IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,	:	
	:	Case No. 2:13-cv-00953
Plaintiffs,	:	
	:	Judge Watson
v.	:	
	:	Magistrate Judge Kemp
JON HUSTED,	:	
	:	
Defendant.	:	

INTERVENOR-DEFENDANT THE STATE OF OHIO'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON INTERVENOR-PLAINTIFFS' FACIAL FEDERAL CONSTITUTIONAL CHALLENGE TO S.B. 193

Respectfully submitted,

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In their response to Intervenor-Defendant the State of Ohio's Motion for Summary Judgment (Doc. No. 185), Intervenor-Plaintiffs admit that:

- S.B. 193's requirements regarding the number of petition signatures and the timing of the submission of those signatures do not render it unconstitutional (Doc. No. 216, pp. 5-6);
- The requirement that parties field a presidential or gubernatorial candidate in order to obtain a four-year ballot-qualification does not render S.B. 193 unconstitutional (Doc. No. 216, p. 9); and
- The requirement that new parties nominate candidates by petition rather than by primary does not render S.B. 193 unconstitutional (Doc. No. 216, p. 10).

Specifically, regarding the petition signature percentages and deadlines, Intervenor-Plaintiffs admit: "Intervenor-Plaintiffs do not assert that every isolated provision in S.B. 193 is unconstitutional. . . . Even if Intervenor-Defendant were correct that these other states' provisions – in isolation – were more onerous than those imposed by S.B. 193, this of course would not automatically render S.B. 193 constitutional . . . because the provisions of S.B. 193 do not exist in a vacuum, and must be evaluated in the context of the statute and in terms of their interaction with other operative Ohio election law." (Doc. No. 216, pp. 5, 7) (emphasis in original.)

Regarding S.B. 193's requirement that parties field a presidential or gubernatorial candidate in order to obtain a four-year ballot-qualification, Intervenor-Plaintiffs admit: "To this, Intervenor-Plaintiffs once again note that they have not asserted that this provision, in isolation, could not withstand constitutional scrutiny." (Doc. No. 216, p. 9). Regarding S.B. 193's requirement that new parties nominate candidates by petition rather than by primary, Intervenor-Plaintiffs admit: "To this, Intervenor-Plaintiffs must again note that they are ***not*** contending that a state can never constitutionally preclude minor parties from accessing the primary ballot." (Doc. No. 216, p. 10) (emphasis in original).

Perhaps because none of their major complaints about S.B. 193 render it unconstitutional, Intervenor-Plaintiffs' response instead attempts to paint a doomsday scenario in which minor parties are all but prohibited from associating with voters due to S.B. 193. But the picture they paint is inaccurate and fails to take into account the differences between major and new and/or minor parties. In actuality, S.B. 193 is a garden-variety ballot-access statute that is in the middle of the road among other states' statutes have withstood constitutional scrutiny.

As an initial matter, Intervenor-Plaintiffs do *not* assert that S.B. 193 standing alone is unconstitutional. Rather, Intervenor-Plaintiffs argue that S.B. 193 *plus* "the rest of Ohio election law" collectively violate their rights. (Doc. No. 216, p. 6). Yet, the only law Intervenor-Plaintiffs challenge in this lawsuit is S.B. 193—not Ohio's entire body of election law. They seek to strike down the only the portions of Ohio's election law that require them to expend effort to qualify for the ballot (i.e., S.B. 193); they have *not* challenged the other aspects of Ohio's law that they argue combine with S.B. 193 to unconstitutionally burden them.

Contrast this scenario with many of the cases Intervenor-Plaintiffs cite, in which each of the laws that the various courts considered in combination *were at issue in the case*. For example, in *Libertarian Party of Ohio v. Blackwell*, the Sixth Circuit expressly considered "whether the combined effect of the Ohio election laws *being challenged* impermissibly burdens the plaintiffs' rights to free speech and association under the First Amendment." 462 F.3d 579, 585 (6th Cir. 2006) (emphasis added). Similarly, in *Lee v. Keith*, the Seventh Circuit noted a prior case (called *Stevenson*) in which it had rejected a challenge to only one aspect of Illinois voting law (an early filing deadline). 463 F.3d 763, 770 (7th Cir. 2006). In *Stevenson*, the court had not considered other aspects of Illinois voting law. *Id*. ("the plaintiffs in *Stevenson* challenged only the early filing deadline; they did not ask this court to consider the deadline in

conjunction with Illinois's demanding signature requirement and its corresponding rule that disqualifies anyone who signs an independent's nominating petition from voting in the primary"). Because of this, the Seventh Circuit found that *Stevenson* was not controlling in *Lee* because an additional aspect of Illinois voting law (a signature requirement) was at issue in *Lee* that had not been at issue in *Stevenson*. *Id*. ("An early filing deadline coupled with a less burdensome signature requirement may well pass constitutional muster."). Explaining that the court needed to view both requirements together this time around, the court said, "we are required to evaluate *challenged* ballot access restrictions together." *Id*. (emphasis added).

To reiterate, here, only S.B. 193 is at issue. However, even if the "combined effect" of S.B. 193 and the rest of Ohio's elections laws *is* considered, Intervenor-Plaintiffs' doomsday scenario quickly falls apart: Ohio law makes it easy for new and minor parties to access the ballot.

First, for the reasons set forth in the State's Motion for Summary Judgment, under S.B. 193, minor parties may qualify for the ballot and may field candidates in even- or odd-numbered years through the filing of what Intervenor-Plaintiffs concede is an unburdensome number of party-formation petitions. (*See* Doc. No. 216, p. 7 ("these other states' provisions [that were upheld] – in isolation – were more onerous than those imposed by S.B. 193")). Intervenor-Plaintiffs admit that under Ohio law, new parties come into existence on the date their petitions are filed. (Doc. No. 216, p. 15); R.C. 3517.012(A)(1). Intervenor-Plaintiffs fail to identify *any* language in S.B. 193 or any other statute that prevents a party that comes into existence in an odd-numbered year from running local candidates in the odd-year election (there are no statewide candidate races in odd-numbered years).

Instead, they merely call the suggestion "preposterous" and "audacious." Yet, these adjectives are all they can muster. Ohio law does require a party to state its intent to run a candidate in the next even-year election, and does expressly confirm that the party may do so. R.C. 3517.012(A)(1). This only makes sense, because even-year elections are more significant, as they are presidential or gubernatorial election years; odd-year elections have no state-wide candidate races. More to the point, nothing in S.B. 193 or any other part of Ohio election law *prevents* a newly-formed party that has complied with the petition-filing requirements from running a candidate in the odd-year election.[1]

Second, to reach the ballot, in addition to filing its party-formation petitions, a new or minor party must simply file candidate-nominating petitions. Intervenor-Plaintiffs cannot seriously contend that this requirement is burdensome when a newly-formed party's candidate must submit only **50 (fifty)** signatures for statewide candidates and **5 (five)** signatures for local candidates. R.C. 3517.012(B)(2)(a)-(b). Major-party candidates, by contrast, must submit **1000 (one thousand)** signatures for statewide offices. R.C. 3513.05.

It is well-settled that a state can reserve ballot access only for those parties that have demonstrated some modicum of support. *Jenness v. Fortson*, 403 U.S. 431, 432 (1971) (finding an important state interest exists "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."). The low signature requirement for minor party candidates set forth in R.C. 3517.012(B)(2)(a)-(b) is Ohio's way of verifying that minor political

[1] Contrary to Intervenor-Plaintiffs' insinuation on page 16 of their response, this position is not inconsistent with the State's prior statement that without S.B. 193, minor parties would have no means to access the ballot. S.B. 193 *provides* the means to access the ballot: filing party-formation and candidate-nomination petitions. The fact that a party who complies with those requirements of S.B. 193 may access the ballot does not contradict the fact that without S.B. 193, they would have nothing to comply with and no access to the ballot.

parties have a "modicum of support". The Ohio General Assembly is permitted to make the determination that Ohio's ballots should not be cluttered with candidates who cannot meet such low thresholds. *Monro v. Socialist Workers Party*, 479 U.S. 189 193-95 (1986) (the state has an interest in "preserving the integrity of the electoral process and in regulating the number of candidates on the ballot," in "requir[ing] a preliminary showing of significant support before placing a candidate on the general election ballot," and in reducing "voter confusion, ballot overcrowding, [and] the presence of frivolous candidacies" on the ballot).

Third, under S.B. 193 a newly-formed political party never has to meet *any* particular *vote* percentage in an election in order to access the ballot in a subsequent election. Intervenor-Plaintiffs' complaint that they must achieve 2% or 3% of the vote in a presidential or gubernatorial race to become ballot-qualified for four years is a red-herring. As explained above, a party may qualify for the ballot *annually* by filing party-formation petitions without any of its candidates ever achieving a particular vote percentage in any particular race. The 2% or 3% requirement for obtaining four-year ballot access is a bonus above and beyond the ability to access the ballot via petition. Providing this bonus does not unconstitutionally burden minor parties' ballot access when they have the option to qualify by petition. *See American Party of Texas v. White*, 415 U.S. 767, 781-82 (1974).

Finally, Intervenor-Plaintiffs' hyperbolic assertions that S.B. 193 prohibits minor parties from "associating" with voters until some far-off-sounding year are nothing more than atmospherics. S.B. 193 does not prevent anyone from seeking petition signatures and engaging in party-organizing activities at all. The Plaintiffs may file a party formation petition in 2015 and run candidates in 2015 and 2016, and may do so again following the 2016 election, regardless of what percentage of the vote they receive in that election. And, as Intervenor-

Plaintiffs concede, S.B. 193's filing deadlines and requirements for the number of petition signatures are, themselves, within constitutional limits.

Boiled down, Intervenor-Plaintiffs' complaints about S.B. 193 amount to their disagreement with the General Assembly's policy decision as to how new political parties must form in the State of Ohio. But they have failed to prove that the policy with which they disagree burdens any constitutional rights. The question before this Court is not whether a better system can be envisioned, but whether Intervenor-Plaintiffs have shown that S.B. 193 is unconstitutional. They have not. Intervenor-Defendant the State of Ohio's Motion for Summary Judgment (Doc. No. 185) should therefore be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2014, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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