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

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED PROCEEDINGS

Introduction

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. In the wake of LPO's two successes, the Ohio Secretary of State adopted Directive 2009-21, *see* Attachment C (Directive 2009-21, dated December 31, 2009), which guaranteed the LPO continued ballot access. *See* First Amended Complaint at ¶¶ 5-9. In particular, the LPO was guaranteed ballot access for the 2010 primary and general elections. *See* First Amended Complaint at ¶ 8. Because the Secretary's Directive 2011-01, *see* Attachment D (Directive 2011-1, dated January

6, 2011), adopted on January 6, 2011, restated Directive 2009-21, the LPO continued to be guaranteed ballot access in Ohio during the 2011 election cycle and beyond. *See* First Amended Complaint at ¶ 8.

On June 29, 2011, the Ohio Legislature passed H.B. 194, which altered the language in the Ohio ballot access laws that had previously been ruled unconstitutional. *See* 2011 Ohio Sess. Law Service 40. Specifically, O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1) were changed 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 are to take place on the first Tuesday following the first Monday in May. *See* First Amended Complaint at ¶ 11. This new primary date applies in both presidential and non-presidential election cycles. *See* First Amended Complaint at ¶ 11. The law was signed by the governor on July 1, 2011 and becomes effective on September 30, 2011. *See* 2011 Ohio Sess. Law Service 40.

By letter dated August 5, 2011, and received by the LPO on August 8, 2011, Defendant informed the LPO that H.B. 194's changes will be immediately applied on September 30, 2011, and that the LPO will have to comply with the changes in order to gain ballot access in 2012. *See* Attachment A (Letter from Secretary of State Jon Husted); Attachment B (Declaration of Michael Johnston). Defendant made clear that the Secretary's previous Directives 2009-21, *see* Attachment C, and 2011-1, *see* Attachment D, are no longer in place and that the LPO no longer is a qualified party in Ohio. It will therefore have to qualify all over again under H.B. 194's terms. *See* Attachment A. Further, because it is impossible for the LPO to go back and comply

with H.B. 194's changes by February 2011, H.B. 194 forever removes the LPO and its candidates from the 2011 election ballot.[1]

Facts

Plaintiff, LPO,[2] 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. *See* First Amended Complaint at ¶ 16. *See also* Attachment B (Declaration of Michael Johnston). The LPO was founded in or around 1972 and is the Ohio affiliate of the national Libertarian Party. *Id.* 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). *Id.* at ¶ 17. 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. *Id.*

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. *Id.* at ¶ 18.

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[1] The LPO was scheduled to run two candidates in partisan local races in Ohio in November 2011. *See* Attachment B (Declaration of Michael Johnston).

[2] The First Amended Complaint also includes two LPO officers joined in that capacity and as voters. 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. *See* First Amended Complaint at ¶ 19. Plaintiff, Michael Johnston, resides in Westerville, Franklin County, Ohio and is Vice Chair & Political Director of the LPO. *See* First Amended Complaint at ¶ 20; Declaration of Michael Johnston (Attachment B). The Plaintiffs are referred to collectively here as "the LPO."

Defendant, Jon Husted, is the Ohio Secretary of State and, pursuant to Ohio Rev. Code § 3501.04, is the chief elections officer of Ohio. *See* First Amended Complaint at ¶ 22. He is sued in his official capacity. *Id.* 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. *See* First Amended Complaint at ¶ 22.

On June 29, 2011, the Legislature passed H.B. 194, which 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.~~

See 2011 Ohio Sess. Law Service 40.

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.

See 2011 Ohio Sess. Law Service 40. The law was signed by the Governor on July 1, 2011 and becomes effective on September 30, 2011. *Id.*

The changes in O.R.C. §§ 3501.01 and 3517.01 now mandate that political parties that did not receive 5% of the vote for Governor or President in the last election must submit signatures from voters equal to 1% of the total vote cast in the last election for President or Governor 90 days before the May primary. For the 2012 election, that means the LPO, which did not win 5% of the vote in 2010's gubernatorial election, must submit approximately 40,000[3] signatures by February 8, 2012 to re-qualify for the ballot. *See* First Amended Complaint at ¶ 15.

H.B. 194's changes were made necessary by two successful suits brought by the LPO against Defendant in 2006 and 2008. The first, *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006), succeeded in striking down both Ohio's November filing deadline for new political parties, and its requirement that new parties submit approximately 40,000 signatures. 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, which was

[3] From available data on the Defendant's web page, it appears that the actual number of required signatures is 38,525. *See* First Amended Complaint at ¶ 25. That number in 2014 will, of course, be much larger, since the vote count in presidential elections is larger. Had H.B. 194's changes applied in 2010, for example, the LPO would have had to submit close to 58,000 signatures. *See* First Amended Complaint at ¶ 10.

20 days later from that invalidated in *Blackwell*, as well as the Secretary's interim signature requirement, which was half the number invalidated in *Blackwell*.

Following its decision in *Brunner*, this Court concluded that the LPO had the requisite community support to merit ballot access. It therefore ordered that the LPO, along with three other minor parties, be placed on Ohio's 2008 election ballot. The Secretary thereafter entered a consent decree agreeing not to enforce her interim requirements, and adopted Directive 2009-21, which guaranteed the LPO (and the three additional minor parties) continued ballot access. On January 6, 2011, the Secretary restated Directive 2009-21, *see* Attachment C, in Directive 2011-01, *see* Attachment D, which continued to guarantee the LPO ballot access in 2011 and beyond. *See* First Amended Complaint at ¶ 8.

The Secretary's adoption of Directives 2009-21 and 2011-01 necessarily recognized and conceded that the courts' two holdings in *Blackwell* and *Brunner* not only invalidated Ohio's ballot access laws for new parties in presidential election years (like 2008), but also applied to non-presidential election cycles (like 2010), which under Ohio's ballot access law at the time had later primaries, held not in March (as with presidential election years) but in May. *See* First Amended Complaint at ¶ 9. Consequently, Defendant conceded that requiring new parties to collect 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, was unconstitutional. *See* First Amended Complaint at ¶ 9.

The Secretary's August 5, 2011 letter to the LPO makes clear that H.B. 194's changes are intended to strip the LPO of its automatic ballot access. Hence, the LPO as of September 30, 2011, will not be qualified for the November 2011 ballot. *See* Attachment A. Defendant made clear that the Secretary's previous Directives are no longer in place and that the LPO no longer is

a qualified party in Ohio. *Id.* Further, H.B. 194's changes require that for the LPO to qualify for the 2012 ballot, it will have to collect approximately 40,000 signatures and submit them to Defendant's office by February 8, 2012, 90 days before the primary. Ohio law provides no other way for the LPO to regain access to Ohio's ballot.

Argument

In considering a request for preliminary injunction, the district court is to consider the (1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction. *See Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir.1997). These are "factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985).

I. Likelihood of Success on the Merits

A. Foreclosing Plaintiffs' Access to the 2011 Election Ballot is Unconstitutional.

The First and Fourteenth Amendment prohibit all but constitutionally reasonable restrictions placed on political parties' ballot access. *See Anderson v. Celebrezze,* 460 U.S. 780, 793-94 (1983). In *Norman v. Reed,* 502 U.S. 279, 288 (1992), for example, the Supreme Court "recognized the constitutional right of citizens to create and develop new political parties." It explained that this "right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." *Id.* (Citing

Anderson v. Celebrezze, 460 U.S. 780, 793-794, (1983); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

Consequently, providing no mechanism for independent or minor party access violates the Constitution, *per se*. *See, e.g., McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (striking down Texas's preclusion of independent presidential candidates). States must have some mechanism for minor party access. *See also Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984) (observing that because Michigan had no valid access law for independent candidates the court was "compelled to again declare, in absolute terms, that the Michigan election laws, so far as they foreclose independent candidates access to the ballot, are unconstitutional").

H.B. 194 overrides the Secretary's previous Directives qualifying the LPO for Ohio's 2010, 2011 and 2012 election ballots. While it creates a mechanism for gaining access to the 2012 ballot, it leaves Ohio with absolutely no mechanism for minor parties, like the LPO, to gain access to Ohio 2011's election ballot. There is nothing the LPO can do under Ohio law to regain access before the November 2011 election. To the extent H.B. 194 achieves this result, it is *per se* unconstitutional. *See McCarthy v. Briscoe*, 429 U.S. 1317 (1976); *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984).

B. Ohio's Signature Requirement is Unconstitutional and Defendant is Estopped from Arguing that it is Valid.

1. O.R.C. § 3517.01(A)'s Signature Requirement is Unconstitutional.

The Sixth Circuit ruled in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), that O.R.C. § 3517.01(A)(1)'s requirement that minor parties collect a number of signatures equal to 1% of the vote cast in the last gubernatorial or presidential election, which was retained by H.B. 194, is unconstitutional when combined with a November (of the previous

year) filing deadline. The court ruled that together the early deadline and high signature requirement violated the First and Fourteenth Amendments.

In order to correct that violation, the Secretary adopted an interim Directive that demanded half the number of signatures required by O.R.C. § 3517.01(A)(1). This Court in *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), invalidated that requirement. When combined with a somewhat later deadline (approximately 20 days later), requiring just over 20,000 signatures still, the Court ruled, violates the First and Fourteenth Amendments.

Ohio has now returned to its old demand--minor parties must collect signatures from a number of voters equal to 1% of the total vote cast in the last gubernatorial or presidential election. That provision was struck down in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). The number of signatures that the LPO must submit in 2012 is almost exactly the number required in 2008--40,000. Because this requirement--indeed, half this requirement--has already been invalidated by this Court and the Sixth Circuit, it is clearly unconstitutional. It was unconstitutional in 2006, 2008, and 2010; it is equally unconstitutional today.

It is not Plaintiffs' intent to rehash Ohio's horrible history of denying access to alternative parties and candidates, *Blackwell*, 462 F.3d at 589 ("in Ohio, elections have indeed been monopolized by two parties, and thus, the burdens imposed by the state's election laws are 'far from remote'"), nor is it necessary to fully canvass how most other states approach ballot access. *Id.* ("of the seven states that require all political parties to nominate their candidates in the state's primary election, Ohio imposes the most burdensome restrictions of both automatic qualification and petition qualification; as a result, it has seen the fewest number of minor parties on the

ballot."). Suffice it to say that the Sixth Circuit in *Blackwell* did both. It found that requiring the collection and submission of approximately 40,000 signatures months before the primary was constitutionally unacceptable. That same conclusion applies to the current case.

2. Defendant is Precluded from Claiming that O.R.C. § 3517.01(A)(1)'s Signature Requirement is Valid.

Claim preclusion prevents parties to prior litigation from re-litigating claims that were previously decided. Generally, in order for a prior judgment to have preclusive effect, four requirements must be satisfied:

> First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second the judgment must be final and on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding.

In re Atlanta Retail, 456 F.3d 1277, 1285 (11th Cir. 2006).

All four elements are met in this case. Defendant is therefore precluded from claiming that O.R.C. § 3517.01(A)'s 1% signature requirement is valid.

Issue preclusion bars parties from re-litigating issues (factual and legal) that were actually resolved in a prior judicial proceeding. *See* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (stating that an issue of fact or law, actually litigated and resolved by a valid final judgment, is binding on the parties in a subsequent action). The validity of O.R.C. § 3517.01(A)(1)'s signature requirement was actually litigated in *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006). Defendant was party to that proceeding. Defendant is therefore now precluded from claiming that O.R.C. § 3517.01(A)(1)'s signature requirement is valid.

C. Ohio's Early Filing Deadline is Unconstitutional.

The Sixth Circuit ruled in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), that O.R.C. §§ 3501(E)'s and 3517.01(A)(1)'s early November filing requirement for minor parties, when combined with its signature demand, violated the First and Fourteenth Amendments. In *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), this Court invalidated the Secretary's interim deadline requiring that minor parties submit over 20,000 signatures just 20 days later. After entering into a consent decree with Plaintiff, Defendant issued a Directive guaranteeing the LPO ballot access in 2010. The Defendant thereby recognized and conceded that O.R.C. §§ 3501(E)'s and 3517.01(A)(1)'s deadline could not be constitutionally applied in a non-presidential election year either, even though the filing deadline was pushed back by O.R.C. §§ 3501(E) and 3517.01(A)(1) to January of the election year.

Now Defendant argues that by adding thirty days to its old election law--which was ruled invalid in *Blackwell*--H.B. 194's new deadline somehow survives constitutional scrutiny. February 8, the argument goes, is late enough.

As explained by the Sixth Circuit in *Blackwell*, no federal court in the country has sustained such an early filing deadline for minor parties and independent candidates. Indeed, the Supreme Court in *Anderson v. Celebrezze,* 460 U.S. 780 (1983), invalidated Ohio's March 20 filing deadline for independent presidential candidates. In that case, John Anderson sought to run as an independent candidate during the 1980 presidential election. Anderson did not decide to run until April 24 of that year, *id.* at 782, which meant that he was precluded from running in several states (including Ohio) by so-called "early filing" deadlines. *Id.* at 786.

Prior to its decision in *Anderson*, the Court in *Tucker v. Salera*, 424 U.S. 959 (1976), *summarily affirming*, 399 F. Supp. 1258, 1266 (E.D. Pa. 1975), summarily affirmed a three-Judge District Court decision invalidating a March deadline for independent congressional candidates. Similarly, in *Lendall v. Jernigan*, 433 U.S. 901 (1977), the Supreme Court summarily affirmed an unreported three-Judge District Court opinion that invalidated an April qualifying deadline for independent candidates for local offices. *See Lendall v. Jernigan*, 424 F. Supp. 951, 952 (E.D. Ark. 1977) (describing the unreported decision that invalidated "the [April] filing deadline for independent candidates for district offices"); *Lendall v. Jernigan*, 45 U.S.L.W. 3438 (1976) (listing questions presented to the Supreme Court).

Since *Anderson*, lower courts have unanimously ruled that pre-March filing deadlines are unconstitutional.[4] Two sister Districts have struck down January and February filing deadlines, respectively. *See Libertarian Party of Ky. v. Ehrler*, 776 F.Supp. 1200, 1205-06 (E.D.Ky.1991); *Cripps v. Seneca County Bd. of Elections*, 629 F.Supp. 1335, 1338 (N.D.Ohio 1985). The Eight Circuit in *MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir.1977), likewise invalidated a February deadline. The Fourth Circuit in *Cromer v. State of South Carolina*, 917 F.2d 819, 821 (4th Cir. 1990), applied *Anderson* to invalidate a March 30 filing deadline for independent candidates for state office. Similarly, the Third Circuit in *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (*Hooks I*), applied *Anderson* to enjoin New Jersey's enforcement of an April 10 qualifying deadline for minor candidates. The Eleventh

[4] It is true that the Seventh Circuit in *Stevenson v. State Board of Elections*, 794 F.2d 1176, 1177 (7th Cir. 1986), sustained an Illinois deadline that forced independent candidates for state office to file in December, 323 days before the November general election. The Seventh Circuit in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), essentially abrogated this holding by striking down that same December deadline in Illinois.

Circuit in *New Alliance Party of Alabama v. Hand,* 933 F.2d 1568, 1576 (11th Cir. 1991), likewise invalidated an April 6 qualifying deadline for minor-party candidates. By striking down later deadlines, the Third, Fourth and Eleventh Circuits have necessarily ruled that March and pre-March filing deadlines for independents and minor-party candidates are unconstitutional under *Anderson*.[5]

The earliest deadline that has been sustained was Ohio's March 1 deadline for independent congressional candidates in *Lawrence v. Blackwell,* 430 F.3d 368 (7th Cir. 2006). The Sixth Circuit in *Libertarian Party of Ohio v. Blackwell,*462 F.3d at 590, however, distinguished that case on the ground that the March filing deadline for independent candidates was the day before the primary. It stated that it "follow[ed] the great weight of authority that has distinguished between filing deadlines well in advance of the primary and general elections and deadlines falling closer to the dates of those elections." *Id.* Where a deadline is months before the primary, as here, it cannot withstand constitutional scrutiny.

D. Ohio's February Deadline and Massive Signature Requirement Combine to Violate the First and Fourteenth Amendments.

The Sixth Circuit in *Blackwell* and this Court in *Brunner* concluded that the combined effects of Ohio's massive signature requirement and early filing deadline violated the First and Fourteenth Amendments. The same is true here. Ohio has put in place once again the same signature requirement invalidated in *Blackwell.* Its new deadline, meanwhile, is only 30 days later than the deadline Defendant conceded was invalid following this Court's holding *Brunner.*

[5] By way of contrast, courts have sustained May and June deadlines. *See Wood v. Meadows,* 117 F.3d 770 (4th Cir. 1997) (upholding Virginia's June qualifying deadline for independents which fell on the same day as the party primaries); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,* 844 F.2d 740 (10th Cir. 1988) (upholding a May 31 qualifying deadline for new-party candidates (and other minor parties' candidates); *Council of Alternative Political Parties v. Hooks,* 179 F.3d 64 (3d Cir. 1999) (*Hooks II*) (sustaining a June deadline).

Given that no court has sustained a deadline this early, the conclusion that Ohio's combination of signatures and deadline violates the First and Fourteenth Amendments is clear.

This is doubly so because 2012 involves a presidential election. The Sixth Circuit in *Lawrence*, 430 F.3d at 375, which sustained Ohio's March 1 deadline for congressional candidates, distinguished *Anderson*'s application of heightened scrutiny as a function of the presidential contest at stake. "[S]trict scrutiny is not appropriate in this case," *id.*, because *Anderson* "involved a presidential election." *Id.* The Court in *Anderson*, the Sixth Circuit reasoned, "held that a state has less of an interest in regulating a national election than one which takes place solely within its borders.…" *Id.* Hence, even though a March 1 deadline would be invalid under *Anderson* in presidential election years, the Sixth Circuit in *Lawrence* sustained it when applied to an off-year election. *Id.* [6] Because the 2012 election includes a presidential contest, any deadline earlier than March 1 is clearly unconstitutional under the logic of *Lawrence.* Indeed, Ohio's February 8 deadline is too early even if 2012 was not a presidential election year. As stated above, no court has sustained a deadline that falls before March 1.

Compounding H.B. 194's constitutional difficulty is the fact that it truncates the time a minor party has to collect signatures. Because it was not passed and signed by the Governor

[6] Several courts have joined the Sixth Circuit's reasoning that restrictions in presidential election years are doubly suspect. Then-Judge Alito's opinion in *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 72 (3d Cir. 1999) (*Hooks II*), which sustained New Jersey's June deadline for independents and alternative party candidates, distinguished *Anderson* in this same way: "the [*Anderson*] Court stressed that the Ohio statute regulated *presidential* elections and not *state or local* elections." (Emphasis original). The Tenth Circuit in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740, 746 n.9 (10th Cir. 1988), which upheld a May 31 qualifying deadline for new-party candidates, likewise distinguished *Anderson* as involving a "challenge [that] arose in the context of an independent candidacy for national office." Because the Oklahoma deadline did not deal with presidential contests, "[t]he state thus has a correspondingly greater interest in imposing restrictions to provide 'assurance that the particular party designation has some meaning.' " *Id.*

until July 1, 2011, and does not become effective until September 30, 2011, minor parties are left with less time to collect the needed signatures. Ohio, like most states, has never placed a limit on how long minor parties can gather signatures. Hence, the LPO's signature collection effort that was at issue in *Blackwell*--which gathered enough signatures to satisfy Ohio's 40,000+ requirement--lasted three years. After H.B. 194, a minor party attempting to qualify in February 2012 has only four months from the statute's effective date.[7]

II. Irreparable Harm

As stated by this Court in *Brunner,* 462 F. Supp.2d at 1014, "[t]he irreparable harm to Libertarian Party and its candidates is denial of access to the ballot." Accordingly, the Court there found that "the violation of Plaintiffs' First Amendment rights constitutes irreparable injury for which injunctive relief is an appropriate remedy." *Id.* For these same reasons, the LPO will experience irreparable injury here; it will miss the 2011 election and will face unconstitutionally high barriers to ballot access in 2012.

III. Harm to Others and the Public Interest

This Court in *Brunner* concluded that contrary to the Secretary's claim that "both declared candidates and the general public will be harmed if the Libertarian Party is allowed access to the ballot at this late date," *id.* at 1014, "the Sixth Circuit [in *Blackwell*] clearly expressed a preference for the 'political dialogue and free expression' engendered by the presence of multiple parties on the ballot." *Id.* at 1014-15. (quoting *Blackwell,* 462 F.3d at 594). "As in *Blackwell,*" it stated, "'the State has made no showing that the voters of Ohio, who are able to cast an effective

[7] Even if one goes back to August 8, when the Secretary finally announced that H.B. 194 was meant to override Directive 2011-1, a minor party only has six months to gather approximately 40,000 signatures.

ballot featuring several independent candidates, would be flummoxed by a ballot featuring multiple political parties.'" *Id.* (quoting *Blackwell,* 462 F.3d at 594). For these same reasons, no showing can be made here that voters in Ohio will be prejudiced by preliminary relief. Rather, it is in the public interest that there be 'political dialogue and free expression'.

IV. No Security is Needed

Rule 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). As noted by one well-recognized authority, however, "the court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant." C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2954. The Sixth Circuit has observed that security is not mandatory under Rule 65(c), and can be dispensed with in the discretion of the court. *See Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995). Because Defendant will suffer no harm, economic or otherwise, no security is required in the present case. *See also Brunner*, 462 F. Supp.2d 1006 (not requiring security).

V. Briefing and Proceedings Should Be Expedited Because of the Approaching November 2011 Election.

The 2011 election in Ohio is scheduled for the first Tuesday in November, 2011. As stated above, H.B. 194 purports to strip the LPO of its ballot status on September 30, 2011, which means that the LPO will not be qualified for the November 2011 election. Because ballots need to be printed weeks in advance of the general election, a decision is necessarily required in this case as soon as possible. Plaintiffs therefore respectfully request that the Court expedite the

informal hearing prescribed by Local Rule 65.1(a), as well as the briefing and any formal hearing held in this case. *See, e.g., Lane v. Kofman,* 765 F. Supp.2d 61 (D. Me. 2011); *American Hospital Ass'n v. N.L.R.B.*, 718 F. Supp. 704 (N.D. Ill. 1989).

Conclusion

For the foregoing reasons, Defendant should be preliminarily enjoined from enforcing H.B. 194's changes to O.R.C. §§ 3501.01(E) and 3517.01(A)(1), and the LPO should remain qualified for Ohio's 2011 and 2012 election ballots. Defendant should be preliminarily ordered to take all necessary steps to insure that the LPO and its candidates have access to all relevant 2011 elections in Ohio, and have access to all relevant primary and general elections in 2012.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing document, together with Plaintiffs' Motion for Preliminary Injunction and all Attachments, were filed electronically with the Court and thereby transmitted to all counsel of record, including Richard Coglianese, counsel for the Defendant, through the Court's CM/ECF system.

I further certify pursuant to Local Rule 65.1(b) that a copy of the First Amended Complaint was electronically transmitted to Richard Coglianese, counsel for the Defendant.

/s/ Mark R. Brown
Mark R. Brown