

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO,
KEVIN KNEDLER, and
MICHAEL JOHNSTON,

Plaintiffs,

v.

JON HUSTED,
in his Official Capacity as Ohio
Secretary of State,

Defendant.

_____ /

Case No. _____

JUDGE _____

MAGISTRATE _____

**PRELIMINARY INJUNCTION
REQUESTED**

COMPLAINT

Introduction

1. Because of prior successful litigation against Ohio's Secretary of State, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), Plaintiff, the Libertarian Party of Ohio (LPO), has since the 2008 general election remained a ballot-qualified political party in Ohio.

2. The LPO in 2008 and again in 2010 elections ran candidates for local, state-wide, and federal office (including the 2008 Presidency).

3. In order to gain ballot access in Ohio in 2008, the LPO filed two separate lawsuits. The first, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), succeeded in striking down both Ohio's early-filing deadline for new political parties, and its signature

collection requirement. The second, *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), succeeded in striking down the Ohio Secretary of State's interim early filing deadline, as well as the Secretary's interim signature requirement.

4. *Blackwell* specifically invalidated Ohio's requirement, spelled out in O.R.C. § 3517.01(A)(1), that new parties in order to qualify for Ohio's ballot collect signatures from a number of voters equal to 1% of the vote in the last gubernatorial or presidential election--a number that would have totaled more than 40,000 signatures in 2008. *Blackwell* also invalidated Ohio's early filing deadline for new parties, which according to O.R.C. § 3501.01(E)(2) and O.R.C. § 3517.01(A)(1) fell 120 days before the March primary, November 5, 2007 for the 2008 general election.

5. Following the invalidation of Ohio's deadline and its signature requirement, and the Legislature's failure to replace the invalid provisions in O.R.C. § 3501.01(E)(2) and O.R.C. § 3517.01(A)(1), Ohio's Secretary of State administratively adopted a new signature requirement and early filing deadline for the 2008 election. The Secretary's new requirement demanded that new parties gather a number of signatures from voters equal to 1/2% of the votes cast in the last gubernatorial or presidential election, which for the 2008 election translated to over 20,000 signatures. The Secretary also required that these signatures be submitted 100 days before the March primary, November 26, 2007.

6. This Court in *Brunner* invalidated both the Secretary's interim signature requirement and the interim November, 26 filing deadline; the Secretary thereafter entered into a consent decree which precluded future enforcement of these provisions.

7. Because Ohio lacked a constitutional ballot access law, this Court after finding that

the LPO had the requisite community support ordered that the LPO and its slate of candidates be placed on the 2008 general election ballot.

8. The Secretary thereafter adopted Directive 2009-21, which guaranteed the LPO continued ballot access so long as the Legislature failed to act. In particular, the LPO was guaranteed ballot access for the 2010 primary and general elections. Because the Secretary's Directive 2011-01, adopted on January 6, 2011, restates Directive 2009-21, the LPO continues to be guaranteed ballot access in Ohio until September 30, 2011.

9. The Secretary's adoption of Directive 2009-21 recognized and conceded that the courts' holdings in *Blackwell* and *Brunner* invalidated Ohio's ballot access laws for new parties in non-presidential election years, which but for the courts' holdings in those two cases would have required the collection and submission of approximately 58,000 signatures 120 days before the May 2010 primaries, which would have placed the qualification date on January 4, 2010 of that election year.

10. But for the courts' two holdings in *Blackwell* and *Brunner*, and the Secretary's Directive 2009-21, a new party would have according to O.R.C. § 3501.01(E)(1) and O.R.C. § 3517.01(A)(1) had to submit approximately 58,000 signatures (which is 1% of the 2008 vote for President) by January 4, 2010 to qualify for the November 2, 2010 general election ballot.

11. On June 29, 2011, the Ohio Legislature passed H.B. 194, which altered the language in O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1) to require that new parties qualify for Ohio's ballots no later than 90 days before the state's primaries, which under H.B. 194 would take place the first Tuesday following the first Monday in May for elections occurring in both presidential and non-presidential election cycles. The law was signed by the governor on July 1,

2011 and is effective on September 30, 2011. *See* 2011 Ohio Sess. Law Service 40.

a. Specifically, H.B. 194 altered O.R.C. § 3501.01 in the following fashion, with strike-through used to represent the deletion of existing language:

(E)(1) “Primary” or “primary election” means an election held for the purpose of nominating persons as candidates of political parties for election to offices, and for the purpose of electing persons as members of the controlling committees of political parties and as delegates and alternates to the conventions of political parties. Primary elections shall be held on the first Tuesday after the first Monday in May of each year ~~except in years in which a presidential primary election is held.~~

(2) “Presidential primary election” means a primary election as defined by division (E)(1) of this section at which an election is held for the purpose of choosing delegates and alternates to the national conventions of the major political parties pursuant to section 3513.12 of the Revised Code. Unless otherwise specified, presidential primary elections are included in references to primary elections. ~~In years in which a presidential primary election is held, all primary elections shall be held on the first Tuesday after the first Monday in March except as otherwise authorized by a municipal or county charter.~~

b. O.R.C. § 3517.01, meanwhile, was specifically changed by H.B. 194 in the following fashion, with strike-through used to represent the deletion of text and underline used to represent the addition of new text:

(A)(1) A political party within the meaning of Title XXXV of the Revised Code is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five per cent of that vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than ~~one hundred twenty~~ ninety days after the date of filing. No such group of electors shall assume a name or designation that is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. If any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president, it shall cease to be a political party.

12. For the 2012 election, Ohio's qualifying date for new parties is, according to the

changes made by H.B. 194 to O.R.C. §§ 3501.01 & § 3517.01, now February 8, 2012.

13. H.B. 194 made no changes to the number of signatures required to be collected under O.R.C. § 3517.01(A)(1), meaning that a new party must collect a number of signatures equal to 1% of the total vote in the last gubernatorial or presidential election and submit them by February 8, 2012.

14. H.B. 194 did not alter Ohio's alternative route to ballot access under which a party that garnered 5% of the total vote cast for Governor or President in the most recent election maintains ballot access. *See* O.R.C. § 3517.01(A)(1).

15. Because of the changes H.B. 194 made to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), the LPO, whose candidates won 184,478 votes (4.91% of the total) for State Treasurer in 2010, 182,977 votes (4.88% of the total) for Secretary of State in 2010, 182,534 votes (4.87% of the total) for State Auditor in 2010, 107,521 votes (2.81% of the total) for Attorney General in 2010, and 92,116 votes (2.39% of the total) for Governor in 2010, will on September 30, 2011 no longer be automatically qualified for Ohio's ballot; instead, the LPO will under the terms of Ohio's new ballot access law, as spelled out in H.B. 194, be required to collect approximately 40,000 signatures and deliver them to the Secretary of State by February 8, 2012.

Parties

16. Plaintiff, LPO, is an affiliation of voters formed for the purpose of influencing public policy by a variety of means, which include running candidates for public office and disseminating its views on policy issues through its candidates' campaigns. The LPO was founded in or around 1972 and is the Ohio affiliate of the national Libertarian Party.

17. LPO was qualified for Ohio's ballot during the 2008 and 2010 general elections and ran nearly fifty candidates for local, state-wide and federal office (including the Presidency). LPO currently has over 5,000 registered party members in Ohio and during the 2010 general election its candidates collectively received over 1,000,000 votes in Ohio.

18. LPO's 2010 slate of state-wide candidates won nearly 5% of the total votes cast in their respective elections; specifically LPO's candidates won 184,478 votes (4.91% of the total) for State Treasurer in 2010, 182,977 votes (4.88% of the total) for Secretary of State in 2010, 182,534 votes (4.87% of the total) for State Auditor in 2010.

19. Plaintiff, Kevin Knedler, resides in Concord Township, Delaware County, Ohio and is the LPO's chair. He brings suit both as the LPO's chair and as a voter who intends to vote for LPO candidates on Ohio's 2012 general election ballot.

20. Plaintiff, Michael Johnston, resides in Westerville, Franklin County, Ohio and is Vice Chair & Political Director of the LPO. He brings suit both as the LPO's Vice Chair and as a voter who intends to cast his vote for LPO candidates on Ohio's 2012 general election ballot.

21. Defendant, Jon Husted, is the Ohio Secretary of State and, pursuant to Ohio Rev. Code § 3501.04, is the chief elections officer of Ohio. Defendant's enforcement of H.B. 194 and Ohio's election laws at all relevant and material times are under color of Ohio law and constitute state action. Defendant is sued in his official capacity as the Ohio Secretary of State.

Jurisdiction and Venue

22. Federal jurisdiction is claimed under the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983.

23. Venue lies in this district under 28 U.S.C. § 1391(b).

Facts

24. Ohio law provides in relevant part as follows:

a. Political parties nominate their candidates for public office via primary elections. Oh. Const. art. V sec. 7.

b. Primary elections in Ohio before the enactment of H.B. 194 were held on the first Tuesday after the first Monday in May of each year, except that in years in which a presidential primary election were held, primary elections were held on the first Tuesday after the first Monday in March. Ohio Rev. Code §§ 3501.01(E)(1) and (2). H.B. 194's change to O.R.C. §§ 3501.01 has moved the primary date for both presidential and non-presidential election cycles to the first Tuesday after the first Monday in May.

c. A political party whose candidate for governor or nominees for presidential elector received at least five percent of the votes cast for governor or for nominees for presidential elector in the most recent general election has automatic access to the ballot in the next primary and general elections. Ohio Rev. Code § 3517.01(A).

d. A party which received less than five percent of that vote may qualify to nominate candidates for public office (via Ohio's primary election) by obtaining petition signatures of qualified electors equal in number to at least one percent of the total vote cast for governor or for nominees for presidential elector in the most recent general election, and now, following H.B. 194's change to O.R.C. § 3517.01(A), by filing such petition signatures with Defendant at least 90 days before the May primary election.

25. In the most recent general election, held on November 2, 2010, approximately 3,852,453 votes were cast for Governor of Ohio. The signature requirement for a petition to

qualify a political party to nominate candidates at the May 8, 2012, primary election, according to Ohio law as amended by H.B. 194, is therefore approximately 38,525 ($3,852,453 \times 0.01 = 38,525$) voter signatures, and the deadline for filing such petition and accompanying signatures is February 8, 2012.

26. Because of changes made by H.B. 194 to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), the LPO will not be automatically qualified for Ohio's 2011 general election or its 2012 primary and general elections.

27. As it did during the 2008 and 2010 election cycles, the LPO seeks to field and run candidates for local, state-wide and federal office (including the Presidency) in Ohio in 2011 and 2012.

28. H.B. 194's changes to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), prevent the LPO from automatically fielding and running candidates for local, state-wide and federal office (including the Presidency) in Ohio in 2011 and 2012.

29. But for H.B. 194's changes to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), the LPO would have been automatically qualified to field and run candidates for local, state-wide and federal office (including the Presidency) during Ohio's 2011 general election and its 2012 primary and general elections.

30. H.B. 194's changes to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), unconstitutionally

restrict LPO's ability to field and run candidates for local, state-wide and federal office (including the Presidency) during 2011 and 2012 and thereafter.

31. As they did during the 2008 and 2010 election cycles, Plaintiffs, Knedler and Johnston, seek to vote for LPO candidates in the 2012 primary and general elections and thereafter.

32. Because H.B. 194's changes to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), interfere with LPO's constitutional right to field and run candidates for local, state-wide and federal office (including the Presidency), Plaintiffs, Knedler's and Johnston's, rights to vote for LPO candidates are unconstitutionally infringed by H.B. 194.

33. But for H.B. 194's changes to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), Plaintiffs, Knedler and Johnston, would be able to vote for candidates for local, state-wide and federal office (including the Presidency) who are running under the LPO banner.

34. H.B. 194's changes to H.B. 194 to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), create an early filing deadline and signature collection requirement that both independently and together violate the First and Fourteenth Amendments to the United States Constitution.

35. On July 26, 2011, Plaintiff, Johnston, sent via certified mail to Defendant a letter inquiring whether it was Defendant's intent to apply H.B. 194's changes to the LPO during the 2012 election cycle.

36. Plaintiff-Johnston's letter requested that Defendant not apply H.B. 194's changes to

the LPO because of the late date on which they were enacted in the 2012 election cycle.

37. Plaintiff-Johnston's letter pointed out several historical examples from Ohio and elsewhere where late changes to election laws that prejudiced otherwise qualified candidates and parties were not applied to them in the immediate upcoming election.

38. Defendant responded to Plaintiff-Johnston's letter by letter dated August 5, 2011 and received by Plaintiff-Johnston on August 8, 2011.

39. Defendant's response stated that H.B. 194's intent was to repeal Directives 2009-21 and 2011-01 and that the Defendant would not delay enforcement of H.B. 194's changes to Ohio's ballot access laws.

Count One

40. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 39.

41. Defendant was provided a fair and full opportunity to litigate, and in face did litigate, the constitutionality of Ohio's signature requirement in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), and *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008).

42. The Sixth Circuit in *Blackwell* and this Court in *Brunner* ruled that Ohio's requiring that a new party collect signatures from approximately 20,000 to 40,000 voters to qualify for Ohio's ballot, in combination with Ohio's other access requirements, violates the First and Fourteenth Amendments.

43. Defendant is precluded by federal rules of issue and claim preclusion from re-litigating the courts' factual and legal conclusions in *Blackwell* and *Brunner* that requiring new parties to collect approximately 20,000 to 40,000 signatures for a party to qualify for the ballot in

Ohio, which in combination with Ohio's other access requirements violate the First and Fourteenth Amendments.

44. Regardless of preclusion principles, requiring that new parties collect approximately 40,000 signatures to qualify for the ballot, in combination with Ohio's other access requirements, violate the First and Fourteenth Amendment rights of LPO, Knedler and Johnston, on their face and as-applied, as well as 42 U.S.C. § 1983.

Count Two

45. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 39.

46. H.B. 194's early February qualifying deadline for new parties, now codified in O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), violates the First and Fourteenth Amendment rights of LPO, Knedler and Johnston, on its face and as-applied, as well as 42 U.S.C. § 1983.

Count Three

47. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 39.

48. Ohio's signature requirement and early February filing deadline, when combined and applied to the 2012 presidential election, violates the First and Fourteenth Amendment rights of LPO, Knedler and Johnston, as well as 42 U.S.C. § 1983.

Count Four

49. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 39.

50. H.B. 194's change to Ohio law which now requires new parties to file by February 8, 2012 and its retention of its signature collection requirement for new parties, when combined, violate the First and Fourteenth Amendment rights of LPO, Knedler and Johnston, on their face and as-applied, as well as 42 U.S.C. § 1983.

Count Five

51. Plaintiffs herein incorporate the allegations made in paragraphs 1 through 39.

52. Notwithstanding H.B. 194, the LPO remains automatically ballot-qualified until September 30, 2011.

53. As conceded in Defendant's August 5, 2011 letter, H.B. 194 strips the LPO of its automatic ballot status on September 30, 2011 and requires it to re-qualify by collecting approximately 40,000 signatures from qualified voters by February 8, 2012.

54. By stripping the LPO of its qualified status on September 30, 2011, H.B. 194 leaves the LPO with no legal means of qualifying for the November 2011 election ballot and leaves the LPO with constitutionally inadequate time to collect approximately 40,000 signatures, field candidates and qualify for the 2012 ballot, in violation of the LPO's First and Fourteenth Amendment rights.

55. Disqualification of the LPO from Ohio's ballot in late September 2011 without providing any legal means for the LPO to qualify for the November 2011 election ballot and requiring its re-qualification in early February 2012 violates the LPO's, Knedler's and Johnston's First and Fourteenth Amendment rights, as well as 42 U.S.C. § 1983.

RELIEF REQUESTED

56. WHEREFORE, Plaintiffs request the following relief pursuant to 42 U.S.C. §§ 1983 and 1988(b):

a. a declaration that H.B. 194's early filing deadline for new parties is unconstitutional on its face and as-applied;

b. a declaration that O.R.C. § 3517.01(A)(1)'s signature requirement for new

parties is unconstitutional on its face and as-applied;

c. a declaration that H.B. 194's early filing deadline and O.R.C. § 3517.01(A)(1)'s signature requirement together for new parties are unconstitutional on their face and as-applied;

d. preliminary and permanent injunctive relief prohibiting Defendant from enforcing either H.B. 194's early filing deadline or O.R.C. § 3517.01(A)(1)'s signature requirement, separately or together;

e. preliminary and permanent injunctive relief placing the LPO and its candidates on Ohio's 2011 general election ballot and on Ohio's 2012 primary and/or general election ballots;

f. reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988(b);

g. such other and further relief as may be just and proper.

Dated: August 9, 2011

Respectfully submitted,

Gary Sinawski
180 Montague Street 25th Floor
Brooklyn, NY 11201
(516) 971-7783
fax: (212) 581-1516
gsinawski@aol.com

s/Mark R. Brown
Mark R. Brown, Trial Counsel
Ohio Registration No. 0081941
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
fax: (614) 236-6956
mbrown@law.capital.edu
Attorneys for Plaintiffs