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DIRECTIVE 2011-01 (Reissue of SOS Directive 2009-21)

January 6, 2011

To: ALL COUNTY BOARDS OF ELECTIONS
Members, Directors and Deputy Directors

Re: Continued Ballot Access for Minor Political Parties in Ohio

Background

This Directive supersedes Directive 2009-21.

On September 6, 2006, the U.S. Court of Appeals for the Sixth Circuit found that Ohio's laws for political party formation and ballot access were unconstitutional.¹ Since that time, the Ohio General Assembly has not enacted a valid ballot access statute to allow its citizens to exercise their First Amendment political speech and associational rights to organize new political parties and to run candidates for office with the designation of any new political party.

In 2008, representatives of several political parties filed suit to obtain ballot access in Ohio for their presidential candidates and candidates for other offices.² The following political parties were granted ballot access in Ohio for the 2008 general election by court order or by agreement of the parties: the Constitution Party, the Green Party, the Libertarian Party, and the Socialist Party USA.³ The court awarded Plaintiffs' counsel a total of \$60,730.75 in attorney fees and costs in the *Libertarian Party* and *Moore* cases.

In 2009, I issued Directive 2009-21 granting these minor political parties ballot access for 2010, due to the failure of the General Assembly to enact a valid ballot access statute.

Under R.C. 3517.01 (A)(1), any political party whose nominee for governor or president, whichever is appropriate, did not receive at least five percent of the vote at the general election ceases to be a political party in Ohio. In the 2010 general election, only the gubernatorial nominees of the Democratic Party and the Republican Party received at least five percent of the

¹ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (2006)(holding that the petition process for political party formation in R.C. 3517.01(A)(1) and the primary election requirement for political parties in Section 7, Article V of the Ohio Constitution violate the First Amendment to the U.S. Constitution).

² See, e.g., *Constitution Party of Ohio v. Brunner*, S.D. Ohio Case No. 2:08-cv-666; *Libertarian Party of Ohio v. Brunner*, 567 F.Supp.2d 1006 (S.D. Ohio 2008); *Moore v. Brunner*, S.D. Ohio Case No. 2:08-cv-224.

³ See Advisory 2008-17; Directive 2008-83.

votes cast for governor. If a political party that was granted ballot access in Ohio in 2008 by court order or agreement and in 2010 by Directive 2009-21 (i.e., the Constitution Party, the Green Party, the Libertarian Party, or the Socialist Party USA) is denied ballot access again in 2011, then it can be expected that the political party will again file a lawsuit in federal court to gain Ohio ballot access in 2011, which can be expected to result in a favorable ruling for the political party and in the state being liable for additional legal fees. There is also the prospect for confusion and delay, which is antithetic to a smooth election process.

Discussion

Given that the General Assembly has not yet enacted a new ballot access statute following the September 6, 2006 court decision, and given the high likelihood of success on the merits of any new lawsuit to obtain ballot access, Ohio boards of elections are hereby instructed to continue to recognize these political parties and to grant candidates of these political parties ballot access in the 2011 election cycle.

Consequently, the following shall apply for the 2011 election cycle:

A. Recognized Major and Minor Political Parties

1. The recognized **major** political parties in Ohio are the Democratic Party and the Republican Party.
2. The recognized **minor** political parties in Ohio are the Constitution Party, the Green Party, the Libertarian Party, and the Socialist Party USA.

B. Minor Party Candidates Seeking Political Party Nomination at the Primary Election

1. Candidates seeking the nomination of a minor political party at the primary election must use the same forms as candidates for major political parties seeking nomination at the primary election.
2. Candidates of minor political parties must pay the same filing fee as candidates for the same office who are seeking the nomination of either of the major political parties.
3. The Secretary of State and boards of elections must accept for filing all facially valid declaration of candidacy and petitions of candidates of the Constitution, Democratic, Green, Libertarian, Republican, and Socialist Parties who file to seek party nomination at the primary election for any office for which nomination at a primary election is available. Any filed declaration of candidacy and petition is subject to verification by the board of elections prior to certification, as with any candidate petition.
4. Any candidate seeking political party nomination at a primary election must declare under penalty of election falsification that the candidate is a member of the political party whose nomination the candidate is seeking. This declaration is made in the declaration of candidacy, such as Secretary of State Form 2-I for candidates seeking political party nomination for offices in a city or village.

5. In accordance with R.C. 3517.013, **any elector** may seek political party nomination as a candidate of a minor political party again in 2011, regardless of the elector's prior political affiliation, voting history, or if the elector holds public elected office, regardless if the elector was appointed or elected to the public office as a nominee of a major political party.

C. Signature Number and Signers of Candidate Petitions for Minor Political Party Candidates

1. Consistent with R.C. 3513.05, the minimum number of signatures for candidates of minor political parties seeking their party's nomination to public elective office at the primary election is **one-half** the minimum number of signatures required for candidates of major political parties.
2. Because primary elections were held for these minor political parties in 2010, the provision of R.C. 3513.05 that permitted any qualified elector to sign the declaration of candidacy and petition of a minor party candidate for the first primary election held by that party in an even-numbered year no longer applies. **Thus, under the seventh paragraph of R.C. 3513.05, signers of a minor party candidate's declaration of candidacy and petition cannot have voted in a different political party's primary election in the preceding two calendar years. Signers may also be unaffiliated (the elector did not vote in any political party's primary election in the preceding two calendar years).**
3. All signers of declaration of candidacy and petitions of candidates seeking nomination or election at a primary election declare that they are members of a political party and make this declaration under penalty of election falsification under R.C. 3513.07. Consequently, signers of such declaration of candidacy and petitions must make their declaration of party membership in good faith and may not sign declaration of candidacy and petitions of candidates of different political parties for the same primary election. (Note: The signing by a qualified elector of a declaration of candidacy and petition for a candidate seeking party nomination or election at a primary election does not impact the eligibility of a qualified elector to sign the nominating petition of an independent candidate or a candidate for a nonpartisan office for which nomination at a primary election is not available (such as township trustee or board of education). Any qualified elector may sign the nominating petition of an independent candidate or a candidate for a nonpartisan office for which nomination in a primary election is not available, regardless of the elector's political affiliation.)

D. Circulators of Minor Political Party Candidate Petitions

1. Circulators of any candidate's petition **do not have to be Ohio residents or Ohio electors** under the ruling of the U.S. Court of Appeals for the Sixth Circuit in *Nader v. Blackwell*, 545 F.3d 459 (2008).
2. However, if the circulator of a declaration of candidacy and petition for a candidate seeking nomination or election at a primary election **is an Ohio elector:**

- a. The circulator must be a member of the same political party (major or minor) as the candidate (the circulator did not vote in a different political party's primary election within the preceding two calendar years under R.C. 3513.05 (seventh paragraph)), or
 - b. The circulator may be unaffiliated, that is, the circulator did not vote in any political party's primary election in the last two calendar years under R.C. 3513.05 (seventh paragraph).
3. Candidates may circulate their own petitions for public or party office under R.C. 3513.05 (tenth paragraph), R.C. 3513.191(C)(4), and R.C. 3517.013.

E. Protests

1. R.C. 3513.05 provides that a protest may only be filed against a candidate for political party nomination or election at a primary election on or before the 74th day before the primary election (February 18, 2011), and such a protest must be filed by:
 - a. An elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate; or
 - b. The controlling committee of the political party named in the candidate's declaration of candidacy.

F. Holding of a Primary Election for One or More Minor Political Parties

1. Absent a charter provision to the contrary, a board of elections must hold a primary election in an odd-numbered year for a major or minor political party in a precinct if more candidates seeking the nomination of that political party file declarations of candidacy and petitions for an office than the number of candidates that the political party may nominate for that office. . However, if no candidate files or if the number of candidates that file seeking a political party's nomination is equal to or less than the number of candidates that may be nominated, then no primary election shall be held for that office in the precinct under R.C. 3513.02. **Note that the determination as to whether a primary election must be held under R.C. 3513.02 is based upon the filing of a declaration of candidacy and petition, not the certification by the board of elections of a candidate's petition.**
2. If a sufficient number of candidates file declarations of candidacy to hold a primary election for an office, then the board of elections must provide separate primary election ballots for the political party (major or minor) for the precinct(s) of the political subdivision for which the candidate seeks office under R.C. 3513.13.
3. R.C. 3517.016 (permitting **any elector** to vote in the primary election of a new minor political party at the first primary election held by that party without being challenged by poll workers based upon political affiliation no longer applies since

primary elections were held for the minor political parties in 2010).
Consequently, poll workers **must challenge** an elector's ability to vote in the
primary election of a minor political party under R.C. 3513.19(A)(3) based upon
the elector's prior political affiliation printed in the poll book.

If you have any questions about this directive or its implementation, please contact the elections
attorney in this office assigned to assist your county board of elections.

Sincerely,



Jennifer Brunner