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' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED PROCEEDINGS

I. H.B. 194's Changes to Ohio's Ballot Access Laws Cause the LPO Immediate and Irreparable Injury.

The Sixth Circuit recently explained the constitutional concept of ripeness in *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir. 2010):

> The ripeness doctrine prevents courts from 'entangling themselves in abstract disagreements' through premature adjudication. Courts consider three factors to evaluate ripeness: '(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.'

(Citation omitted). In the present case, as described more fully below, it is very likely that the Plaintiffs will be harmed by H.B. 194. Indeed, the LPO is being harmed at this very moment. The factual record, moreover, is clean and fully developed. Last, the injuries that are inflicted on

the LPO are irreparable; the LPO will experience significant hardship if relief is withheld. In short, there is no sound reason for delay. Nothing is gained by waiting.

The Sixth Circuit has long recognized that a deprivation of First Amendment rights, even "for a minimal period of time, constitutes irreparable harm." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002) (describing the holding in *Connection Distribution Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). In the context of elections and ballot access, the Sixth Circuit (like most courts)[1] has been especially solicitous of First Amendment challenges. Ripeness is rarely a problem when plaintiffs press facial First Amendment challenges to state election laws.

In *Anderson v. Spear*, 356 F.3d 651, 669 (6th Cir. 2004), for example, the Sixth Circuit ruled that a challenge to Kentucky's limitations on candidate contributions was ripe even though the limitations had never been applied to the plaintiffs. Indeed, the Sixth Circuit went so far as to find the complaint ripe even though the state claimed it would not apply the limitations to the plaintiffs. *Id.* The Sixth Circuit explained that facial First Amendment challenges to state laws, like the facial claim made by the LPO here, have routinely been entertained notwithstanding uncertainty surrounding their application. "[B]ecause a party may challenge a statute based upon the 'assumption that the statute's very existence may cause others not before the court to refrain

[1] *See* Saul Zipkin, *Democratic Standing*, 26 J. LAW & POLITICS 179, 182 (2011) ("federal courts have applied standing doctrine in a distinct manner in the election setting, effectively shaping an oversight role in the democratic process. A review of election claims reveals that courts have attributed structural or probabilistic harms to plaintiffs without an individualized showing of particular harm. The treatment of mootness and ripeness standards similarly shows courts shaping the application of justiciability doctrine to ensure the opportunity to consider election claims. In short, courts have translated the democratic harms at issue in election cases into standing-cognizable harms, positioning themselves as front-line monitors of the electoral process.").

from constitutionally protected speech or expression[,]' the facial challenge is ripe for adjudication." *Id.* (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)). *See also Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377, 399 (6th Cir. 2001) (finding that a First Amendment challenge to restrictions on street performers was ripe because the restrictions might "chill the exercise of free speech and expression").

As the Secretary explained to the Plaintiffs in his August 5, 2011 letter, *see* Attachment A to Plaintiffs' Memorandum in Support of Preliminary Injunction and Expedited Proceedings, § 5 of H.B. 194 flatly states that "Directives 2011–01 and 2009–21 issued by the secretary of state are hereafter void and shall not be enforced or have effect on or after the effective date of sections 3517.01 and 3517.012 of the Revised Code, as amended by this act." *See* 2011 Ohio Sess. Law Service 40. There can therefore be no doubt about H.B. 194's objective. It was meant to strip the LPO of its qualified political party status before the November 2011 election.

Defendant, in his August 5, 2011 letter, makes clear that he will not delay this legislative command. Indeed, he claims he does not have the authority to contradict it. Consequently, Defendant has conceded that H.B. 194 strips the LPO of the "qualified" political party status that it enjoyed beginning in 2008 with this Court's injunction in *Brunner* and the resulting access guaranteed by then-Secretary Brunner's Directives 2009-21 and 2011-01.

A. LPO Candidates' Right to Party Labels

Qualified "political party" status carries several benefits in Ohio. One is that the party's candidates will be identified as such on the ballot. Without qualified "political party" status, the party label under Ohio law cannot be included with the candidate's name on the ballot. *See Schrader v. Blackwell,* 241 F.3d 783 (6th Cir. 2001) (upholding Ohio's laws prohibiting

independent candidates and candidates from unqualified political parties from being identified on ballots as being associated with parties in general elections); *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992). *See generally* Richard Winger, *Ballot Format: Must Candidates Be Treated Equally?*, 45 CLEVE. ST. L. REV. 87, 99-100 (1997).

Even though the 2011 election includes no state-wide or federal races, there are many partisan local races across Ohio. In these contests, qualified political parties will display their candidates on the ballots with their party labels. The LPO is running two candidates in partisan elections,[2] candidates who but for H.B. 194 would have to be identified on their respective ballots as "Libertarians." Stripping the LPO of its qualified political party status has the immediate effect of preventing its two partisan candidates from identifying themselves on their respective ballots as "Libertarians." Rather, their ballot cues will only include their names, with no party reference. And without a party label, political scientists agree that a candidate's chance of success is greatly diminished. *See* Winger, *supra*, 45 CLEVE. ST. L. REV. at 96 ("The election campaign of a minor party is hampered when the ballot does not list that minor party's ballot label.").

The Secretary now argues, through an affidavit submitted by a subordinate, Matthew M. Damschroder, that the LPO's two candidates in partisan races will be identified as Libertarians on their respective election ballots. *See* Defendant's Memorandum Contra Plaintiffs' Motion for

[2] Mike Burkholder is running as a Libertarian for Troy City Auditor in Miami County. Kurt Liston is running as a Libertarian for the Akron City Council in Summit County. *See* Attachment E (Declaration of Michael Johnston at ¶ 3). Several Libertarian party members are also running in non-partisan races across Ohio in 2011. Todd Grayson is running for the Perrysburg City Council in Wood County; Ken Sharp is running for the Toledo City Council in Lucas County; and Mark Noble and Bob Bridges are running for the Columbus City Council in Franklin County. *Id.* at ¶ 4.

Preliminary Injunction at 7. Damschroder's statement, however, does not make this clear at all. He merely states that if the two LPO candidates are "certified by a county board of elections to appear on the November 8, 2011 ballot," they will not have their party labels removed. Noticeably absent is any guaranty that county election boards must certify these two LPO candidates as qualified "political party" candidates for the November 2011 election. At best the Secretary is leaving the matter to county election boards, which under Ohio law, *see Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001), cannot allow the candidate of an unqualified political party to carry a party identifier in his cue on the ballot.[3]

Given the Secretary's position in his August 5, 2011 letter to the LPO that he has no authority to change or contradict H.B. 194, moreover, the LPO cannot be faulted for questioning whether the position the Secretary now apparently takes in the midst of this litigation will (or even can) be given force. After all, the Secretary has not issued any Directive to county election boards instructing them to include LPO candidates' party labels on their ballots. The Secretary has not issued any formal instructions.

Courts have consistently rejected the claim that "nonbinding assurances," like that tendered here, render First Amendment claims unfit for immediate review. For example, the Sixth Circuit in *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), which rejected a ripeness defense in the context of litigation over Kentucky's campaign contribution limitations (described more fully above), relied on the Fourth Circuit's holding in *Virginia Society for Human Life, Inc.*

[3] No explanation is given by the Secretary for how he will insure that the LPO's partisan candidates are identified as "Libertarians" on their respective local ballots. No Directive, to Plaintiffs' knowledge, has been issued to this effect by the Secretary.

v. FEC, 263 F.3d 379, 388-90 (4th Cir.2001) (" *VSHL*"), to support its conclusion that the First Amendment complaint was timely.

VHSL, 263 F.3d 379, involved a First Amendment challenge to federal limitations on corporate expenditures. The FEC argued that the case should not be heard because it would not enforce the challenged provisions. The Fourth Circuit rejected the FEC's claim that these "nonbinding assurances" defeated the challenge. In the words of the Sixth Circuit in *Anderson*, 356 F.3d at 669, "the Fourth Circuit found the case ripe because the agency had not promulgated a rule exempting the parties from the regulation." The *Anderson* court likewise rejected Kentucky's assertion that the matter was not ripe because the challenged limitations would not be enforced: "there is no evidence that the [defendant] has issued such a regulation, and, notwithstanding its harkening to previous litigation posture, there is nothing to prevent [the defendant] from promulgating a policy *tomorrow* applying the statute ... in future elections." *Id.* (emphasis in original).

The Secretary here has promulgated no rule or Directive protecting the LPO's partisan candidates' right to use the Libertarian Party's label on their respective ballots in the November 2011 election. At most, the Secretary has, like the defendants in *Anderson* and *VHSL*, offered "nonbinding assurances." Just as in *Anderson*, the Secretary's office could tomorrow change its mind and instruct the county election boards to fully follow H.B. 194. In the absence of a formal rule, Directive or enforceable agreement, the Secretary's litigation posture means little; it cannot overcome the "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Anderson*, 356 F.3d at 669 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). "[N]onbinding assurances," the

Fourth Circuit stated in *VHSL*, 263 F.3d at 388, do "not overcome the presumption of a credible fear of" enforcement when First Amendment rights are at stake.

B. LPO's Right to Appoint Election Observers

Assuming that county election boards were to flout § 5 of H.B. 194 and Ohio's laws banning the use of party labels on ballots for candidates running under unqualified political party banners, *see Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001), and were to identify the LPO's partisan candidates as "Libertarians" on their respective ballots, stripping the LPO of its qualified political party status for the 2011 election still causes immediate, irreparable injury to the LPO. Carrying the party label on general election ballots is not the only benefit attached to "political party" status in Ohio. There are several more, all of which must be denied the LPO by H.B. 194 after September 30, 2011.

For example, Ohio law authorizes only qualified "political parties," within the meaning of O.R.C. § 3501.01(F),[4] to appoint election observers. *See* O.R.C. § 3505.21 (stating that "any political party" may appoint observers); Ohio Secretary of State Directive 2008-09 (explaining that as of the "date of this directive" in 2008 "there are only two recognized political parties in Ohio, the Democratic and Republican Parties," capable of appointing election observers). Consequently, now that it has been stripped of its political party status, the LPO cannot appoint election observers for the 2011 general election.

[4] Section 3501.01(F) defines "political party" to mean those parties that have satisfied O.R.C. 3517.01's requirements of having won 5% of the vote in the last presidential or gubernatorial election or having timely submitted signatures equal in number to 1% of that last vote.

C. LPO's Right to Accept Contributions

Another example is tied into the complicated world of campaign finance regulation. Under Ohio law, only "political parties" can accept unlimited money for a State Candidate Fund and a Restricted Fund (the latter of which can include corporate money).[5] Without continuing ballot access, the LPO will on September 30, 2011 be treated as a political action committee (PAC) under Ohio law, which means that it will be subjected to contribution limits that are not applied to political parties. As a PAC rather than a qualified political party, the LPO will be severely limited in the amount of money it can raise and accept from supporters. *See* Attachment E (Declaration of Michael Johnston at ¶¶ 5-7).

* * *

In sum, the Secretary's "nonbinding assurances" cannot overcome the presumption that Ohio law means what it says--that the LPO on September 30, 2011 will cease to be a recognized "political party" in Ohio. The Secretary has offered no legally enforceable assurance that the LPO's candidates will be identified as "Libertarians" on the November 2011 election ballot, nor has it offered any kind of assurance that the LPO will continue to enjoy other rights and privileges provided "political parties" after September 30, 2011. Instead, in his August 5, 2011 letter, the Secretary simply told the LPO that there was nothing he could do. The LPO is clearly injured, and will continue being injured so long as H.B. 194's ballot restrictions remain in place.

II. Waiting Until September 30 Only Compounds and Magnifies the LPO's Injuries.

The Secretary asks this Court to wait on a proposed referendum to repeal H.B. 194, one that the Plaintiffs have no connection with and cannot influence in any fashion. It asks the Court

[5] *See* http://www.sos.state.oh.us/SOS/Campaign%20Finance/CFGuide/Resources/limchart.aspx.

to "wait-and-see" whether a quarter-million signatures can be collected from voters in half of Ohio's counties in a record-breaking six-week time-frame; only then, the Secretary argues, will H.B. 194 be relevant to the 2011 general election and the February 8, 2012 qualifying date.

Putting to one side the initiative effort's small chance of success--the vast majority of volunteer initiative efforts (including those that have several months as opposed to only six weeks to collect signatures), after all, do not survive the initial signature-collection stage,[6] while even heavily-financed initiative campaigns reach the ballot well-under half the time[7]--it is telling to note that the Secretary himself is not waiting. Indeed, the Secretary has seen fit to immediately begin implementing the terms of H.B. 194. On August 23, 2011, in order to implement H.B. 194, Secretary Husted issued a Directive to all county election boards prohibiting the mailing of

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[6] *See, e.g.*, Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 53 (2003) (stating that in Oregon, a high-use initiative state, "[b]etween 1988 and 2002, little better than 1 in 10 volunteer-only efforts made it to the ballot. Since 1996 only three volunteer-only initiatives have qualified for the ballot, and one of these, a vote-by-mail initiative, was spearheaded by the Secretary of State and other government officials."). Moreover, in states like Ohio (as opposed to Oregon) that require "geographic distribution" of the signatures submitted to support initiatives, success rates are even lower. *See* Jennifer S. Senior, *Expanding the Court's First Amendment Accessibility Framework for Analyzing Ballot Initiative Circulator Regulations*, 1 U. CHI. L. FOR. 529, 532-33 (2009) ("none of the high use initiative states—Oregon, California, Arizona, Colorado, and Washington—have a geographic distribution requirement, which is not a coincidence since geographic distribution requirements tend to make qualifying an initiative more difficult and expensive.").

[7] Ellis, *supra*, at 53 (observing that in Oregon "about 40 percent of initiatives that relied at least partly on paid petitioners have made it to the ballot since 1996."). The amount of money needed to place an initiative on the ballot, moreover, generally stretches into the hundreds of thousands of dollars. *See* Robin E. Perkins, Comment, *A State Guide to Regulating Ballot Initiatives: Reevaluating Constitutional Analysis Eight Years After* Buckley v. American Constitutional Law Foundation, 2007 MICH. ST. L. REV. 723, 731 (2007) (observing that "[i]n 2006, Citizens for Tax Reform, an Ohio-based initiative to limit government spending, contracted with a petition circulation firm to gather the 450,000 signatures necessary to place its initiative on the ballot. At $1.70 per-signature, the total price of the signatures alone was $765,000."); Michael S. Kang, *Voting as Veto*, 108 MICH L. REV. 1221, 1276 (2010) (stating that in California paid professionals "regularly" charge "more than $1 million to qualify an initiative").

unsolicited absentee ballots. *See* Joe Vardon, *Husted forbids unsolicited absentee-ballot mailings*, COLUMBUS DISPATCH, Aug. 23, 2011, at B8.

The Secretary, it seems, wants to have it both ways. For purposes of this litigation, H.B. 194 is not pressing. The Court should wait and see what happens; maybe H.B. 194 will prove irrelevant. However, for other purposes, like sending out absentee ballots, H.B. 194 demands immediate action. After all, time is short and the election is close.

The truth, of course, is that the Secretary's desire to immediately begin implementing H.B. 194 is perfectly reasonable. The November 8, 2011 election is closely approaching and decisions must be made now. Ballots must be printed; deadlines must be met. Waiting a full month to see if an initiative might miraculously qualify for the ballot in record-breaking time solves nothing. It can only compound the uncertainty that LPO presently faces. It only magnifies LPO's injuries.

A. LPO Is On the Horns of a Dilemma

Even assuming that the proposed initiative relied upon by the Secretary were to have the hundreds of thousands of dollars in financial support needed to present a credible chance of collecting a quarter-million valid signatures in a limited six-week period, increased odds could still not alter the immediacy of the harms that plague the LPO. Like it or not, H.B. 194 (as the Secretary's actions make clear) is the law in Ohio. Notwithstanding the possibility that it may be suspended, H.B.194 presently places the LPO on the "horns of a dilemma." The LPO is being forced right now to make the choice between waiting on the proposed referendum (and hoping for the best) and devoting significant resources to immediately begin the collection-effort needed to gather 40,000 signatures by February 8, 2012. If LPO waits, of course, it will lose valuable time that could have been devoted to collecting signatures. If it acts, it will be forced to spend

thousands of dollars and devote thousands of hours to fulfill a signature-collection requirement that is quite likely unconstitutional. Either way, the LPO suffers immediate, irreparable injury.

The "horns of a dilemma" doctrine stretches back for generations. In *A.O. Smith Corp. v. Federal Trade Commission*, 530 F.2d 515, 524 (3d Cir. 1976), for example, the court stated that a court

> should find agency action ripe for judicial review if the action is final and clear-cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action's validity, he must change his course of day-to-day conduct, ...; alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence.

See also Coastal States Gas Corp. v. Department of Energy, 495 F. Supp. 1300, 1307 (D. Del. 1980) (observing that "the 'horns of a dilemma' characteristic of pre-enforcement review cases [can] overcome ripeness challenges"); *Standard Oil Co. v. Federal Energy Administration*, 440 F. Supp. 328, 369 (N.D. Ohio 1977) (noting that "horns of a dilemma" can overcome ripeness challenge).

For example, in *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), the plaintiffs challenged Virginia's open primary law under the First Amendment in 2005, two years before the next election. Because the next primary election was not scheduled to be held until 2007, and since the requisite number of candidates for the challenged primary might not even run, the District Court dismissed the action. The Fourth Circuit in *Miller*, 462 F.3d at 317-18, reversed:

> Knowing that voters wholly unaffiliated with the plaintiffs' party will participate in their primary dramatically changes the plaintiffs' decisions about campaign financing, messages to stress, and candidates to recruit. Because campaign planning decisions have to be made months, or even years, in advance of the election to be effective, the plaintiffs' alleged injuries are actual and threatened. The mere existence of the open primary law causes these decisions to be made differently than they would absent the law, thus meeting the standing inquiry's second requirement of a causal connection between the plaintiffs' injuries and the law they challenge.

B. Uncertainty Causes Immediate Injury

Waiting, as recommended by the Secretary, only fuels the uncertainty that infringes the LPO's First Amendment rights. Because it is not clear whether it has ballot access in either 2011 or 2012, the LPO will experience increased difficulty attracting candidates and supporters. It cannot say to potential voters and candidates, "We are a qualified political party and you should join us." If the Secretary's argument is accepted, the LPO will be forced into limbo for over a month. And it is clear that a deprivation of First Amendment rights even "for a minimal period of time, constitutes irreparable harm." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002) (describing the holding in *Connection Distribution Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

In the First Amendment context, uncertainty chills speech. *See Telco Communications v. Carbaugh*, 885 F.2d 1225, 1229 (4th Cir. 19890 ("The prospect of such prolonged uncertainty cannot but chill a party's First Amendment freedoms."). Uncertainty, all by itself, causes injury. *See New Albany DVD, LLC v. City of New Albany*, 350 F. Supp. 2d 789, 794-95 (S.D. Ind. 2004) ("In addition, uncertainty as to constitutionality could chill the future exercise of First Amendment protected activity by others also within its reach and affected by its terms.").

This Court made these points crystal clear in the context of elections in *Chamber of Commerce of U.S. v. Ohio Elections Commission*, 135 F. Supp. 2d 857, 862 (S.D. Ohio 2001):

> In this case, if the Court were to invalidate the statutes in their entirety, the Court's opinion would redress the concern of the Chamber of Commerce as to whether its speech activities are subject to regulation. Thus, the Court's ruling would eliminate the Chamber of Commerce's uncertainty about which of its ads would be regulated and lift any potential chill on the Chamber of Commerce's First Amendment rights.

See also North Carolina Right to Life, Inc. v. Leake, 344 F.3d 418, 431 (4th Cir. 2003) (stating that the "Court [in *Riley v. National Federation of the Blind*, 487 U.S. 781, 785-86 (1988),]

concluded, therefore, that the uncertainty and risk created by '[t]his scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.'"); *American Federation of Government Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 759 (DC Cir. 1984) ("we should be no more grudging about relieving uncertainties imposed by credible threats of enforcement, particularly when the threats may chill the exercise of first amendment rights.").

* * *

Although the delay championed by the Secretary will not alleviate Plaintiffs' injuries--indeed, it will only magnify them--delay will fortify the Secretary's use of a laches defense later in these proceedings. The Court on October 1, 2011, assuming it accepts the Secretary's invitation and waits, will surely face a claim that the upcoming November 8, 2011 election and February 8, 2012 qualifying deadline are too close to correct. The Secretary's tactic is obvious: delay these proceedings by claiming they are premature, and then in the end claim the defense of laches. *See Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 570 (6th Cir. 2000) ("Potential plaintiffs ... steer a hazardous course between the Scylla of laches and acquiescence and the Charybdis of premature litigation."). The Secretary's attempt to prejudice Plaintiffs' First Amendment rights in this fashion should not be rewarded. The LPO's claims should be resolved now, while there remains time to correct the constitutional deficiencies found in H.B. 194. Later may be too late.

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 as a "political party" 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 enjoy all the privileges and rights associated with qualified "political parties."

Respectfully submitted,

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Certificate of Service

I certify that the foregoing document and Attachment 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.

_/s/ Mark R. Brown_____
Mark R. Brown