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. 2:11-cv-722

JUDGE MARBLEY

MAGISTRATE JUDGE KING

PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO COMPEL COMPLIANCE WITH PRELIMINARY INJUNCTION

More than thirty days after this Court issued its preliminary injunction on September 7, 2011, enjoining "[t]he State ... from enforcing H.B.194's changes to O.R.C. §§ 3501.01(E) and 3517.01(A)(1)," and "requir[ing] it to take steps to enact ballot access laws that address the constitutional deficiencies identified here, in *Brunner*, and in *Blackwell*," Defendant has done nothing. Indeed, rather than attempt to correct the deficiencies this Court found in Ohio's ballot access laws, Ohio has passed a law that make them worse. On September 21, 2011, Ohio passed a law that moved the 2012 primaries, which were scheduled for early May of 2012 when this Court issued its Order, to March 6, 2012. *See* Ohio Legis. Serv. 49 (2011) (stating that it became effective on 9/26/2011). *See also* Marc Kovac, Ohio's primary will be in March, THE DAILY RECORD, September 22, 2011 (http://www.the-daily-record.com/news/article/5099384)

(reporting that Ohio's primary was moved to March 6, 2012). Because Ohio's law at the time this statute was passed required that new parties, including Plaintiff-LPO, qualify ninety days before Ohio's primaries,[1] this change moved Plaintiff-LPO's qualification date for the 2012 election primary forward sixty days to approximately December 7, 2011.

On October 7, 2011, Defendant filed with the Court a copy of its September 21, 2011 letter to the General Assembly asking that the Assembly to take action. *See* Docket No. 14. Defendant apparently believes this letter is sufficient to comply with the Court's Order that Defendant must pass constitutionally acceptable ballot access procedures for the 2012 election. However, Defendant did nothing else. He has not supplied the Plaintiffs with needed forms to qualify Libertarian Party presidential delegates. He has not issued letters or Directives explaining to local election boards how Plaintiff-LPO and its candidates are to qualify. He has not attempted to establish any mechanism whatsoever for the orderly qualification of Plaintiff-LPO and its candidates. Defendant has ignored Plaintiffs' and Plaintiffs' counsel's repeated requests over the past thirty days to do something to address Ohio's ballot access problem and insure that Plaintiff-LPO and its candidates have a constitutionally-acceptable procedure for gaining access to Ohio's 2012 primary and general election ballots.

[1] The ninety-day requirement imposed by H.B. 194, and enjoined by this Court, may have been suspended by a proposed Referendum that was submitted on September 29, 2011. *See* Joe Hallet, HB194 foes turn in signatures, Columbus Dispatch, Sept. 30, 2011 (http://www.dispatch.com/content/stories/local/2011/09/30/hb-194-foes-turn-in-signatures.html). Assuming that the Referendum has enough signatures, Ohio's old 120-day pre-primary requirement will once again become the law in Ohio, and will require that Plaintiff-LPO qualify as a party for the 2012 election by approximately November 7, 2011. Of course, this precise result was deemed unconstitutional in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 569 (6th Cir. 2006), and clearly violates this Court's conclusion that an early February qualification requirement cannot be constitutionally enforced.

As things now stand in Ohio, there is no constitutionally-acceptable ballot access mechanism for minor parties. Plaintiff-LPO and its candidates are therefore confronted with uncertainty. Plaintiff-LPO cannot effectively recruit candidates because it cannot guarantee them that it has ballot access. Those candidates who want to run have been provided no direction from Defendant on how to proceed. In sum, unlike the two major parties, whose candidates have certainty and a clear apparatus for obtaining ballot access, Plaintiff-LPO has been left in the dark. It has been intentionally placed by Ohio at a competitive disadvantage.

Faced with this same situation in 2009, then-Secretary of State Jennifer Brunner issued Directive 2009-21, which clearly delineated the minor parties' rights to Ohio's primary and general election ballots. Secretary Brunner issued this same directive in January of this year in an attempt to manage this year's elections. *See* Directive 2011-01. Both were repealed by H.B. 194 in early July of this year. Defendant offers no explanation for why he cannot issue a similar Directive clarifying the mechanism for minor-party candidates to gain access to Ohio's primary and general election ballots. Had it wanted to comply with this Court's order, that is what Defendant would have done. Defendant's failure to do so, in light of its failure to appeal, is inexcusable.[2]

[2] Defendant pretends that he is prevented from acting by this Court's conclusion in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008), where this Court ruled that the Ohio Secretary of State cannot consistent with the Election Clauses of the federal Constitution regulate federal elections. That holding, however, does not speak to the Secretary's authority to regulate state elections, nor does it purport to limit the Secretary's authority to comply with the unchallenged orders of a federal court. Regulating federal elections in the first instance falls outside the Secretary's constitutional authority. Still, once a federal court finds that the Secretary is violating the First and Fourteenth Amendments by enforcing unconstitutional access laws, the Secretary can clearly be ordered to take the steps that are necessary to bring Ohio into compliance with the Constitution of the United States. *See* U.S. Const. art. VI, cl.2 (the "Supremacy Clause"); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("the prohibitions of the

In the absence of constitutionally-acceptable ballot access laws, courts have no choice but to place on ballots the names of parties and candidates that have "the requisite community support." *See Goldman-Frankie v. Austin,* 727 F.2d 603, 607 (6th Cir. 1984). Faced with a recalcitrant Michigan legislature, the Sixth Circuit in *Goldman-Frankie* remedied Michigan's deficiencies by simply placing the unconstitutionally excluded candidate's name on the ballot. As observed by this Court in *Libertarian Party of Ohio v. Brunner,* 567 F. Supp. 2d 1006, 1015 (S.D. Ohio 2008), "where a state has unconstitutionally prevented a party or a candidate from accessing the ballot, 'a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support.'" (Quoting *McCarthy v. Briscoe,* 429 U.S. 1317, 1323 (1976)). This Court in *Brunner* explained that although it "will not prescribe Constitutional election procedures for the state," *id.* at 1015, "in the absence of constitutional, ballot access standards, when the 'available evidence' establishes that the party has 'the requisite community support,' this Court is required to order that the candidates be placed on the ballot." *Id.* The Court accordingly found in 2008 "that the Libertarian Party has the requisite community support to be placed on the ballot in the state of Ohio." *Id.*

As reflected in the election returns from 2010, all of which are public-record[3] and can therefore be judicially-noticed, *see* Fed. R. Evid. 201(b), Plaintiff-LPO is even more popular today. It won nearly 5% of the vote for several state-wide offices, including State Treasurer,

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Fourteenth Amendment extend to all action of the State ... whatever the agency of the State taking the action, or whatever the guise in which it is taken") (citations omitted).

[3] *See* http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results.aspx.

Secretary of State, and State Auditor.[4] *See* First Amended Complaint at ¶ 15. Plaintiff-LPO, moreover, has a lengthy history, as does its national parent, the Libertarian Party. Plaintiff-LPO was founded in or around 1972. *See* First Amended Complaint at ¶ 16. Plaintiff-LPO was qualified by this Court's order in *Brunner* 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). *See* Complaint at ¶ 17. Plaintiff-LPO currently has over 5,000 registered party members in Ohio. *See* Complaint at ¶ 17. During the 2010 general election its candidates collectively received over 1,000,000 votes in Ohio. *See* Complaint at ¶ 17. It clearly has the 'requisite community support' needed to appear on Ohio's ballots under this Court's holdings in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1015 (S.D. Ohio 2008), *Moore v. Brunner,* 2008WL3887639 (S.D. Ohio 2008) (finding that the Socialist Party of Ohio had sufficient support to be ordered onto Ohio's 2008 ballot), and the Sixth Circuit's holding in *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court either order that the Plaintiff-LPO and its candidates be placed on Ohio's 2012 primary and election ballots, or in the alternative compel the Defendant to issue a Directive to this same effect.

[4] Plaintiff-LPO candidates in 2008 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, and 182,534 votes (4.87% of the total) for State Auditor in 2010. *See* 2010 Election Results: General Election (http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results.aspx).

Respectfully submitted,

s/*Mark R. Brown*

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Certificate of Service

I certify that the foregoing document was filed electronically with the Court and thereby transmitted to all counsel of record through the Court's CM/ECF system.

/s/ Mark R. Brown
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