APPENDIX A

United States Court of Appeals, Sixth Circuit

LIBERTARIAN PARTY OF OHIO and Harold Thomas, Plaintiffs-Appellants,

v.

Degee WILHEM, Helen E. Balcolm, Otto Beatty, III, Dennis Brommer, Don Michael Crites, Catherine A. Cunningham, and A. Scott Norman, in their official capacities, Defendants-Appellees.

No. 20-3585

Argued: August 24, 2020

Decided and Filed: February 10, 2021

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 2:19-cv-02501—Algenon L. Marbley, District Judge.

ARGUED: Mark R. Brown, Columbus, Ohio, for Appellants. Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees. ON BRIEF: Mark R. Brown, Columbus, Ohio, for Appellants. Michael J. Hendershot, Benjamin M. Flowers, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellees.

Before: GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

GRIFFIN, Circuit Judge.

Ohio law mandates that the Ohio Elections Commission (OEC) be composed of three members from each of the top two political parties in the state, and an additional seventh member who cannot have any

political affiliation. *See* Ohio Rev. Code § 3517.152(A)(1). The Libertarian Party of Ohio (LPO) and its former chairman, Harold Thomas, contend this law violates their First Amendment right to associate for political purposes. The district court disagreed, and we affirm.

I.

A.

Plaintiff Harold Thomas is the former chairman of the Libertarian Party of Ohio and a current member of the LPO.[1] During the 2020 election season, the LPO was a minor political party recognized in Ohio, but it lost its status by not receiving a sufficient share of the vote in the 2020 general election. Defendants are the appointed members of the Ohio Elections Commission (OEC or the Commission) and have been sued in their official capacities.

"[T]he Commission is an independent agency consisting of seven members, six of whom are appointed by the governor on the recommendation of the combined state House and Senate caucuses of the major political parties. Three members are appointed from each of the two major political parties and the seventh is an unaffiliated elector appointed by the other six members." *Project Veritas v. Ohio Election Comm'n*, 418 F. Supp. 3d 232, 236–37 (S.D. Ohio 2019). All members of the OEC serve five-year terms. The OEC enforces Ohio's campaigning and election laws. It may investigate complaints, issue fines, and publish advisory opinions on matters of Ohio election law. *See id.* It is also empowered to re-

[1] Thomas resigned his executive position while this appeal was pending.

fer criminal violations of Ohio's election law to county prosecutors. *See* Ohio Admin. Code § 3517-1-14-(B)(3) and (C).

The procedure for selecting OEC Commissioners is set forth in Ohio Revised Code § 3517.152(A)(1):

> There is hereby created the Ohio elections commission consisting of seven members.
>
> ... [T]he speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member shall jointly submit to the governor a list of five persons who are affiliated with that political party. ... [T]he two legislative leaders in the two houses of the general assembly of the major political party of which the speaker is not a member shall jointly submit to the governor a list of five persons who are affiliated with the major political party of which the speaker is not a member. Not later than fifteen days after receiving each list, the governor shall appoint three persons from each list to the commission.
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> * * *
>
> Not later than thirty days after the governor appoints these six members, they shall, by a majority vote, appoint to the commission a seventh member, who shall not be affiliated with a political party. If the six members fail to appoint the seventh member within this thirty-day period, the chief justice of the supreme court, not later than thirty days after the end of the period during which the six members were required to appoint a member, shall appoint the seventh member, who shall not be affiliated with a political party.

As defendants observe, § 3517.152(A)(1) does not restrict the partisan seats to any specific party. Instead,

> three members will be selected from *any* party that wins enough seats in the legislature to qualify as one of the State's two major parties. Thus, the parties to this appeal do not dispute that, if "a minor party" builds "its base and become[s] one of the two major parties in the state," it would secure "an avenue for its members to serve on the Elections Commission." Rightly so: though the statute does not say so expressly, it is implicit in the statute's party-neutral design that a political party, upon losing its major-party status, loses to the *new* major party its ability to nominate members to fill seats for which the term has expired.

Record citations omitted. Based on this procedure and Ohio's election results, there are presently three Republican commissioners, three Democrat commissioners, and one commissioner with no party affiliation. *See* Ohio Elections Commission, Members/Staff, *available at* https://elc.ohio.gov/wps/portal/gov/elc/about-us/membership-staff (last visited Feb. 4, 2021).

B.

In the lead-up to Ohio's 2018 gubernatorial election, three organizations hosted televised debates between the nominees chosen by the Democratic Party and the Republican Party, to the exclusion of other candidates, including the ballot-qualified nominee of the LPO. In September 2018, the LPO filed administrative complaints with the OEC, alleging

that each of the organizations hosting those debates had violated Ohio's campaign-finance laws because the exclusive debates between major-party candidates were illegal, in-kind campaign contributions. *See* Ohio Rev. Code § 3599.03. But in December 2018, the OEC found no violation and dismissed the administrative complaints.

The LPO and Thomas then sued the individual commissioners of the OEC in their official capacities, alleging violations of their First and Fourteenth Amendment rights. As relevant here, plaintiffs alleged that § 3517.152(A)(1) violated their First Amendment associational rights because it rendered LPO members ineligible for service on the OEC.[2] The district court entered summary judgment in defendants' favor, reasoning § 3517.152(A)(1) withstood constitutional scrutiny under either of two potential frameworks. This timely appeal followed.

II.

We review the district court's summary judgment determination de novo. *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 526 (6th Cir. 2014). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

III.

Initially, we must address defendants' assertion,

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[2] Plaintiffs also alleged selective enforcement of Ohio's campaign finance laws. The district court dismissed those claims for lack of standing, and plaintiffs do not challenge that ruling on appeal.

first raised on appeal, that plaintiffs lack standing. The "irreducible constitutional minimum" of standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Plaintiffs must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.* at 560–561, 112 S.Ct. 2130. Absent these three elements, a plaintiff has failed to show a present "case or controversy" that we are authorized to adjudicate under Article III of the Constitution. *Id.* at 560, 112 S.Ct. 2130 ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). Therefore, even though the failure to raise an issue before the district court usually renders it forfeited on appeal, *see, e.g.*, *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630 (6th Cir. 2014), we must consider plaintiffs' standing because it implicates our subject-matter jurisdiction, *see Spokeo, Inc. v. Robins*, ––– U.S. ––––, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016), and such defects cannot be forfeited, *see United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) ("[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.").

The OEC offers several reasons why plaintiffs have not demonstrated their standing to challenge § 3517.152(a). First, it says that Thomas, as LPO chairman, was not eligible for membership on the Commission at the time the lawsuit was filed under a separate provision of § 3517.152. Specifically, defendants point out that Ohio law prohibits political party officers from serving on the OEC. *See* Ohio

Rev. Code § 3517.152(F)(1)(c) ("No member of the Ohio elections commission shall ... [b]e an officer of the state central committee, a county central committee, or a district, city, township, or other committee of a political party or an officer of the executive committee of the state central committee, a county central committee, or a district, city, township, or other committee of a political party[.]"). While Thomas is no longer the chairman of the LPO, standing must exist from the outset of the suit, so if Thomas lacked Article III standing at the time the complaint was filed, his resignation of the chairmanship cannot cure the defect. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 206 (6th Cir. 2011).

But Thomas had standing at the outset of the suit. As the OEC concedes, Thomas "has introduced evidence that he would like to be on the Ohio Elections Commission[,]" but his membership in the Libertarian Party prevents him from being considered for the seventh commission seat. Under these circumstances, "a plaintiff need not translate his or her desire for a job into a formal application" because "that application would be merely a futile gesture." *Carney v. Adams*, —— U.S. ——, 141 S. Ct. 493, 503, —— L.Ed.2d —— (2020) (internal quotation marks, brackets, and citation omitted).[3] Further, the sepa-

[3] In *Carney*, the Supreme Court concluded that a Democrat-turned-independent did not have standing to challenge Delaware's "major party" requirement, which mandated the state's judges be a member of either of the two most popular political parties. *Carney*, 141 S. Ct. at 498–503. The Court reached this conclusion by observing in part that the plaintiff had not applied to any of 14 judicial openings for which he would have been eligible as a Democrat between 2012 and 2016, and that

rate provision § 3517.152 poses no obstacle to Thomas's eligibility because it prohibits a person only from *simultaneously* holding public office as an OEC commissioner and a leadership position in a political party. *See* § 3517.152(F)(1)(c). Accordingly, if Thomas had been selected for a seat on the OEC, he could have resigned his party leadership role (and has now done so while this appeal was pending). Thus, the record demonstrates that Thomas has standing to challenge § 3517.152(A)(1), and further discussion of plaintiffs' standing is unnecessary to our resolution of the suit. *See Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020).

IV.

Moving now to the merits, we recognize that there are arguably two frameworks that plaintiffs may invoke to establish a violation of their First Amendment rights—*Anderson-Burdick* and the unconstitutional-conditions doctrine. However, we limit our holding to the latter because the parties agree that we should forego application of *Anderson-Burdick* to plaintiffs' claim.[4] *See* Appellant's Opening Br. at 48

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his decision to switch his political affiliation from Democrat to unaffiliated independent "made it less likely that he would become a judge[,]" but more likely that he could "vindicate his view" that Delaware's major party requirement was unconstitutional. *Id.* at 501.

[4] In a recent case, we declined to decide which of these frameworks applied to First and Fourteenth Amendment challenges brought against the criteria for government service on Michigan's Independent Citizens Redistricting Commission. *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020). While some may harbor doubts over the applicability of *Anderson-Burdick* to such cases because the challenged law neither regulates the administration of elections nor burdens voting rights, *see id.* at

("LPO does not believe it necessary to apply the *Anderson-Burdick* formula here. ..."); Reply at 28 ("LPO does not believe *Anderson-Burdick* needs [to] be used in this case."); Appellee's Br. at 49 ("[T]he Court should refuse to apply *Anderson-Burdick*.").

A.

The unconstitutional-conditions doctrine prevents the government from denying a benefit on the basis of a person's constitutionally protected speech or associations. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In *Perry*, the Court explained that the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

Perry, 408 U.S. at 597, 92 S.Ct. 2694 (alteration and internal citation omitted). In a trio of cases, the Supreme Court has employed the unconstitutional conditions doctrine to examine the tension between governmental patronage practices—hiring and firing based on political affiliation—and the First Amendment rights of individuals. Those cases warrant further discussion.

422–24, 429–31 (Readler, J. concurring), we leave that matter for another day when it is properly before the court.

First, in *Elrod v. Burns*, Justice Brennan wrote for a plurality of the Court and held that patronage dismissals violated the First and Fourteenth Amendments because they amounted to the government conditioning employment on particular political affiliations, and thus "severely restrict[ed]" the employees' right to "political belief and association." 427 U.S. 347, 372, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). However, the plurality also acknowledged that First Amendment protections were "not ... absolute[,]" and that patronage dismissals did not violate the First Amendment in "policymaking positions." *Id.* at 360–61, 367–68, 96 S.Ct. 2673. Concurring in the judgment, Justices Stewart and Blackmun would have decided the case on narrower grounds: "[A] nonpolicymaking, nonconfidential government employee" could not be discharged solely because of his political beliefs under *Perry*. *Id.* at 375, 96 S.Ct. 2673 (Stewart, J., concurring in the judgment).

The Court then built upon *Elrod* in *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). There, the issue was whether the dismissal of two assistant public defenders for their political affiliation violated the First Amendment, or whether the plaintiffs fit within *Elrod*'s policymaking exception. *Id.* at 510–11, 100 S.Ct. 1287. The Court clarified that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. 1287. "As one obvious example," the Court explained, "if a State's election laws require that precincts be supervised by two election judges of differ-

ent parties, a Republican judge could be legitimately discharged solely for changing his party registration." *Id.* With this understanding, the Court held that the patronage dismissals of the plaintiffs violated the First Amendment because "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." *Id.* at 519, 100 S.Ct. 1287.

Finally, in *Rutan v. Republican Party of Illinois*, the Court considered "whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support." 497 U.S. 62, 65, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). The case arose out of a system of patronage instituted by the Governor of Illinois by imposing a state-wide hiring freeze and then requiring that any exception to the freeze receive his "express permission." *Id.* When determining whether permission should be granted, the governor's office looked at whether the applicant voted in his party's primaries, provided financial or other support to his party, had joined or promised to work for the party in the future, and whether the applicant was supported by local party officials. *Id.* at 66, 110 S.Ct. 2729. Moreover, state officials also allegedly used party affiliation to make decisions about recalling laid-off employees and when selecting employees for promotions. *Id.* at 67, 110 S.Ct. 2729. The Supreme Court held "that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation." *Id.* at 79, 110 S.Ct. 2729.

B.

As discussed above, the touchstone of our inquiry

is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. 1287. However, we do not write on a blank slate; our precedent fills in many of the gaps for determining whether or not party affiliation is an appropriate criterion for government employment. Most significantly, we elaborated in *McCloud v. Testa* on the types of positions for which it would not violate the First Amendment to consider party affiliation and set forth four categories of public employment that fall "with reasonable certainty" within the *Elrod-Branti* exception:

> **Category One**: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
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> **Category Two**: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
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> **Category Three**: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of

> communications to category one positions, category two positions or confidential advisors;
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> **Category Four**: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

97 F.3d 1536, 1557 (6th Cir. 1996) (footnotes omitted). Further, the *McCloud* court instructed that where there is "any ambiguity" in determining whether a particular position falls within one of the categories, "it is to be construed in favor of the governmental defendants" at least when the position is "unclassified or non-merit under state law." *Id.* It also provided examples of positions in each category. Relevant here, we explained that "a gubernatorially-appointed Democratic economist placed on a revenue forecasting committee consisting by law of two economists (one Republican and one Democrat) chosen by the state legislature, two economists of similar party affiliation chosen by the governor, and one economist of any party chosen by the president of the state's most prominent university" would fall within Category Four. *Id.*

More recently, in *Peterson v. Dean*, we considered whether Tennessee's county election administrators were subject to patronage dismissals under the *Elrod-Branti* exception. 777 F.3d 334, 336 (6th Cir. 2015). Tennessee law requires the State Election Commission to appoint five election commissioners for each county, with three members being of the majority party and two members of the minority party. *Id.* at 338. The county commissioners, in turn, were required to "appoint an administrator of elec-

tions" to serve as the "chief administrative officer of the commission." *Id.* Eight of these county administrators were ousted from their positions allegedly because of their actual or perceived political affiliation. They then filed suit under 42 U.S.C. § 1983, claiming that their patronage dismissals violated their First and Fourteenth Amendment rights. *Id.* at 340. On appeal, the parties agreed that "the common and controlling issue was whether the statutory position of county administrator of elections in Tennessee [was] lawfully subject to patronage dismissal" under *Elrod* and *Branti*. *Id.* at 337.

In concluding the administrators fell within the exception, we started from the premise that county election commissioners in Tennessee were Category One employees under *McCloud* because their positions were statutorily established and vested with discretionary authority to carry out functions of political concern. *See id.* at 345. From there, we observed that "[c]ategory two is constructed to recognize that it may be necessary to deny First Amendment protection not just to positions at the very top of any state administrative hierarchy, but in some cases to those occupying levels a bit farther down the hierarchy." *Id.* at 345 (quoting *McCloud*, 97 F.3d at 1557 n.31). Thus election administrators "neatly fit[ ]" into Category Two because "the position [was] one to which a significant amount of the total discretionary authority available to category one employees ha[d] been delegated." *Id.* at 346 (quoting *Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 266 (6th Cir. 2010)).

Writing in dissent, Judge Clay disagreed. In his view, the county election commissioners were not Category One employees because they did not "exer-

cise meaningful discretion on issues where there is room for principled disagreement on the goals or their implementations." 777 F.3d at 352 (Clay, J., dissenting) (internal quotation marks omitted). Judge Clay instead concluded that they were subject to patronage dismissals because their positions fell within Category Four, given that they were "filled by balancing out political party representation." *Id.* (quoting *McCloud*, 97 F.3d at 1557). Accordingly, while he concluded that county administrators could not be discharged for their political affiliation, all three members of the panel agreed that the county election commissioners were subject to patronage dismissals. *Id.*

C.

Applying the foregoing precedent to the plaintiffs' claim, the district court properly granted summary judgment in favor of defendants because OEC Commissioners fall within Category Four of the *McCloud* framework, and Ohio may thus condition employment on the OEC on party affiliation. They are akin to the supervisory judges discussed in *Branti*, 445 U.S. at 518, 100 S.Ct. 1287, the economists appointed to maintain partisan balance in *McCloud*, 97 F.3d at 1557, and the county election commissioners in *Peterson*, 777 F.3d at 346; *id.* at 352 (Clay, J., dissenting). Accordingly, § 3517.152(A)(1) is not an unconstitutional condition on government employment because it is "appropriate" for Ohio to consider political affiliation to serve its stated interest in maintaining partisan balance among the members of the OEC. For this reason, § 3517.152(A)(1) does not violate plaintiffs' First Amendment rights.

Plaintiffs' arguments to the contrary are not per-

suasive. First, they compare § 3517.152(A)(1) to laws prohibiting persons from government service based on immutable characteristics or laws that require a person seeking public employment to profess a certain belief or disbelief in religion, or laws requiring a person to forswear membership in a "disfavored political organization" for government employment. The challenged law is similar, in their view, because it "condition[s] one's full participation in Ohio's political community and electoral machinery on forfeiting her freedom of association." Therefore, the argument goes, "[b]anning members of minor parties from office is no more constitutional than banning Jews or Republicans from office."

We disagree. Section 3517.152(A)(1) does not single out any ideology, viewpoint, or protected class. It instead operates such that whichever parties are the two most represented factions in the Ohio legislature—for now the Republicans and the Democrats, but subject to change should another party achieve greater electoral success—receive three seats each on the OEC with one additional seat to a person with no political affiliation. There is no comparison to be drawn from laws which afford equality of opportunity to all political parties, and those that expressly prohibit a person from government employment because of a protected characteristic. *Cf. American Party of Texas v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974) (holding that it is not invidious discrimination for a state to grant minor parties official recognition, but deny them the right to hold primaries even though the main political parties are so entitled); *Jenness v. Fortson*, 403 U.S. 431, 440, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (holding that Georgia did not violate the First or Four-

teenth Amendment rights of independent candidates or unrecognized political parties by requiring that they petition for access to the ballot, while recognized parties—who attained twenty percent of the vote in a prior election—obtained ballot access by holding a primary election); *see also Werme v. Merrill*, 84 F.3d 479, 484–85 (1st Cir. 1996) ("[T]he Libertarian Party has exactly the same opportunity to qualify as a source of election inspectors and ballot clerks under New Hampshire law as does any other party. Equality of opportunity exists, and equality of opportunity—not equality of outcomes—is the linchpin of what the Constitution requires in this type of situation.").

Second, the LPO attempts to draw a distinction between "discretionary hiring and firing decisions" and "statutory categorical disqualifications" because *Elrod* and the cases that follow govern only the former and do not bear on the latter. This distinction is not borne out by our caselaw. Look no further than *McCloud* or *Peterson*. In each of those cases, our court clearly contemplated statutory schemes that would result in "categorical" exclusions to maintain partisan balance. The touchstone under *Elrod* and *Branti* is whether the State of Ohio can demonstrate that party affiliation is an "appropriate" requirement for the effective performance of the public office involved. *See Branti*, 445 U.S. at 518, 100 S.Ct. 1287. That remains the standard whether Ohio is justifying hiring criteria as in *Rutan* or the discharge of an existing employee like *Branti*. We thus reject plaintiffs' attempt to recast decades of precedent.[5]

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[5] Plaintiffs also contend that we should follow the Third Circuit's reasoning from *Adams* and conclude that commissioners

V.

For these reasons, we affirm the judgment of the district court.

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are not policymakers. Defendants respond that *Adams* is contrary to our precedent, citing *Newman v. Voinovich*, 986 F.2d 159 (6th Cir. 1993). We need not address this purported conflict because the Supreme Court vacated our sister court's opinion and remanded with instructions to dismiss the case for lack of jurisdiction. *Carney*, 141 S. Ct. at 503.

APPENDIX B

United States District Court,
S.D. Ohio, Eastern Division

LIBERTARIAN PARTY OF OHIO, et al., Plaintiffs,

v.

Degee WILHEM, et al., Defendants.

Case No. 2:19-cv-02501

Signed 06/05/2020

Mark George Kafantaris, Kafantaris Law Offices, Mark R. Brown, Columbus, OH, for Plaintiffs.

Julie M. Pfeiffer, Brandi R. Laser Seskes, J. Andrew Fraser, Tiffany L. Carwile, Ohio Attorney General's Office Constitutional Offices Section, Columbus, OH, for Defendants.

OPINION & ORDER

ALGENON L. MARBLEY, CHIEF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on three Motions: (1) Defendants' Motion for Summary Judgment; (2) Plaintiffs' Motion for Reconsideration of the Court's Opinion and Order Denying Plaintiffs' Motions for a Preliminary Injunction and for Summary Judgment; and (3) Plaintiffs' Motion for Leave to File a Sur-Reply to Defendants' Motion for Summary Judgment. Docs. 49, 51, 56. The Motions are ripe for review and the Court will resolve each of them without oral argument. For the reasons set forth below, the Court **GRANTS** Defendants' Motion for Summary Judgment [#49], **DENIES** Plaintiffs' Motion for Re-

consideration [#51], and **DENIES** Plaintiffs' Motion to File a Sur-Reply [#56].

II. BACKGROUND

On September 24, 2018, the Libertarian Party of Ohio and Harold Thomas ("Plaintiffs"), as Party chair, filed complaints with Ohio's Elections Commission asserting that three organization responsible for facilitating gubernational debates throughout Ohio in 2018 violated Ohio Revised Code § 3599.03, which governs corporate campaign contributions. Doc. 1 at 39-41. Plaintiffs claimed that these organizations, by staging an exclusive debate between the Democratic and Republican gubernational candidates, and by not notifying or inviting Plaintiffs' gubernational candidate or employing objective criteria in selecting debate participants, engaged in illegal corporate campaign contributions. *Id.* According to Plaintiffs, the Commission's legal counsel advised the Commission that the debates had been illegally coordinated, staged, planned, and sponsored under Ohio law, and recommended that the Commission find these organizations in violation of the state's campaign finance laws. *Id.* at 41. But Philip Richter, legal counsel to the Commission, denied that he ever made this recommendation. To the contrary, he attests that he recommended that the Commission find no violation. In any case, on December 6, 2018, the Commission dismissed Plaintiffs' administrative complaints, finding no violation had occurred. *Id.* at 42.

On June 15, 2019, Plaintiffs sued the individual Commissioners on Ohio's Elections Commission ("Defendants") in their official capacity for violating Plaintiffs' First and Fourteenth Amendment rights.

In Count One, Plaintiffs brought a First Amendment challenge to Ohio Revised Code § 3517.152, which restricts membership on Ohio's Elections Commission to affiliates of the two major political parties. In Counts Two and Three, Plaintiffs alleged that Defendants violated their First and Fourteenth Amendment rights by selectively choosing not to enforce Ohio' campaign finance laws and by dismissing their administrative complaints. The Court, however, dismissed Counts Two and Three after finding Plaintiffs lacked standing to assert those claims. *See* Doc. 29.

On November 25, 2019, the Court held a hearing on Plaintiffs' Motion for a Preliminary Injunction, where Plaintiffs asked the Court to do the following: (1) declare that O.R.C. § 3517.152 violates the First Amendment; (2) prohibit the state of Ohio from enforcing O.R.C. § 3517.152; (3) direct Defendants to vacate their prior dismissal of Plaintiffs' administrative complaints; (4) direct Defendants to refer Plaintiffs' administrative complaints to a neutral decision maker; (5) enjoin Defendants, as currently constructed, from considering administrative complaints brought against or on behalf of minor political candidates; and (6) direct Defendant, as currently constructed, to refer administrative complaints brought against or on behalf of minor political parties or their candidates to neutral decision makers. On January 13, 2020, the Court issued an Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction. *See* Doc. 50. In addition, that Opinion and Order Denied Plaintiffs' First and Second Motions for Summary Judgment because the Motions turned on the same legal question presented in the Motion for a Preliminary Injunction.

Now before the Court are three Motions. First, Defendants move for summary judgment on Plaintiffs' First Amendment challenge to O.R.C. § 3517.152. Second, Plaintiffs ask the Court to reconsider its Opinion and Order Denying their Motions for a Preliminary Injunction and for Summary Judgment. Finally, Plaintiffs move for leave to file a sur-reply to Defendants' Motion for Summary Judgment.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides that a court may grant summary judgment if "the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). No dispute of material fact exists where the record "taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In analyzing a motion for summary judgment, the court must evaluate "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

IV. ANALYSIS

A. Plaintiffs' Motion for Reconsideration

Plaintiffs ask the Court to reconsider its Opinion and Order Denying their Motions for a Preliminary Injunction and for Summary Judgment. This Court has previously opined on the landscape surrounding

motions for reconsideration and expressed how it views them disfavorably:

> As a general principle, motions for reconsideration are looked upon with disfavor unless the moving party demonstrates one of the following: (1) a manifest error of law; (2) newly discoverable evidence which was not previously available to the parties; or (3) intervening change of controlling law. Neither the passage of time, during which the legal landscape did not change, nor a different spin on the same arguments, is a proper basis for a motion for reconsideration. Furthermore, mere dissatisfaction with a Court's ruling is an inappropriate and insufficient ground to support a motion for reconsideration. This doctrine reflects the sound policy that litigation should not be subject to instant replays but rather decided and put to rest.

Ohio Midland, Inc. v. Proctor, 2006 WL 3793311, at *2 (S.D. Ohio Nov. 28, 2006) (Marbley, J.) (internal quotations and citations omitted).

Here, Plaintiffs argue that the Court's reliance on *Pirincin v. Board of Elections*, 368 F. Supp. 64 (N.D. Ohio 1973), and *Werme v. Merrill*, 84 F.3d 479 (1st Cir. 1996), for the proposition that O.R.C. § 3517.12 is not discriminatory towards minor political parties, such as the Libertarian Party of Ohio, is misplaced. Plaintiffs contend, among other things, that these cases, and particularly *Pirincin*, are factually dissimilar, outdated, and no longer have precedential value. Notably, Plaintiffs did not address *Werme* in their reply briefing to the Motion for a Preliminary Injunction and allotted only two sentences to address

Pirincin, despite Defendants relying heavily on both authorities. *See* Plaintiffs' Reply Brief, Doc. 44 at 11 ("*Pirincin v. Board of Elections*, 368 F. Supp. 64 (N.D. Ohio), *aff'd*, 414 U.S. 990, 94 S.Ct. 345, 38 L.Ed.2d 231 (1973), does not support OEC's argument. The laws challenged there actually allowed members of minor parties to serve on local election boards, a fact expressly noted in the opinion."). Yet, Plaintiffs now cry foul and attempt to use their Motion for Reconsideration as a vehicle to advance eleven pages worth of arguments that should have been raised earlier. A motion for reconsideration, however, is not an opportunity for a do-over. *Aero-Motive Co. v. Great Am. Ins.*, 302 F. Supp. 2d 738, 740 (2003) ("[A] motion for reconsideration may not be used to raise issues that could have been raised in the previous motion[.]"). Moreover, given that neither *Pirincin* nor *Werme* have ever been overturned, the Court properly relied on these cases as persuasive authority.

Alternatively, Plaintiffs suggest that a change in the law warrants reconsideration of their Motions. Namely, Plaintiffs point to the Sixth Circuit's recent decision in *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020), where the court struck down a challenge to the composition of Michigan's Independent Citizens Redistricting Commission. But that opinion only further supports the Court's decision Denying Plaintiffs' Motions for a Preliminary Injunction and for Summary Judgment. As will be discussed below, *Daunt* affirms that the Court used the proper framework to analyze Plaintiffs' First Amendment claim. Accordingly, Plaintiffs' Motion for Reconsideration [#51] is **DENIED**.

B. Defendants' Motion for Summary Judgment

As a threshold matter, Plaintiffs have moved for leave to file a sur-reply to Defendants' Motion for Summary Judgment. Plaintiffs assert that a sur-reply is necessary to correct Defendants' claim that Eleventh Amendment immunity is coextensive with Article III subject-matter jurisdiction. The Court, however, is fully capable of assessing the state of the law surrounding Eleventh Amendment immunity without the aid of additional briefing. Furthermore, it is unnecessary to reach the issue of sovereign immunity because Count One of Plaintiffs' Complaint raises only a facial challenge to O.R.C. § 3517.152, as opposed to an as-applied challenge seeking retroactive relief. *See Edelman v. Jordan*, 415 U.S. 651, 677, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (holding "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief"). For these reasons, Plaintiffs' Motion for Leave to File a Sur-Reply [#56] is **DENIED**. With that decided, the Court now turns to Defendants' Motion for Summary Judgment, where they ask the Court to dismiss Plaintiffs' First Amendment challenge to O.R.C. § 3517.152.

In Count One of the Complaint, Plaintiffs allege that O.R.C. § 3517.152, which restricts membership on Ohio's Elections Commission to affiliates of the two major political parties, violates the First Amendment. In relevant part, that statute provides:

> [T]he speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member shall jointly submit to the governor a list of five persons who are affiliated with that political party....

> [T]he two legislative leaders in the two houses of the general assembly of the major political party of which the speaker is not a member shall jointly submit to the governor a list of five persons who are affiliated with the major political party of which the speaker is not a member.... [T]he governor shall appoint three persons from each list to the commission.
>
> [A]fter the governor appoints these six members, they shall, by a majority vote, appoint to the commission a seventh member, who shall not be affiliated with a political party.

O.R.C. § 3517.152(a)(1). Plaintiffs contend that the Commissions' eligibility criteria is unconstitutional because it restricts membership to affiliates of the two major political parties, without providing a route for minority party affiliates to seek membership. *See* Doc. 1 at 48.

Recently, in *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020), the Sixth Circuit took up a similar First Amendment challenge to a ballot initiative establishing Michigan's Independent Citizens Redistricting Commission. There, the initiative disqualified from serving on the Commission eight classes of individuals who currently, or in the past six years, had any of the following political ties:

> (1) A declared candidate for partisan federal, state, or local office;
>
> (2) An elected official to partisan federal, state, or local office;
>
> (3) An officer or member of the governing body of a national, state, or local political party;

> (4) A paid consultant or employee of a federal, state, or local elected official or political candidate, or a federal, state, or local political candidate's campaign or of a political action committee;
>
> (5) An employee of the legislature;
>
> (6) Any person who is registered as a lobbyist agent with the Michigan bureau of elections, or any employee of such person;
>
> (7) An unclassified state employee who is exempt from classification in state civil service pursuant to article XI, section 5, except for employees of courts of record, employees of the state institutions of higher education, and persons in the armed forces of the state; or
>
> (8) A parent, stepparent, child, stepchild, or spouse of any individual identified above.

Id. at 2. Recognizing that the proper framework through which the constitutionality of the Commission's eligibility criteria should be analyzed was a matter of first impression, the Sixth Circuit looked to the *Anderson-Burdick* test (which this Court used) and the unconstitutional-conditions doctrine, concluding that the Commission's composition withstood scrutiny under both. Following the Sixth Circuit's lead, this Court will analyze Plaintiffs' First Amendment challenge to O.R.C. § 3517.12(a)(1) under both the *Anderson-Burdick* test and the unconstitutional-conditions doctrine.

1. Whether the Statute Survives Scrutiny under the *Anderson-Burdick* Test

In *Anderson v. Celebrezze*, 460 U.S. 780, 788-89, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick*

v. Takushi, 504 U.S. 428, 433-34, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the Supreme Court articulated a flexible framework for testing the validity of state election regulations. Although the cases that the Supreme Court has analyzed under this framework have generally "involved laws that regulate the actual administration of elections, the rationales for applying the *Anderson-Burdick* test—ensuring that the democratic processes are fair and honest and maintain[ing] the integrity of the democratic process—resonate here, too." *Daunt*, 956 F.3d at 406-07 (internal quotations and citations omitted). Indeed, at its core, "the *Anderson-Burdick* framework is used for evaluating state election law[s] and a law restricting membership of the body" responsible for governing electoral matters in the state of Ohio "could conceivably be classified as an election law." *Id.* (internal quotations and citation omitted).

Under the *Anderson-Burdick* framework, the level of scrutiny to be applied corresponds with the degree to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, the Court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" and then "evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564. The Supreme Court simplified this inquiry in *Burdick*:

> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recog-

> nized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify restrictions.

504 U.S. at 434, 112 S.Ct. 2059 (internal quotations and citations omitted).

Importantly, "[r]egulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it." *Daunt*, 956 F.3d at 407 (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016)) (internal quotations omitted). Determining whether the burden is severe or incidental requires examining "content-neutrality and alternate means of access." *Id.* (quoting *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998)). A law would not be content-neutral, and would impose a severe burden if, for example, it "limit[ed] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Id.* (quoting *Anderson*, 460 U.S. at 793, 103 S.Ct. 1564). In the same vein, a law would impose a severe burden if it left "few alternate means of access to the ballot," "restrict[ing] the availability of political opportunity." *Id.* (quoting *Anderson*, 460 U.S. at 793, 103 S.Ct. 1564) (internal quotations omitted).

Here, O.R.C. § 3517.152(a)(1) does not impose a severe burden on rights guaranteed by the First Amendment, as the statute is content neutral and does not limit political participation by an identifiable political group. To be sure, O.R.C. § 3517.152(a)(1) does not limit service on Ohio's Elections Commission to members of the Democratic and Republican parties; rather, it limits service to affiliates of the two major political parties in the state of Ohio, without reference to a specific party. While in practice, the statute currently prohibits any person affiliated with a minor political party, such as Ohio's Libertarian Party, from being considered for membership on the Commission, the statute does not foreclose the opportunity for a minor political party to build its base and become one of the two major parties in the state, which would in turn provide an avenue for its members to serve on the Elections Commission. O.R.C. § 3517.152(a)(1), therefore, is a generally applicable, nondiscriminatory regulation providing equality of opportunity. The First Circuit, in *Werme v. Merrill*, upheld an identical scheme in the selection of election inspectors and ballot clerks in the state of New Hampshire. 84 F.3d 479, 484-85 (1st Cir. 1996) ("New Hampshire's regulation is nondiscriminatory, that is, it does not differentiate among Republicans, Democrats and Libertarians. Instead, the regulation conditions the right to appoint election inspectors and ballot clerks on a certain degree of success at the polls. Distinguishing between recognized political parties based on past electoral accomplishment is not per se invidiously discriminatory. So here: the Libertarian Party has exactly the same opportunity to qualify as a source of election inspectors and ballot clerks under New

Hampshire law as does any other party. Equality of opportunity exists, and equality of opportunity—not equality of outcomes—is the linchpin of what the Constitution requires in this type of situation."); *see Pirincin v. Bd. of Elections of Cuyahoga Cty.*, 368 F. Supp. 64, 71-72 (N.D. Ohio 1973) ("At the present time the secretary makes appointments to the county boards of elections from the Republican and Democratic parties because these parties are the two that have pulled the highest number of votes for governor. However, Section 3501.06 protects against locking in these two parties. Another political party may recommend persons to fill positions on boards of elections should that third political party amass the highest or the next highest number of votes in the state at the last preceding gubernational election.... Thus, the opportunity to have representation on each county board of elections is available to all political parties.").

Additionally, the state of Ohio has important regulatory interests sufficient to justify O.R.C. § 3517.152's minimal restrictions. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 ("[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions."). Certainly, Ohio has an interest in ensuring that political balance on its Elections Commission protects the fairness of the deliberative process and that judicial and policy-making decisions are well-rounded and diversified. Plaintiffs previously conceded this point. *See* Doc. 37 at 16 ("Plaintiffs concede that Ohio, like Delaware, has a legitimate interest in political balance in the context

of investigating and adjudicating election disputes."). Further, requiring bipartisanship on an Elections Commission is universally regarded as an effective means of preventing fraud and ensuring honest elections. *See Vintson v. Anton*, 786 F.2d 1023, 1025 (11th Cir. 1986) ("Appellants admit that Alabama constitutionally may, as all States do, so far as we are aware, follow the practice of requiring bipartisanship in the composition of election boards. Such adversary partisan confrontation is universally regarded as an effective means of preventing fraud and ensuring honest elections."). Finally, political balance achieves fairness, consistency, and objectivity. *See Gill v. State of Rhode Island*, 933 F. Supp. 151, 156 (D.R.I. 1996) ("The provisions ensure fairness by providing for a bipartisan board.").

In short, O.R.C. § 3517.152(a)(1) imposes only a reasonable, nondiscriminatory restriction upon the First Amendment rights of minority political parties seeking membership on Ohio's Elections Commission. Moreover, the statute advances the state's important regulatory interests by implementing a checks and balances system between the state's two major political parties, while providing minority parties the same opportunity to seek representation on the Commission should they garner the necessary voter support. For these reasons, O.R.C. § 3517.152(a)(1) survives scrutiny under the *Anderson-Burdick* test.

2. Whether the Statute Survives Scrutiny under the Unconstitutional-Conditions Doctrine

The other potential framework through which the Court can evaluate Plaintiffs' First Amendment challenge is the unconstitutional conditions doctrine.

This is the framework for which Plaintiffs advocate. *See* Plaintiffs' Response Brief, Doc. 52 at 11 ("Today, political restriction placed on governmental positions are not judged under the right to vote, and are not treated as restrictions on the franchise/electoral process. Rather, they are measured by the unconstitutional conditions doctrine announced and applied in post-1973 cases like *Elrod*, *Branti*, and *Connick*. The critical question is whether government is disregarding political affiliation, as it must, or is using political affiliation as a qualification for employment."). In essence, Plaintiffs argue that O.R.C. § 3517.152(a)(1) improperly subjects members of minor political parties to an adverse employment action due solely to their political affiliation.

In *Elrod v. Burns*, the Supreme Court held that the practice of patronage dismissals—firing government employees due to disloyalty to an incumbent party—violated the First Amendment because these types of dismissals restrict political belief and association. 427 U.S. 347, 372, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Later, in *Branti v. Finkel*, the Court qualified its holding in *Elrod* and instructed that "party affiliation may be an acceptable requirement for some types of employment." 445 U.S. 507, 517, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). The Court noted that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* The Court thus concluded that the pertinent question "is whether the hiring authority can demonstrate that a party affiliation is an appropriate requirement for

the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. 1287.

Building upon Supreme Court precedent, the Sixth Circuit in *McCloud v. Testa* identified several categories of employment positions where it would be acceptable *per se* to consider party affiliation. 97 F.3d 1536, 1557 (6th Cir. 1996). One category is particularly relevant here:

> **Category Four:** positions that are part of a group of positions filled by balancing out the political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

Id. The Sixth Circuit provided the following example as an illustration:

> **Category Four**: a gubernationally-appointed Democratic economist placed on a revenue forecasting committee consisting by law of two economists (one Republican and one Democrat) chosen by state legislature, two economists of similar party affiliation chosen by the governor, and one economist of any party chosen by the president of the state's most prominent university.

Id. Ohio's Elections Commission appears to fall squarely within this fourth category.

Previously, the Court declined to foreclose Plaintiffs' First Amendment challenge under *McCloud*, finding the Sixth Circuit "did not contemplate a statute such as O.R.C. § 3517.152 that makes affiliation with a minor political party a disqualifying factor." *See* Doc. 29 at 11. In doing so, however, the Court neglected to give proper deference to the Sixth Circuit's charge to construe any ambiguities in favor

of governmental defendants. *See McCloud*, 97 F.3d at 1557 ("In connection with using these categories, we note that if there is any ambiguity about whether a particular position falls into any of them (and so also within the *Branti* exception), it is to be construed in favor of the governmental defendants when the position at issue is unclassified or non-merit under state law per the *Rice* canon."). Moreover, O.R.C. § 3517.152 more accurately conditions membership on the Elections Commission on a political party's success at the polls, which is not discriminatory *per se*. *See Werme*, 84 F.3d at 484-85; *Pirincin*, 368 F. Supp. at 71-72.

Finally, the Court is reminded that the ultimate inquiry is whether the state of Ohio can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. *See Branti*, 445 U.S. at 518, 100 S.Ct. 1287. Two reasons support this finding. First, the Elections Commission, like judges, acts in a quasi-judicial capacity. *See* O.A.C. §§ 3517-1-14-(B)(3) & (C) (noting the Commission is authorized to find violations of Ohio's campaign finance laws, assess fines, and refer violations to the local prosecutor). The Sixth Circuit has unequivocally stated that judges are policymakers within the meaning of *Elrod* and *Branti*, and thus, can be appointed based on political considerations. *See Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) ("[J]udges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters. Therefore, we believe that Governor Voinovich's appointment of judges based on political considerations is consistent with *Elrod*, *Branti*, and *Rutan*.") (internal citation omitted); *cf. Adams v. Governor of Dela-*

ware, 922 F.3d 166, 181 (3d Cir. 2019) ("We ... conclude that state judges do not fall within the policy-making exception because affiliation with a particular political party is not a requirement for the effective performance of the judicial role."). Additionally, the Commission has other explicit policy-making functions, such as the ability to recommend legislation and issue advisory opinions. *See* O.R.C. § 3517.153(D); *Elrod*, 427 U.S. at 368, 96 S.Ct. 2673 ("In determining whether an employee occupies a policymaking position, consideration would also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals."). Second, as discussed at length above, Ohio has an important interest in ensuring that political balance on its Elections Commission protects the fairness of the deliberative process and that judicial and policy-making decisions are well-rounded and diversified. To that end, O.R.C. § 3517.152(a)(1) establishes a bipartisan Commission that has an inherent system of checks and balances. *See Vintson*, 786 F.2d at 1025 (11th Cir. 1996) ("Appellants admit that Alabama constitutionally may, as all States do, so far as we are aware, follow the practice of requiring bipartisanship in the composition of election boards. Such adversary partisan confrontation is universally regarded as an effective means of preventing fraud and ensuring honest elections."); *Gill*, 933 F. Supp. at 156 ("The provisions ensure fairness by providing for a bipartisan board."). Accordingly, O.R.C. § 3517.152(a)(1) withstands scrutiny under the unconstitutional conditions doctrine and Defendants' Motion for Summary Judgment is **GRANTED**.

V. CONCLUSION

For the reasons stated herein, the Court **GRANTS** Defendants' Motion for Summary Judgment [#49], **DENIES** Plaintiffs' Motion for Reconsideration [#51], and **DENIES** Plaintiffs' Motion to File a Sur-Reply [#56]. Plaintiffs' Complaint is hereby **DISMISSED**.

IT IS SO ORDERED.

APPENDIX C

No. 20-3585

United States Court of Appeals
for the Sixth Circuit

Filed March 19, 2021

LIBERTARIAN PARTY OF OHIO AND HAROLD THOMAS,

Plaintiffs-Appellants,

v.

DEGEE WILHEM, HELEN E. BALCOLM, OTTO BEATTY, III, DENNIS BROMMER, DON MICHAEL CRITES, CATHERINE A. CUNNINGHAM, AND A. SCOTT NORMAN, IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellees.

ORDER

BEFORE: GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judges has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt, Clerk

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* Judge Murphy recused himself from participation in this ruling.