memorandum explaining that dissolved parties will have no primaries in 2015).

If this were not enough, S.B. 193 completely strips the dissolved and emerging parties of their rights to participate in primaries and general elections on an equal basis in Ohio during odd-numbered years. The ACLU's careful, and correct, interpretation of S.B. 193 leads it to conclude that "in 2015 and all other odd-numbered years, S.B. 193 *completely precludes* minor parties from forming ad fielding candidates." Doc. No. 165-1 at PAGEID # 3276 (emphasis original). After all, "O.R.C. § 3517.01(A) ... entitles the party to 'nominate candidates to appear on the ballot at the *general election* held in [an] *even-numbered year*[.]" *Id.* (emphasis and inserts original).[2] Plaintiff-LPO has run candidates in odd-numbered years in the past, *see* Third Amended Complaint (verified), Doc. No. 188 at ¶ 2, and will do so in 2015 if it remains a

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[2] This is confirmed by S.B. 193's amendment to O.R.C. § 3517.012, which establishes the deadlines for protests (by any voter!) to petitions filed by new parties. These protests are not due until 114 days before the general elections, meaning that they cannot be decided by the Secretary until well-after primaries have been held. Is the Secretary prepared to recognize some sort of limbo for parties that successfully file their petitions before primaries, but that can still be challenged several months later? If primaries are held for the new parties under these circumstances, do the elected candidates forfeit their elections when protests are subsequently filed? The absurdity of all this makes clear that S.B. 193 does not envision new parties obtaining ballot access by way of S.B. 193's petitioning process before primaries are held.

recognized political party.

This is not the first time that Ohio has attempted to benefit the two major parties at the expense of the minor parties. In *Williams v. Rhodes*, 393 U.S. 23, 25 (1968), the Supreme Court observed that Ohio for years made it "virtually impossible" for minor parties to gain ballot access. The Supreme Court struck down this "permanent monopoly," stating that "[n]ew parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Id.* at 32.

Applying the logic of *Williams v. Rhodes*, federal courts have often invalidated "perks" designed to shield the major parties from minor-party challengers. *Green Party of Michigan v. Land*, 541 F. Supp.2d 912 (E.D. Mich. 2008), provides a recent illustration in the context of party membership. Michigan, like Ohio, uses primaries to register party members. As now established by S.B. 193 in Ohio, minor parties in Michigan were not necessarily entitled to primaries. In *Land*, 541 F. Supp.2d 912, the court concluded that Michigan's formula for registering party members (and the many benefits it entailed) unconstitutionally discriminated against the minor parties. The court rejected the argument that minor parties necessarily differ from major parties, because "[i]n a general election ... the parties do compete directly with each other, and 'they have the same interest in having resources which assist them in competing.'" *Id.* at 917.

The court in *Land* concluded that "[o]ne of the most valuable kinds of information for use in campaigns is the party affiliation of individual voters." *Id.* Further, it rejected Michigan's claim that minor parties were provided an equal opportunity to earn primaries (and register members) by winning more votes in the preceding general election:

> This argument fails to appreciate that when the Statute was passed in 2007, only the Democratic and Republican parties had met the 20% threshold in the previous presidential

> election. ... Accordingly, while at first blush the Statute may appear neutral on its face, further inquiry reveals that the Statute, by its own terms, benefits the major political parties to the detriment of all others.

Id. at 917-18.

For this same reason, S.B. 193 unconstitutionally benefits the two major parties in Ohio at the expense of new and dissolved parties. They are assured primaries after the November 2014 election. They will retain and enroll new members. The LPO will not. S.B. 193 "benefits the major political parties to the detriment of all others." Further, the major parties will be able to run partisan candidates in odd-number years, like 2015, while dissolved parties will not. S.B. 193 violates Equal Protection and the First Amendment.[3]

B. S.B. 193 Violates Ohio's Constitution By Denying to New Political Parties Their Rights to Hold Primaries.

The Sixth Circuit in *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006), which invalidated Ohio's previous limitations on minor-party access, stated that Ohio's "Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections. Ohio Const. Art. V, § 7." *Id.* at 582. Nothing has changed since that ruling. No court has stated the contrary. Ohio's Constitution has not changed. The Sixth Circuit's ruling in *Blackwell* remains correct to this day.

Article V, § 7, of Ohio's Constitution 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 ...." Ohio's apparent argument in support of S.B. 193 is that § 7 authorizes "petitions as provided by law" as alternatives to primaries. However, the Ohio Supreme Court in

State ex rel. Gottlieb v. Sulligan, 193 N.E.2d 270, 273 (Ohio 1963), rejected this interpretation of Article V, § 7.

Sulligan addressed whether a major party's substitution of candidates following a primary was permissible under Ohio's Constitution. The Ohio Supreme Court ruled that it was, but under a separate Ohio constitutional provision, Article II, § 27, which provides for the filling of vacancies in public office. It made clear that a party's nomination by petition of its candidates, in the first instance, cannot be squared with Article V, § 7.

Specifically, Article V, § 7's reference to "petitions as provided by law," the Ohio Supreme Court ruled in *Sulligan*, was limited to independent candidates: "the nominating petition is the method by which the independent candidate seeks his place on the elective ballot." *Id.* at 273. What this means is that political parties must use primaries in the first instance to nominate candidates. They may substitute candidates for those who prevailed in the primary, but they cannot simply nominate their candidates by convention or petition.

Ohio therefore cannot rely on the "petition" language of Article V, § 7, to authorize the election or appointment of party-candidates outside the primary process. *Sulligan*'s interpretation of Article V has never been questioned. Indeed, Ohio has routinely argued in cases filed by the Plaintiff-LPO challenging Ohio's draconian ballot access laws that Ohio's primary requirement, found in Article V, § 7, presented the substantial and compelling reason for forcing minor parties to file early. *See, e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006).

C. Intervenor-Defendant-Ohio Has Waived Ohio's Eleventh Amendment Immunity.

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[3] Although Plaintiffs have not included a stand-alone facial challenge to S.B. 193 under the First Amendment in their Third Amended Complaint, Plaintiffs fully join the ACLU's persuasive claim that S.B. 193 facially violates the First Amendment.

The Eleventh Amendment to the United States Constitution prohibits suits against States in federal court. Consequently, Plaintiffs could not have forced the State of Ohio, by name, to defend either Ohio's residence requirement for circulators or S.B. 193 in this Court. Just as plain is that Plaintiffs' federal-law Counts against Defendant-Husted challenging Ohio's residence requirement for circulators, S.B. 193, and Ohio's employer-statement rule are proper in this Court under *Ex parte Young*, 209 U.S. 123 (1908) (creating exception to the Eleventh Amendment for federal claims seeking prospective relief against state officers in their "official capacities").

The fiction in *Ex parte Young*, which allows state officials to be sued for federal constitutional violations in federal court, does not extend to declaratory and injunctive claims made under State laws. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984). Consequently, the Defendant-Secretary, is not amenable to suit under Article V, § 7, of the Ohio Constitution in the absence of a waiver. Here, there is just such a waiver.

Intervenor-Defendant-Ohio ("the State" or "Ohio") voluntarily intervened in this action to defend its newly enacted residence requirement for circulators. *See* Doc. No. 5. Since that time, Ohio has gone well-beyond just defending Ohio's residence requirement for circulators; it has actively defended S.B. 193. On September 8, 2014, for example, Ohio moved for summary judgment claiming that S.B. 193 is constitutionally acceptable. *See* Doc. No. 185. Because Ohio has voluntarily decided to defend S.B. 193 in this Court, it has waived its and the Secretary's Eleventh Amendment immunity from suit under both federal and State law.

1. Ohio's Voluntary Intervention Constitutes Waiver.

Had the State of Ohio not voluntarily intervened as an additional Defendant, Plaintiffs would have been barred by the Eleventh Amendment from prosecuting in this Court their Ohio

constitutional claims for declaratory and injunctive relief. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 120 (1984). Nor could Plaintiffs have forced Ohio, by name, to defend against Plaintiffs' federal constitutional claims. *See, e.g.*, *Alabama v. Pugh*, 438 U.S. 781 (1978) (holding that State of Alabama could not be joined as defendant in federal court in § 1983 case filed under Eighth Amendment). However, once Ohio voluntarily intervened in this matter, Plaintiffs were freed from these Eleventh Amendment constraints. Ohio became a Defendant of its own choosing.[4]

The Supreme Court's holding in *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), makes clear that a state's voluntary invocation of federal jurisdiction, as here, waives its Eleventh Amendment immunity. There, Georgia was properly sued in state court, where it enjoys no Eleventh Amendment immunity. Georgia removed the action to federal court and then attempted to assert an Eleventh Amendment defense. The Supreme Court rejected the tactic, finding that Georgia's voluntary invocation of federal jurisdiction waived its Eleventh Amendment immunity:

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

Id. at 619. The Supreme Court explained that "[t]o adopt the State's Eleventh Amendment

[4] This does not mean that Ohio may be involuntarily sued under 42 U.S.C. § 1983. It cannot because of *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), which held that States are not proper defendants under § 1983. *See Lapides*, 535 U.S. at 617-18 (waiver through removal applies to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings"). It is for this reason that Plaintiffs' Count Five is prosecuted under Ohio's own remedial mechanism, which can be used to properly name Ohio and its agents as defendants. *See Racing Guild of Ohio, Local 304 v. State Racing Commission*, 503 N.E.2d 1025 (Ohio 1986) (discussed *infra*).

position would permit States to *achieve unfair tactical advantages*, if not in this case, in others." *Id.* at 621 (emphasis added and citations omitted).

The Supreme Court pointed to *Clark v. Barnard*, 108 U.S. 436 (1883), a case where a state had intervened in federal litigation as the paradigmatic example of how anomalous it would be to allow a state to voluntarily enter federal court yet claim immunity: "[T]he Court has made clear in general that 'where a State *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.'" *Lapides*, 535 U.S. at 619 (emphasis in original) (citing *Clark v. Barnard*, 108 U.S. 436 (1883)).

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

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) ("courts have deemed that a state that voluntarily appears in federal court has waived its immunity for all compulsory counterclaims"), as well as to ancillary proceedings needed to enforce judgments. *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). Moreover, courts have specifically ruled that a state's waiver (through either intervention or removal) exposes it to claims that are later added under Federal Rule of Civil Procedure 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. Pennsylvania Dep't of Public Welfare*, 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." *See also 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").

2. Ohio's Active Defense of S.B. 193's Merits Constitutes Waiver.

Ohio's voluntary intervention in this case exposed Ohio and its Secretary to additional claims that were properly filed under the Federal Rules of Civil Procedure. Even if Ohio had stood by its Eleventh Amendment defense and refused to litigate the merits surrounding S.B. 193, its waiver would have been complete.

Here, however, Ohio has gone much farther. It has chosen to actively defend the merits of

S.B. 193. Indeed, it moved for summary judgment claiming that S.B. 193 is constitutional. *See* Doc. No. 185 at PAGEID # 3614 ("The challenged provisions of S.B. 193 are fully constitutional[.]"); *id.* at PAGEID # 3631 ("[T]he State of Ohio respectfully requests ... that the Court grant summary judgment in Defendants' favor on Intervenor-Plaintiffs' federal constitutional challenge to S.B. 193.").

That Ohio's motion for summary judgment is directed at the ACLU's constitutional challenge is of no moment. Ohio was just as immune from suit in this Court under that challenge. *See Alabama v. Pugh*, 438 U.S. 781 (1978). Still, Ohio chose to waive its immunity from suit; and in doing so it has rendered itself susceptible to claims under its own laws, *see Stroud v. McIntosh*, 722 F.3d 1294, 1300 (11th Cir. 2013) ("the source of a plaintiff's claim against a state (state law or federal law) is irrelevant to whether a state waives its immunity against that claim by removing to federal court"), be they pressed by one Plaintiff or another.

Ku v. State of Tennessee, 322 F.3d 431 (6th Cir. 2003), establishes that a State's choosing to litigate the merits of a dispute in federal court waives Eleventh Amendment protections. There, 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 belated 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 *Ku* is that a State cannot have it both ways. Consistency and fairness

dictate that when a State, by name, voluntarily defends its law in federal court, it has waived Eleventh Amendment immunity. Inviting judgment on the merits of a claim, as in *Ku*, necessarily constitutes a waiver of Eleventh Amendment immunity for that claim.

Clark, *Lapides*, *Embury*, and *Ku* hold that States, following their voluntary invocation of federal jurisdiction, are held to the same standards applied to other litigants. States cannot join federal litigation and then selectively dictate which arguments and challenges can be made by their opponents. Once it has voluntarily joined a federal case, a State is a party "to the full extent required for its complete determination." *Clark v. Barnard*, 108 U.S. at 448. The State is subject to counterclaims, as in *Clark* and *Knight,* 321 F.3d at 125-26 (Fed. Cir. 2003), as well as amendments to complaints, as in *Embury*, 361 F.3d at 564 (9th Cir. 2004). "[T]he 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." *Id.* (emphasis added). "[T]he source of a plaintiff's claim against a state (state law or federal law) is irrelevant to whether a state waives its immunity against that claim by removing to federal court." *Stroud v. McIntosh,* 722 F.3d 1294, 1300 (11th Cir. 2013).

Here, Ohio chose to defend the merits of S.B. 193 long after Plaintiffs amended their Complaint to challenge S.B. 193. Ohio can hardly claim surprise. No claim has been made that Plaintiffs somehow violated federal law or the Federal Rules of Civil Procedure by adding Count Five. "Additional limits" on a State's amenability to suit in federal court, 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).[5]

By voluntarily intervening in this case, and then voluntarily defending the merits of S.B. 193, Ohio has waived its Eleventh Amendment immunity. Either would be sufficient. Together they leave no doubt.

3. Ohio Law Authorizes Declaratory and Injunctive Relief Against State Officials and the State.

Ohio law authorizes declaratory and injunctive actions against Ohio, both by name and through its departments and agencies (including the Secretary), in Ohio's Courts of Common Pleas. Neither Ohio nor its agency enjoys state-law sovereign immunity from such an action. *See*, *e.g.*, *Mega Outdoor, L.L.C., v. Dayton*, 878 N.E.2d 683, 692 (Ohio App. 2007) ("Sovereign immunity applies to money damages, not to claims for equitable relief, such as injunctive relief.").[6]

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[5] The Secretary has argued that Ohio's waiver of its Eleventh Amendment immunity does not apply to him. *See* Doc. No. 31. 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 immunity from its principal, the State. As the principal, Ohio has the right to waive any derivative Eleventh Amendment immunity of its agent. 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.

[6] This Court reserved judgment on whether O.R.C. § 2721.12 applies in federal court. *See* Doc. No. 47 at PAGEID # 836. This Court and the Northern District have repeatedly ruled that § 2721.12 is inoperative in federal court. *See Kammeyer v. City of Sharonville*, 311 F. Supp. 2d 653, 662 (S.D. Ohio 2003); *Bell v. Marinko*, 235 F. Supp. 2d 772, 780 (N.D. Ohio 2002); *Clay v. Edward J. Fisher, Jr. M.D., Inc.*, 588 F. Supp. 1363, 1365 (S.D. Ohio 1984); *Zilba v. City of Port Clinton, Ohio*, 924 F. Supp.2d 867, 884 (N.D. Ohio 2013).

Racing Guild of Ohio, Local 304 v. State Racing Commission, 503 N.E.2d 1025 (Ohio 1986), makes this clear. There, a state agency claimed that it was protected from suit in the Courts of Common Pleas by sovereign immunity. The Ohio Supreme Court disagreed:

> Ohio jurisprudence is literally riddled with examples of actions for injunctive relief proceeding against state departments, boards, agencies and commissions, all defined as the "state" under O.R.C. § 2743.01(A) .... [I]t is clear that an action for injunctive relief may be brought against the state as defined in O.R.C. § 2743.01(A) in a court of common pleas.

Id. at 1028.

III. Plaintiffs Cross-Move for Summary Judgment Under Counts Six Through Nine.

In order that this case can be fully resolved, a proper appellate record can be created, and Plaintiffs right to appeal (and possibly seek certiorari) is fully preserved, Plaintiffs respectfully cross-move for summary judgment under Counts Six through Nine.[7] Defendant-Secretary moved for summary judgment on these Counts on September 17, 2014. *See* Doc. No. 205. Plaintiffs herein incorporate by reference their Response, *see* Doc. No. 207, to the Secretary's Motion for Summary Judgment, their two unsuccessful Motions for Preliminary Relief, *see* Docs. No. 57 & 192, their post-Hearing Brief, *see* Doc. No. 256, and all evidence (including documents,

[7] Ostensibly after learning that Plaintiffs were moving for Summary Judgment, Felsoci on October 22, 2014 formally threatened Plaintiffs with sanctions unless Plaintiffs immediately dismissed their claims against him. *See* Exhibit 3. Felsoci's threat is improper on so many levels that it is difficult to know where to begin. First, he made the threat without even reading Plaintiffs' Motion for Summary Judgment, which explains that Plaintiffs seek to preserve the Counts for appeal (and possible certiorari). Second, Felsoci's motion to dismiss Counts Six through Eight was denied, and he has never even moved to dismiss Count Nine. Third, his demand is incorrectly premised on an equation between preliminary relief and final success on the merits. Fourth, it assumes that litigation beyond an unsuccessful motion for preliminary relief is necessarily frivolous and vexatious. Fifth, it ignores the fact that Felsoci voluntarily intervened in this case; Plaintiffs did not add him. Sixth, it ignores that Plaintiffs have a pending Rule 37 expense request against Felsoci for discovery violations. *See* Doc. No. 170. Seventh, it perpetuates the obstructive behavior that this Court found dirtied Felsoci's hands. *See* Doc. No. 260 at PAGEID # 7104-05.

depositions and live testimony) submitted in support thereof.[8]

CONCLUSION

Plaintiffs respectfully move for **SUMMARY JUDGMENT**.

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I certify that this Motion, Memorandum and Proposed Order were 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*
Mark R. Brown

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[8] Meaningful relief on appeal is still possible under Counts Six through Nine notwithstanding Earl's absence from the general election ballot. For example, the Secretary can be ordered to continue to recognize Plaintiff-LPO as a political party in Ohio. *See* Third Amended Complaint at ¶ 380.EE. The claims under these Counts, moreover, are 'capable of repetition yet evading review.' An appeal from final judgment based on these Counts would not be moot.