CASE NO. 11-4066

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Libertarian Party of Ohio, Kevin Knedler, Michael Johnston,
Plaintiffs-Appellees,

vs.

Jon Husted, in his Official Capacity as Secretary of State,
Defendant,

and

Ohio General Assembly,
Proposed Intervenor-Appellant.

On Appeal From The United States District Court,
Southern District Of Ohio, Eastern Division, Case No. 2:11-CV-722

BRIEF OF PROPOSED INTERVENOR-APPELLANT

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Proposed Intervenor-Appellant Ohio General Assembly submits that oral argument before this Court is needed because the constitutionality of a part of the State's election scheme regulating access to the ballot is at issue. The General Assembly requests oral argument to clarify the written arguments and to address important questions regarding the status of an act of the General Assembly, Amended Substitute House Bill 194 ("H.B. 194"), which was challenged below.

STATEMENT OF JURISDICTION

A. Plaintiffs asserted that the District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. The Secretary disputed the district court's jurisdiction under U.S. Const., art. III, on the ground that Plaintiffs' challenge was not ripe. Plaintiffs asserted that proposed changes to Ohio's ballot access laws would violate their First and Fourteenth Amendment rights by denying them ballot access.

B. The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1), because this is an appeal of a district court order granting an injunction. The district court preliminarily enjoined any enforcement of the ballot access provisions in H.B. 194.

C. The district court issued the order granting the preliminary injunction on September 7, 2011. (R. No. 13). The General Assembly filed its notice of appeal on October 7, 2011, 30 days after the district court ruled. (R. No. 16). The appeal is therefore timely under Fed. R. App. P. 4(a). On the same day, the General Assembly moved to intervene for purposes of taking such appeal. (R. No. 15).

D. This appeal is from the granting of a preliminary injunction against enforcement of certain provisions of a proposed state statute, H.B. 194.

ISSUES PRESENTED FOR REVIEW

1. Whether the Ohio General Assembly is entitled to intervene in this case?

2. Whether the district court had jurisdiction to hear the challenge to the constitutionality of H.B. 194 raised by Plaintiffs below (collectively, "LPO"), where that act was not effective at the time the complaint was filed, was not effective on the date the court issued its preliminary injunction, is not effective today, and cannot become effective until after the November 2012 general election?

3. If the district court had jurisdiction to determine the constitutionality of H.B. 194, must that ruling be vacated because the issue is now moot?

4. Where it is constitutional to require minor parties to nominate their candidates in a primary election, whether Ohio can require those minor parties to submit, 90 days in advance of a May primary, signatures of registered voters amounting to 1% of those who voted in the last gubernatorial or presidential race.

INTRODUCTION

The following reflection captures the key issue in this appeal:

> In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary? When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question.

Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997). The court below failed adequately to consider that question in holding that LPO's challenge to a state statute proposing a new ballot access law for minor political parties, H.B. 194, was ripe for adjudication, despite the fact that the statute was not effective and might never become effective due to a statewide referendum effort.

The district court should not have ruled on LPO's motion for preliminary relief because their challenge was not ripe. To the extent that the claim was ripe at the time the district court ruled, it is now moot and binding precedent requires vacatur of the injunction below. The preliminary injunction should also be vacated on the merits of LPO's claim, as established precedent dictates that the ballot access provisions in H.B. 194 do not violate LPO's constitutional rights.

STATEMENT OF THE CASE

LPO filed a complaint (R. No. 1) and an amended complaint (R. No. 2) on August 9, 2011. Both named Ohio Secretary of State Jon Husted (the "Secretary") as the only defendant. They asserted that but for the passage of H.B. 194, LPO's

candidates would have been "automatically qualified" to field and run candidates for office during Ohio's 2011 and 2012 elections. (R. No. 2, Am. Cmplt. ¶¶ 28-29). Counts two through five challenged the constitutionality of provisions of H.B. 194, particularly the signature requirement and filing deadline. *Id.* ¶¶ 45-55. Count one asserted a claim under the doctrine of *res judicata*. *Id.* ¶¶ 40-44.

LPO also sought a preliminary injunction asking for two things: that H.B. 194's provisions governing ballot access be enjoined; and that the court order the Secretary to "restore" LPO's automatic ballot access for the 2011 and 2012 elections. (R. No. 5 at 2). The Secretary opposed the motion on ripeness grounds, as the act was not effective and might never be effective. (R. No. 8). The Secretary also opposed the motion on the merits. *Id.*

A. The evidence for and contra the preliminary injunction.

At the preliminary injunction hearing, LPO presented one witness. LPO's vice chair, Michael Johnston, testified that he believed that H.B. 194 removed the party's ballot access as of September 30, 2011. (R. No. 24, Trans. 4:8-19). Johnston testified that it would be difficult for LPO to gather the required number of signatures, but he admitted that in 2004 LPO succeeded in collecting nearly 60,000 signatures to petition for recognition. *Id.*, 10:3-11:2. He also acknowledged that LPO's website, which he believed to be truthful, stated that LPO successfully gained ballot access via petition in 1982 and 2000. *Id.*, 11:3-

12:7. Although he testified that H.B. 194's petition requirements would make it more difficult to field candidates, he admitted that the candidates he knew of who contacted LPO were not even sure that they wanted to run for office. *Id.* at 16:21-17:3. Johnston believed that he would have to file a petition for 2012 access by the end of November. *Id*, 6:18-7:3. While he testified that H.B. 194's provisions would make it harder to raise money, he admitted that, as a non-party, LPO could operate as a political action committee ("PAC"), and that LPO had never received a contribution in excess of the PAC limit (roughly $11,000). *Id.*, 18:24-19:10. He testified that LPO had about $10,000 in its bank account as of August 30, 2011, *id.* 20:22-21:1, and had about 5,500 members in Ohio. *Id.*, 12:11-15.

The Secretary also adduced testimony from one witness, Matthew Damschroeder, the Secretary's Director of Elections. Mr. Damschroeder testified that LPO was mistaken in its belief that H.B. 194 would remove its ballot access for the November 2011 election. *Id.* at 26:5-13. Mr. Damschroeder clarified that H.B. 194 would have no impact on LPO for 2011 and that any changes arising from H.B. 194 would not go into effect until 2012 if the act became effective. *Id.*; *id.* at 30:7-18. Mr. Damschroeder explained that the group seeking referendum on H.B. 194 had filed their initial 1,000 signatures and obtained certification of such signatures and of their proposed ballot language from the Secretary and the Ohio Attorney General. *Id.* at 30:19-25-31:1-4. He testified that the deadline to file the

full signatures was September 29, 2011. *Id.* He affirmed that if sufficient signatures were filed on September 29, 2011, then H.B. 194 would be stayed until the November, 2012, election. *Id.* at 31:5-12. Finally, he refuted the suggestion that LPO would have to file signatures by the end of November, 2011, testifying that under H.B. 194, a petition would be due in early February, 2012, 90 days before the May primary. *Id.* at 31:13-19.

In opposition to the motion for preliminary relief, the Secretary also offered Mr. Damschroeder's affidavit. (R. No. 8-1). Mr. Damschroeder's uncontroverted testimony was that permitting petitions to be filed any closer to the primary than 90 days would make the Secretary's duties in running the election nearly impossible to fulfill. Specifically, Mr. Damschroeder attested that prior to holding an election, the Secretary must: certify the official form of the ballot, and boards of elections must schedule training for precinct election officials and appoint at least four officials for each precinct; process new voter registration and change of address forms; prepare and mail voter registration acknowledgement cards notifying voters where their assigned precinct is located; process applications for absentee ballots; prepare absentee ballots; designate two board employees to assist confined voters unable to mark the absentee ballot; send two employees to deliver a ballot to voters confined in a private or public institution; process change of name and address for any voter who appears at the board offices; remind candidates to file their pre-

election campaign finance reports; review challenges and requests for correction to precinct registration lists and conduct the necessary hearings; receive campaign finance reports filed by candidates, political action committees, caucus committees, and political parties; prepare and post the official voter registration list for each precinct; complete programming and logic/accuracy testing of all voting equipment; process notices of appointments for election day observers; advertise local questions and issues in newspapers of general circulation; inspect polling locations and complete the final arrangement for their use; prepare the supplies for each precinct; and transport and set up the voting equipment at each polling location. *Id.* at ¶ 5a-u.

Once the election is complete the following are required: boards of election may begin the official canvass of ballots not earlier than 11 days but not more than 15 days after the election and must complete the official canvass no later than the 21st day after the election; boards must conduct and complete recounts of elections, if applicable; the Secretary and boards of elections must remind candidates to file post-election campaign finance reports; the Secretary and county boards of election will receive post-general election campaign finance reports from candidates, political action committees, caucus committees, and political parties detailing contributions and expenditures through December 9; dependent upon action by the Ohio General Assembly, county boards of elections will reprogram

their county voter registration database and central voting system databases to account for decennial redistricting; the Secretary and boards of elections must send notices to candidates required to file annual campaign finance reports; the Secretary and county boards of election will receive annual campaign finance reports filed by certain candidates, political action committees, caucus committees, and political parties detailing contributions and expenditures through December 31, 2011; special elections may be held; and finally, candidate nominating petitions, including presidential candidates for party nomination, will file their petitions with the Secretary and county boards of elections; and the county boards of election will have to verify all of these signatures as well as the signatures on petitions from minor political parties seeking to nominate candidates through partisan primary elections. *Id.* at ¶¶6-15.

When a new political party submits its paperwork, the local boards of elections must review the petitions and verify the signatures on each of the part petitions. The Secretary must aggregate the total number of signatures and allow time for a challenge to any of the petitions. *Id.* This work must occur while the Secretary and the boards of elections are completing their other statutory duties.

B. The district court's preliminary injunction ruling.

On September 7, 2011, twenty-three days before H.B. 194 was scheduled to become effective, twenty-two days before H.B. 194 was formally stayed by Fair

Elections Ohio's initial filing of its referendum petition, and 154 days before LPO's February 8, 2012, petition deadline, the district court entered a preliminary injunction. (R. No. 13). The court recognized that the act was subject to a referendum effort and that, if sufficient signatures were filed on September 29, 2011, the act would be stayed until after the November 2012 election. *Id.* at 3. The Court also found that, despite H.B. 194, LPO would be on the November 2011 ballot. *Id.* at 4. Nonetheless, the court held that LPO's constitutional challenge to H.B. 194 was ripe. In so holding the Court opined that "As the record currently stands, the bill is to become effective in less than a month." *Id.* at 5. The court deemed the success of the referendum effort a "mere possibilit[y]." *Id.* The court relied on the fact that the "State has already begun taking steps to enforce the new law" and "has already notified LPO that as a result of the law, the LPO is not currently a qualified party for the 2012 election." *Id.*

On the merits, the court held that LPO's alleged injuries warranted a preliminary injunction. The court expanded the decision of this Court in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) to hold that, in combination, requiring new parties to gather signatures equal to 1% of the votes cast in the last election for Governor and to file a petition 90 days prior to a May primary severely burdened the First Amendment rights of LPO. *Id.* at 7. The district court's finding of a severe burden makes no reference to the record in the

case. Rather, the court relied on findings from *Blackwell* that, at early periods in the election cycle, "candidates are not known and voters are not politically engaged." *Id.* The court also found that "in effect, these deadlines protect the two major parties at the expense of a more vigorous, deliberative democracy." *Id.* The court found specifically that requiring a minor party to collect a "large amount" of signatures 90 days before a primary, and 279 days before a general election "limit[s] the ability of the party to campaign, to recruit members, and to participate in the most basic of democratic processes." *Id.* at 8.

Having found the burden imposed to be severe, the court subjected H.B. 194's provisions to strict scrutiny. *Id.* at 9. The court found that the State's justification for the 90 day filing requirement was insufficient. Specifically, the court acknowledged that it "may be reasonable to assume that the State needs 90 days to process the paperwork," but held that such practical concerns do not "further a compelling state interest." *Id.* The court also acknowledged that the State's interests in ensuring that "political parties have a modicum of support, which helps avoid confusion, deception, and frustration in the democratic process" are valid. *Id.* The court held, however, that the State did not adequately explain how the 1% signature requirement and 90 day filing deadline prior to a May primary further such goals. *Id.* As a result, the court concluded that LPO was likely to succeed on the merits of its challenge.

The court also held that LPO met the other elements for preliminary relief. The irreparable harm was "denial of access to the ballot." *Id.* at 11. The public harm was damage "'to political dialogue and free expression' that is done when political parties are unnecessarily restricted from participating in the public discourse." *Id.* (quoting *Blackwell*, 462 F.3d at 594). The court enjoined the "State" from enforcing H.B. 194's ballot access provisions in 2011. *Id.* The court declined to "instruct the State how to manage its elections in 2012, but require[d] it to take the steps to enact ballot access laws that address the constitutional deficiencies identified here, in *Brunner*, and in *Blackwell*." *Id.* at 11-12.

C. Events following the district court's ruling.

On October 7, 2011, the Secretary filed a notice of compliance with the court's order. (R. No. 14). The Secretary issued Directive 2011-28 on September 1, 2011, ensuring that LPO candidates would remain on the November 2011 ballot irrespective of whether H.B. 194 became effective. *Id.* The Secretary also sent a letter to the General Assembly encouraging it to enact new ballot access laws. *Id.* The Secretary pointed out that he lacked any authority to enact new laws. *Id.*

Also on October 7, 2011, the Ohio General Assembly moved to intervene in the case and filed a notice of appeal of the court's preliminary injunction order. (R. No. 15, 15-1, 16). The Secretary did not appeal. The district court has not ruled on the motion to intervene.

On October 11, 2011, the Plaintiffs filed an emergency motion to compel the Secretary to issue a directive qualifying LPO candidates automatically for 2012. (R. No. 18). On October 18, 2011, the court held a conference to address the motion. The court issued a "*Nunc Pro Tunc* Order" (R. No. 23) amending the September 7 order, which was subject to this pending appeal, to require the Secretary to give LPO ballot access for the 2012 election cycle.

STATEMENT OF FACTS

I. Ohio's Ballot Access Laws

The Ohio Constitution provides that "[a]ll nominations for elective state, district, county, and municipal offices shall be made at direct primary elections or by petition as provided by law…." Ohio Const. art. V § 7. Ohio law recognizes three different types of political parties: major political parties, intermediate political parties, and minor political parties. R.C. 3501.01(F). They are parsed according to the percentage of votes their candidates for Governor or President received in the last election: major (20% or more); intermediate (10-20%); minor (5-10%). R.C. 3501.01(F). Any party that garners at least 5% of the vote for Governor or President in the last election is automatically qualified to be a "political party" in the next election. R.C. 3517.01(A)(1). Alternatively, a party may qualify by filing a petition signed by electors in the amount of 1% of the vote cast for President or Governor in the last general election. R.C. 3501.01(F)(3).

All parties are required in Ohio to nominate their candidates in a primary election. R.C. 3513.01(A). Historically, in Ohio, primaries are held in March in presidential election years and in May in all other years. *Id.*

II. Background regarding LPO's access to the Ohio ballot.

In 2003, the LPO filed a timely petition for ballot access as a minor party under Ohio law. *Blackwell*, 462 F.3d at 583. LPO failed, however, to use the correct petition form. *Id.* As a result, LPO's petition for the 2004 elections was denied by the Secretary. *Id.* LPO sued, challenging the constitutionality of Ohio's minor party ballot access laws under the First and Fourteenth Amendments. *Id.* This Court held that ballot access provisions requiring a minor party to file a petition reflecting signatures of registered voters amounting to 1% of the total votes case in the previous election (32,290 in 2004), at least 120 days prior to a March 2 primary, taken together, operated unconstitutionally. *Id.* at 595. The Court declined to extend its holding to election years in which Ohio law provided for a May primary. *Id.* at 591, n.11.

Following *Blackwell*, the General Assembly was unable to reach a consensus on new legislation prior to the 2008 elections. Then Secretary of State Jennifer Brunner attempted to breach the gap through directive. LPO was unable to meet the petition requirements provided for in the Brunner directive and filed another lawsuit. *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Oh.

2008). The *Brunner* court held that the Secretary lacks authority to enact minor party ballot access provisions by directive and, in the absence of any effective law permitting a minor party to gain ballot access, declared LPO ballot-qualified for the 2008 general election ballot. *Id.* at 1016. Following *Brunner*, and through early 2011, the General Assembly was yet unable to enact new law permitting minor parties to gain party recognition by petition. As a result, the Secretary continued the ballot qualification for LPO and other minor parties for the 2010 and 2011 election cycles through directive, under the authority of *Brunner*. (R. No. 5-5; Directive 2009-21); (R. No. 5-6; Directive 2011-01).

III. The General Assembly's crafting of new ballot access provisions in H.B. 194 and the referendum staying H.B. 194's effective date.

In 2011, the General Assembly took up legislation to reform Ohio's elections process, H.B. 194. H.B. 194 included new minor party ballot access provisions. *See* Statutory Appx., *infra* at 46. The bill passed the legislature on June 29, 2011, and was signed by the Governor on July 1, 2011. (R. No. 2, Am. Cmplt. ¶11). H.B. 194 was scheduled to become effective on September 30, 2011, *id.*, subject to the people's right of referendum. See Ohio Const. art. II, § 1c.

Shortly after being signed by the Governor, H.B. 194 became the subject of a well-publicized drive to collect signatures to challenge the bill on referendum. *See, e.g.*, Sabrina Eaton, *National AFL-CIO is aiding referendum to overturn Ohio voting law*, Cleveland Plain Dealer, August 31, 2011. In fact, the petitioners, Fair

Elections Ohio, obtained initial approval from the Attorney General and the Secretary to gather signatures for their petition on August 18, 2011. See R.C. 3519.01(B) (requirements for referendum)[1]; (R. No. 8, Opp. PI at 5); (R. No. 19, Sec. Ans. ¶64). On September 29, 2011, Fair Elections Ohio submitted signatures to place H.B. 194 on the November 2012 ballot. Directive 2011-30.[2] Because the initial signatures fell short of the number required, Fair Elections Ohio submitted a supplemental petition on November 22, 2011. See Directive 2011-39.[3] On December 9, 2011, the Secretary certified that Fair Elections Ohio satisfied the requirements to place H.B. 194 on the November 2012 general election ballot. *See* Secretary of State press release dated December 9, 2011.[4] Pursuant to Ohio law, H.B. 194 is stayed and will not become effective unless it is approved by voters at the November 2012 general election. Ohio Const. art. II, § 1c.

H.B. 194 would retain provisions of current law defining major, intermediate and minor political parties; the 1% signature requirement for new party petitions, and the requirement that, in general, all parties nominate candidates in primaries. H.B. 194 would have changed current law, in pertinent part, in the following ways:

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[1] http://www.ohioattorneygeneral.gov/BallotInitiatives; http://www.sos.state.oh.us/SOS/mediaCenter/2011/2011-08-18a.aspx

[2] http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-30.pdf

[3] http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-39.pdf

[4] http://www.sos.state.oh.us/SOS/mediaCenter/2011/2011-12-09.aspx

- New party petitions would be due 90 days before the primary (rather than 120 days), H.B. 194, amending R.C. 3517.01; and
- All primaries, even in presidential election years, would be held the first Tuesday after the first Monday in May. H.B. 194, amending R.C. 3501.01(E).

In the last general election, 3,852,453 people cast votes for Governor. (R. No. 8-1, Damschroeder aff. ¶ 20). Thus, if H.B. 194 were effective, a party seeking recognition for 2012 would have been required to obtain the signatures of at least 38,525 registered voters. Because H.B. 194 also moved the primaries, if it were effective, in 2012 Ohio's primary would have fallen on May 8, which would make the 90th day before the primary February 8.

SUMMARY OF THE ARGUMENT

The General Assembly seeks reversal and vacatur of the district court's preliminary injunction on three grounds. First, LPO's constitutional challenge to the ballot access provisions of H.B. 194 was not ripe. Ripeness raises both jurisdictional and prudential considerations for the court. *Cassim v. Educ. Credit Mgmt.*, 594 F.3d 432, 437-438 (6th Cir. 2010). Here, both considerations militated against review. The district court lacked jurisdiction to hear LPO's challenge because LPO offered no credible evidence that the injuries it feared would "ever come to pass." *Warshak v. United States*, 490 F.3d 455, 467 (6th Cir. 2007). It

was uncontested that LPO was guaranteed ballot access for 2011, (R. No. 13, Order, at 4), it was uncontested that H.B. 194 was subject to a referendum effort, *id*. at 3, and it was uncontested that LPO's earliest deadline under the act was not until February 2012. *Id.* (petition due 90 days before May primary). Moreover, established precedent holds that courts should not hear constitutional challenges to acts subject to popular vote because review would interfere with the state's legislative process and the people's right to vote the measure up or down. *See Ranjel v. City of Lansing*, 417 F.2d 321, 324-25 (6th Cir. 1969).

Second, even if the matter was ripe on September 7, the date of the ruling below, the preliminary injunction must be vacated and the matter dismissed because it is now moot. Subsequent to the district court's order and filing of this appeal, the petitioners seeking a referendum on H.B. 194 successfully filed sufficient signatures to stay the act and put it to popular vote in November 2012. *See*, *supra*, at 16. Thus, it is not possible for any provision of H.B. 194 to have any impact on LPO or its candidates until 2013.

Third, and alternatively, the district court's order must be reversed because LPO failed to meet the required elements for preliminary injunctive relief. Most prominently, LPO failed to establish a likelihood of success on the merits of its claim because it failed to adduce any evidence to show that the ballot access provisions of H.B. 194 pose a severe burden on its constitutional rights. LPO's

evidence was based on misapprehension of the statute and its effective date. (R. No. 24, Trans. at 4:8-19, 6:18-7:3) (belief that H.B. 194 would remove LPO's 2011 ballot access and that LPO would be required to gather signatures by November 2011). Nor could LPO establish irreparable harm, for the same reasons that the challenge was not ripe for review. For all of the foregoing reasons, the General Assembly asks the court to vacate the preliminary injunction order and direct the district court to dismiss the case as moot.

LAW AND ARGUMENT

I. The General Assembly is entitled to intervene in this action and may therefore prosecute this appeal.

The General Assembly has a right to intervene in this action pursuant to F.R.C.P. 24(a)(1) and 24(a)(2) and the trial court should have granted the motion to intervene.[5] Rule 24(a)(1) provides that a party may intervene when given an unconditional right by federal statute. Federal law permits the state to intervene when the constitutionality of a state statute is in question. 28 U.S.C § 2403(b). Because the Secretary did not appeal, the state is not represented on appeal absent intervention by the legislature. Thus, the General Assembly was entitled to intervene under Rule 24(a)(1). See *Arizonans for Official English*, 520 U.S. at 74

[5] This Court can treat the district court's failure to rule on the General Assembly's motion as a denial. *Crenshaw v. Herbert*, 409 F.3d Appx. 428, 430 (2d Cir. 2011); *United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000).

(when Governor did not appeal, Attorney General had a right "secured by Congress" to present argument on appeal).

Alternatively, the General Assembly has a right to intervene under Rule 24(a)(2), which has four elements: "(1) timeliness of application; (2) a substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Timeliness is reviewed for abuse of discretion and the remaining factors are reviewed *de novo*. *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993).

The General Assembly's motion was timely. No cause existed to intervene while the Secretary defended the constitutionality of the Act, and the legislature did not know that the Secretary would not appeal until the appeal deadline loomed. Moreover, the General Assembly did not know that the district court would order the State to enact new laws. The litigation is at an early stage; at the time the General Assembly moved to intervene, answers had not been filed. The motion was, thus, timely. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990); *Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989) (intervention allowed even at late stage when court's remedy triggers intervenor's interest in the action).

The General Assembly has a substantial interest in the case. As noted in *Northeast Ohio Coalition for the Homeless v. Blackwell* ("*NEOCH*"), the State, on behalf of the General Assembly, has a "manifest legal interest in defending the constitutionality of Ohio's laws." *NEOCH*, 467 F.3d 999, 1007 (6th Cir. 2006).

In the absence of intervention, the General Assembly's interest would be impaired. The district court enjoined enforcement of a law that was not and may never become effective. Absent the General Assembly's intervention and appeal, that order would stand. Moreover, the district court ordered the State of Ohio to "take steps to enact ballot access laws . . . ." (R. No. 13, Order at 12). Apart from popular initiative, only the General Assembly can "enact ballot access laws." Ohio Const. art. II, § 1. Yet, absent intervention and appeal the General Assembly is unable to seek relief from this order. The *NEOCH* Court determined that the State satisfied this third element because an adverse ruling in the underlying case could hinder its ability to litigate the constitutionality of the law. *Id*. at 1007-1008. That is precisely the situation the General Assembly faces here.

Finally, the Secretary's representation does not adequately protect the interests of the General Assembly. This is evident, first, in the fact that the Secretary did not appeal. It also is manifest in the distinct roles of the Secretary and the General Assembly. The *NEOCH* Court noted that the legislature has an independent interest in the validity of laws, while the Secretary's primary interest

is running elections. *Id*. at 1008. As the State in *NEOCH* easily met the four elements of intervention, so does the General Assembly here.

II. The district court's ruling regarding the constitutionality of H.B. 194 should be vacated because the challenge was not, and is not, justiciable.

A. LPO's constitutional challenge to H.B. 194's ballot access provisions was not ripe.

Whether a claim is ripe is a legal question that is reviewed *de novo*. *Cassim*, 594 F.3d at 437-438. The jurisdiction of federal courts is limited to cases and controversies. U.S. Const. art. III, § 2. The ripeness doctrine ensures "'that the courts decide only existing, substantial controversies, not hypothetical questions or possibilities.'" *Cassim*, 594 F.3d at 437 (quoting *Déjà vu of Nashville, Inc. v. Metro*, 274 F.3d 377, 399 (6th Cir. 2001)). Ripeness prevents the courts "through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985).

This Court has oft stated that ripeness arises both from the limitations of Article III and from "prudential reasons for refusing to exercise jurisdiction." *Cassim*, 594 F.3d at 437 (quoting *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18 (1993)). The Court is called to "exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances." *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985); *see also Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 399-400 (6th Cir. 1998).

The district court erred in holding that LPO's challenge to H.B. 194 was ripe for two reasons. First, the district court failed to put sufficient import on the fact that H.B. 194 was subject to referendum efforts. Injunctions against laws subject to referendum are strongly disfavored because they impact the right of the people of the state to vote on the law in question. In addition, an act subject to a pending referendum is inchoate and such a challenge is no more ripe for review than a challenge to a bill that has passed only one house of the legislature. Second, LPO's challenge to H.B. 194 was not ripe under standard legal analysis because LPO offered no evidence that it was likely to suffer an actual and imminent injury.

1. Constitutional review of acts subject to referendum should be deferred until after the act is adopted by voters at the polls.

This Court has recognized that judicial review of laws subject to initiative or referendum are disfavored. *Ranjel*, 417 F.2d at 324. In *Ranjel*, opponents of a bill sought to enjoin a referendum, asserting violations of their constitutional rights. *Id.* This Court noted that initiative and referendum are "an important part of the state's legislative process. Being formulated on neutral principles, [these processes] should be exempt from Federal Court constraints." *Id.* The Court followed *Mulkey v. Reitman*, 64 Cal. 2d 529, 535, 413 P. 2d 825, 829 (1966). The *Reitman* court rejected a mandamus petition to keep a law off the ballot based on its alleged unconstitutionality, holding that it would be more appropriate to review the legality of the law after the election rather than "interfere with the power of the

people to adopt or reject the same at the polls." *Mulkey*, 64 Cal. 2d at 535. This Court concluded that "the better practice was that followed by the [Court] in *Reitman*, which allowed the election to proceed and ruled on the validity of the measure after its passage." *Ranjel*, 417 F.2d at 324-25.

Following this rule, most courts facing a challenge to an act subject to vote have declined to address it before the election. *See, e.g.*, *O'Kelley v. Cox*, 278 Ga. 572, 604 S.E.2d 773, 774 (2004) ("The judiciary is vested with the power to determine the constitutionality of legislation, but at present there is simply no legislation which can be the subject of a constitutional attack"); *Diaz v. Bd. of County Comm'rs*, 502 F. Supp. 190, 193 (S.D. Fla. 1980) ("A determination of the constitutionality of the results must wait until that now-hypothetical time when there may be actual results."); *State ex rel. O'Connell v. Kramer*, 73 Wash. 2d 85, 87, 436 P.2d 786 (1968) (en banc) ("[W]e cannot pass on the constitutionality of proposed legislation, whether by bills introduced in the House or Senate, or measures proposed as initiatives, until the legislative process is complete and the bill or measure has been enacted into law."); *City of Rocky Ford v. Brown*, 133 Colo. 262, 265-266, 293 P.2d 974 (1956) ("In the first instance the proposed ordinance is clothed with the presumption of validity and its constitutionality will not be considered by the courts by means of a hypothetical question, but only after enactment.").

The foregoing precedents demonstrate that both jurisdictional and prudential considerations counsel that constitutional challenges to statutes subject to referendum are not ripe. Any such ruling is an advisory opinion because it is unknown, until the act is put to vote, whether the act will ever become law. In addition, prudence requires abstention because striking down an act prior to the people's vote renders the vote an empty exercise and, thus, interferes with the power the people have reserved to themselves to adopt or reject acts proposed by the legislature. Ohio Const. art. II, § 1c; *Rocky Ford*, 133 Colo. at 266 ("The separation of governmental powers must be held inviolate, therefore [the] court may not intrude upon the legislative powers through an advisory opinion.")

Moreover, hearing a constitutional challenge to an act subject to referendum violates the rule that courts avoid constitutional questions unless review is unavoidable. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *United States v. Green*, 654 F.3d 637, 646 (6th Cir. 2011).

In sum, the district court erred in holding that LPO's challenge to H.B. 194 was ripe. The court's only explanation for its ruling was that Fair Elections Ohio's gathering of sufficient signatures to stay the act was a mere "possibility." At the time of the district court's ruling, it is undisputed that the petitioners had taken all

the steps that were required through September 7 to put the matter on the ballot. While the filing of sufficient signatures on September 29, 2011, was not a certainty, it was at least as likely as not. LPO bore the burden to show its claim was ripe. *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 360 (6th Cir. 2008). Thus, all things being equal, the court should have declined to address their constitutional challenge or, at a minimum, held its ruling in abeyance until after September 30. Moreover, as addressed more fully below, LPO failed to show an actual or imminent injury, even if H.B. 194 had become effective on September 30. For that reason as well, LPO's claim was not ripe.

2. The district court erred in finding that LPO's challenge was ripe under the standard legal test for ripeness.

In determining whether a claim is ripe, a court considers three factors: (1) the likelihood that the alleged harm will come to pass; (2) whether the factual record is sufficiently developed; and (3) the hardship to the parties if judicial relief is denied at this stage of the proceedings. *Warshak*, 490 F.3d at 467. LPO did not demonstrate any of these factors.

First, the harm alleged by LPO will not come to pass. LPO alleged that H.B. 194 would deny them ballot access in 2011 and 2012. For 2011, the undisputed evidence was that LPO would be on the November 2011 ballot whether or not H.B. 194 became effective on September 30, 2011. (R. No. 13, Order, at 4). For 2012, the undisputed evidence and plain reading of the law demonstrated that

H.B. 194 would require nothing of LPO until early February, 2012, at which time their petition and signatures would be due, but only, again, if H.B. 194 became effective on September 30. *Id.* At the time of the preliminary injunction hearing, LPO's witness admitted that they only had two possible candidates and that those candidates were not committed to running. (R. No. 24, Trans. 16:21-17:3). Thus, LPO's need for ballot access appears to have been entirely speculative. On this record, LPO failed to show that the harm it alleged was likely to come to pass.

Second, the factual record was not sufficiently developed to support the court's adjudication because, had the court waited only a few weeks, the parties would have known whether Fair Elections Ohio filed signatures to stay the act. Because the status of the referendum was material to the court's jurisdiction, the district court should have waited to allow the facts to develop.

Third, no harm was likely to come to LPO absent adjudication, and the passage of time has shown beyond dispute that no harm will come to them. LPO sought relief in this case for the 2011 and 2012 elections. As a matter of law, H.B. 194 is stayed and will be stayed until it is put to the Ohio electorate at the November, 2012, election. *Supra*, at 16. The act can have no possible impact on LPO candidates in 2011 or 2012.

This court should reverse and vacate the preliminary injunction issued below because LPO's constitutional challenge was not ripe.

B. To the extent that LPO's constitutional challenge to H.B. 194 was ripe on September 7, it is now moot, and the preliminary injunction must be vacated.

"Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Official English*, 520 U.S. at 68 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973))). Mootness is a question of law that is reviewed *de novo*. *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009). On December 9, 2011, the Secretary certified that Fair Elections Ohio submitted sufficient signatures to put H.B. 194 on the November 2012 ballot. *See* n. 4, *supra*. As a result, the entire act is stayed under the November 2012 election and will not go into effect unless adopted by a majority of Ohio voters. Ohio Const. art. II, § 1c. To the extent that LPO's claim for relief in 2011-2012 was ever ripe, it is now moot.

Because LPO's claims were mooted by happenstance, well-established precedent requires this Court to vacate the preliminary injunction order below and dismiss the action. "'A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance' . . . 'ought not in fairness be forced to acquiesce in' that ruling." *Camreta v. Greene*, 131 S. Ct. 2020, 2035

(2011) (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall Pshp.*, 513 U.S. 18, 25 (1994)). "The equitable remedy of vacatur ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.'" *Camreta*, 131 S. Ct. at 2035 (quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950)); see also *Evans v. Zych*, 644 F.3d 447, 450 (6th Cir. 2011).

LPO's constitutional challenge to H.B. 194, if it were ever ripe, became moot when the Fair Elections Ohio filed sufficient signatures to subject the act to referendum on the November 2012 ballot. Because such actions were not in the control of any party in this case, this Court should vacate the preliminary injunction with instructions to dismiss the case as moot.

III. H.B. 194's combination of a signature requirement and a petition filing date of 90 days prior to a May primary is constitutional, and the district court thus erred in finding that LPO was likely to succeed on the merits.

In the alternative, the order should be vacated because the district court erred in ruling on the merits of LPO's challenge. On appeal of a preliminary injunction, the court reviews legal conclusions *de novo* and factual findings for clear error. *Babler v. Futhey*, 618 F.3d 514, 520 (6th Cir. 2010).

Ohio requires minor parties who lack sufficient votes in the last election to petition for party status. R.C. 3501.01(F)(3). The petition requires signatures in an amount equal to 1% of those who voted in the last election for Governor or

President. *Id.* In 2010, 3,852,469 votes were cast for Governor. (R. No. 8-1, Damschroeder aff. ¶20a). LPO thus would have been required to gather 38,525 signatures to petition for recognition. As of August 18, 2011, there were 7,951,735 registered voters in Ohio. *Id.* ¶21. Thus, to qualify as a new political party, a group would need to submit signatures from only 0.48% of all registered voters. As noted previously, H.B. 194 gave new parties significant additional time to gather such signatures, by extending the deadline to 90 days before the primary (from 120) and by moving the primary from March to May.

The law governing ballot access is well settled. States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). When reviewing a constitutional challenge to an election law, a court must "weigh the 'character and magnitude' of the burden the State's rule imposes on those rights [to ballot access and to vote for the candidate of one's choice] against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Id.* at 358 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The State's "important regulatory interests" are usually sufficient to justify "reasonable, nondiscriminatory restrictions." *Id.* A party challenging the State's reasonable and nondiscriminatory rule bears "a heavy constitutional

burden." *Schrader v. Blackwell*, 241 F.3d 783, 790-91 (6th Cir. 2001). Furthermore, the general principles in support of the right to form a political party cannot be "interpreted as an open sesame for minor parties and individuals who want to appear on the ballot with the major candidates." *Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1304 (4th Cir. 1989).

A review of cases dealing with signature and filing deadlines shows that the deadline established in H.B. 194 is not unduly burdensome. Any burden imposed by Ohio's 1% signature requirement is mitigated by many factors. Ohio law requires only that signators be registered to vote. They did not have to vote in a recent election. They can sign more than one petition. They need not commit to voting for the new party candidate. They need not live in any particular geographic area. No time limit exists on the start of signature gathering – new parties may gather signatures as early as they like. Had LPO begun to gather signatures on the day it filed the complaint, for example, it would have had to acquire only 210 signatures per day to file by the February 8, 2012. (R. No. 8, Opp. PI, at 4 n.2).

In finding a severe burden on LPO's rights, the district court focused on the filing deadline of 90 days prior to a May primary. The court opined that "[d]eadlines so far in advance of the election force minor parties to recruit candidates at a time when major parties candidates are not known and when voters

are not politically engaged." (R. No. 13, Order, at 7). The court also found that mandating a "large number of signatures 90 days before the primary, and 279 days before the general election . . . limit[s] the ability of the party to campaign, to recruit members, and to participate in the most basic of democratic processes." *Id.*

These findings are not supported by the record below. LPO offered no evidence that Ohio voters were "disengaged" at the time they filed their lawsuit or on the date of the court's ruling. In fact, the evidence was to the contrary. The fact that Fair Elections Ohio was able to marshal signatures equal to 6% of those who voted for Governor in 2010 and 3% of those who voted for Governor in 44 of Ohio's 88 counties demonstrates, in itself, that the Ohio electorate is and was engaged from July, 2011, through December, 2011 (the duration of the petition drive). *Supra*, at 16. The Secretary also offered evidence of the extraordinary number of signatures collected from Ohio voters on several ballot measures. (R. No. 8-1, Damschroeder aff., Exhs. A-C). At best, LPO showed that it was doubtful of its ability to marshal sufficient support from voters to succeed in a petition drive because it lacks funding and membership. *See* (R. No. 24, Trans. at 20:22-21:1 (LPO had approximately $10,000 in its bank account in August 2011); *id.* 12:11-15 (LPO had approximately 5,500 members in Ohio). This does not support a holding that H.B. 194 poses a "severe" burden. The legislature is entitled to demand that a party demonstrate a modicum of support to attain minor party status.

Moreover, whether major party candidates are not known is irrelevant to minor party ballot access. The district court appeared to be relying on *Anderson*, which involved ballot access for independent candidates, whose decision to run may well turn on dissatisfaction with the major party nominees. 460 U.S. at 791-92. Where all parties are required to nominate candidates through a primary, all such candidates will have to declare, and the parties gain recognition, before the primary. No candidate from any party will know his or her opponents in the general election prior to the primary. All party candidates are treated alike.

No court has held that it is unconstitutional to require parties to select candidates in a single primary election. Indeed, the Supreme Court has opined that "It is too plain for argument . . . that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or party convention." *Am. Party of Texas v. White*, 415 U.S. 767, 781 (1974). If a candidate must be selected in a primary, it follows that a party must be recognized *before* such primary. Thus, in every state requiring primaries, the new party will be required to field candidates *before* the major party candidates are known, as all such candidates are subject to the same primary requirement. The court in *Anderson* recognized that the deadline will also always be a significant number of months before the general election, as party nominees require time to campaign against each other for any given office

and, in presidential years, the primary must precede the "national convention, which is regularly held during the summer." 460 U.S. at 800-801.

Even if this Court agrees that a 1% signature requirement and petition filing date 90 days before a May primary poses a severe burden, these limitations are narrowly drawn to serve a compelling state interest. The State has a compelling interest in requiring "a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1974); *Timmons*, at 363-64. Furthermore, when a candidate's political party affiliation is listed on the ballot, "the voters and the state are entitled to some assurance that particular party designation has some meaning in terms of a 'statewide, ongoing organization with distinctive political character.'" *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 795 (11th Cir. 1983) (quoting *Storer v. Brown*, 415 U.S. 724, 745 (1974)). Ohio's requirements advance these interests.

The requirement that a new party gather signatures equal to 1% of the votes cast for Governor (or .48% of the registered voting population) in the last election provides evidence of that modicum of support. A party that cannot gather the signatures lacks the necessary support. The requirement that a new party file its petition 90 days before the primary promotes fair and well-organized elections

because 90 days is a reasonable, and close to minimum, time period necessary to permit the Secretary and local boards of election to check that the signatures are valid (prevent fraud), prepare and certify the form of ballot, and give candidates time to campaign for the primary election, when such candidate is challenged.

The district court accepted that the State "needs 90 days to process the paperwork," but held that this kind of practical consideration does not warrant a severe burden on constitutional rights. (R. No. 13, Order, at 9). The Supreme Court, however, has recognized that common sense should play a role in the review of ballot access laws. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (as a "practical matter there must be substantial regulation of elections"). If the state "needs" 90 days to process the paperwork, then a 90 day filing deadline is, *ipso facto*, "narrowly tailored" to serve that interest. As explained in the uncontroverted testimony and affidavit of Matthew Damschroeder, prior to holding an election, the Secretary must certify the ballot, ensure that local boards train precinct election officials, appoint various employees and officials to provide various services to voters, process myriad forms including voter registrations and changes of address, prepare, mail and process absentee ballots, assist confined voters, monitor and send notices regarding campaign finance reporting, ensure programming and accuracy testing for all equipment, advertise local questions and inspect polling locations, among other duties. (R. No. 8-1). In 2011-2012 the

process is more complex than usual due to decennial redistricting and apportionment and the resulting need to reorganize Ohio's elections along new geographic lines. *Id.* ¶ 11. The State has asked only for the time that it needs to run the primary election.

Because the State's interests in fair and organized elections and requiring new parties to demonstrate a minimum level of support are well-recognized and compelling, the weight of authority supports that H.B. 194's ballot access provisions are constitutional. In *Burdick*, the Supreme Court upheld Hawaii's prohibition on write-in voting. 504 U.S. at 436. In reaching that conclusion, the Supreme Court held that a ban on write-in voting was permissible where the state "provides for easy access to the ballot until the cutoff date for filing of nominating petitions, two months before the primary." *Id.* The court described this "easy access" system. Political parties could qualify automatically for the ballot if, in the previous general election, they obtained at least 10% of the vote for any one office or 2% of all votes cast for all offices for the state legislature combined. H.R.S. § 11-61.[6] Parties which do not meet those requirements must file a petition 150 days prior to an open, mandatory primary election, containing signatures of 1% of *all* the state's registered voters. *Burdick*, 504 U.S. at 435. Candidates whose

[6] To meet the 2% requirement, a new party would have to run candidates for almost every state legislative seat, to attain an overall 2% of the votes cast in all such elections.

parties meet neither requirement could run as independents. *Id.* In holding that Hawaii's ballot access scheme was constitutional, the *Burdick* court noted that it had "previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome than Hawaii's one-percent requirement." *Id.* at 435, n. 3 (citing *Norman v. Reed,* 502 U.S. 279, 295 (1992); *American Party of Texas*, 415 U.S. at 767; *Jenness*, 403 U.S. at 431).

Notably, the Hawaii scheme described as "easy" in *Burdick* is far more restrictive than Ohio's proposed access rules set forth in H.B. 194. While both states have mandatory primaries, Hawaii required a petition to be filed 150 days before the primary, whereas H.B. 194 permits a new party to file 90 days before the primary.[7] Hawaii required a new party to gather signatures from 1% of all of Hawaii's registered voters, whereas Ohio requires a new party to collect 1% of those votes cast in the last gubernatorial or presidential election, which is less than half of 1% of all registered voters, based on Ohio's 2010 election. Like Ohio, Hawaii also permitted parties to qualify for the ballot based on their performance in past elections, and candidates whose parties did not qualify could run as independents. *Burdick,* at 435-436. The *Burdick* court held that Hawaii's ballot access laws posed only a slight burden on voters. *Id.* at 438. Thus, no compelling interest was required to justify a prohibition on write-in candidates.

[7] In 1992, Hawaii's primary was held in early September, making signatures due in early April. H.R.S. § 12-2.

Burdick controls here. Because the ballot access laws set forth in H.B. 194 are much more generous than Hawaii's, Ohio's proposed ballot access provisions cannot, as a matter of law, impose a severe burden on Plaintiffs' rights. Because Ohio's proposed ballot access laws are both reasonable and politically neutral, Ohio has shown that its interests justify the proposed restrictions for new parties.

As noted in *Burdick*, the Supreme Court has many times held that ballot access laws far more restrictive than those set forth in H.B. 194 were constitutional. *See American Party of Texas*, 415 U.S. at 782, 783 n.15 (Texas can require conventions, notarized signatures equal to 1% of the vote cast for Governor, gathered over 55 day period; 1% petition requirement is "lenient"); *Jenness*, 403 U.S. at 432 (Georgia requires signatures of 5% of registered voters gathered in 180 day period).

Likewise, many lower courts have held provisions much more restrictive than those proposed in H.B. 194 to pass constitutional muster. *See e.g., Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011)(Arkansas can require signatures of 10,000 registered voters, 1.27% of the votes cast for Governor, gathering during a 90 period of time chosen by the party[8]); *Swanson v. Worley*, 490 F.3d 894, 905 (11th Cir. 2007) (Alabama may require signatures of 3% of electors who voted for Governor, due in June); *Socialist Workers Party v.*

[8] The Court noted that there were 781,332 votes cast for Governor in 2010; 10,000 is 1.27% of that number.

Hechler, 890 F.2d 1303, 1306 (4th Cir. 1989) (West Virginia may ban those who sign a new party petition from voting in a major party primary, while requiring signatures of 1% of all votes cast in the last election, due the day before May primary; W. Va. Code § 3-5-1a); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd*, 844 F.2d 740, 744 (10th Cir. 1988) (Oklahoma may require signatures of 5% of votes cast Governor or President, gathered in 1 year, filed in May of even numbered year); *Libertarian Party of Florida*, 710 F.2d at 793-94 (Florida may require signatures of 3% of all voters, gathered over 188 days).

The Plaintiffs' expert in *Swanson* tried to claim the Alabama law was one of the most restrictive in the country. The court rejected that claim, finding that "legislative choices of other states are irrelevant … because a court is 'no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature.'" *Id.* at 910 (quoting *Libertarian Party of Florida*, 710 F.2d at 794). The court also found that there were several alleviating factors at issue in the Alabama statute, including the fact that anybody could sign a petition regardless of party affiliation, voters who already voted in a primary could still sign the petition, voters could sign more than one petition, there was no limitation on the number of signatures from any area, there was no maximum number of signatures that could be submitted, because there was no time limitation on when the signature effort could begin there was

sufficient time to conduct the signature gathering effort, there was a proven ability to make the ballot in the past, and since the Libertarian Party only had to spend $100,000 to collect signatures it was not impermissibly burdensome. These alleviating factors are also true under the rules proposed in H.B. 194.

These precedents establish that States may constitutionally mandate that a new political party obtain signatures equal to 5% of its registered voters. They may limit the amount of time that a new political party can obtain signatures to a 55-day window. They may require that all signatures be notarized. The Ohio General Assembly has not chosen to impose nearly so restrictive a system, when compared to these requirements, a 1% petition requirements based off of the total number of votes for Governor, with filing 90 days before a May primary is not unduly burdensome.

The district court significantly expanded this Court's holding in *Blackwell* to conclude that H.B. 194's ballot access provisions were unconstitutional. The provisions challenged by Plaintiffs here *both* shortened the time before the primary in which a petitions must be filed *and* moved the primary significantly closer to the date of the general election. The *Blackwell* majority found great significance in the fact that the law at issue there required the submissions a full *year* ahead of the general election – not the nine months established by the current law. 462 F.3d at 586. And that panel dealt with a statute requiring submissions to be made 120

days in advance of the primary – not the 90 day period the present law that shortens that period by one quarter. Significantly, too, the *Blackwell* opinion found that it was the two significantly greater requirements *in combination* that made the previous law invalid: "It is true that a 120 day period may be a reasonable amount of time to process the registration of a political party; however, that is not the inquiry before us. Rather, we must examine whether first this 120-day period take place in advance of a March primary, resulting in a filing deadline one year in advance of the general election, promotes a compelling State interest [a standard applicable because of the 'combination.']" *Id.* at 593. The panel explicitly declined to rule on a related requirement for non-presidential years that required the signatures 120 days in advance of the primary and still 10 months ahead of the general election. *Id.* at 591, n. 11.

The cases cited by LPO are inapposite. *Anderson*, 460 U.S. at 780, decided before and distinguished by *Burdick*, does not control. It dealt with a filing deadline for an independent presidential candidate when Ohio's overall election scheme was markedly different. *Wood v. Meadows*, 207 F.3d 708, 710 (4th Cir. 2000) *upheld* Virginia's filing requirements for independent candidates, noting that "states may require independent candidates to file their petitions . . . before, at the same time, or after party primary candidates do so." *Wood* also noted that the Supreme Court does not require a state to justify electoral regulations if they are

reasonable and non-discriminatory. *Id.* at 716. Finally, *Wood* held that "administrative convenience readily falls under the rubric of a state's 'regulatory interests,' the importance of which the Supreme Court has repeatedly recognized." *Id.* at 715. The holding in *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 880 (3d Cir. 1997) appears to be based on some factual evidence that is not true for our case: the New Jersey statute apparently discriminated against minor parties by requiring them to file nominating petitions 54 days before major parties were required to do so, denying them the ability to "react" to events occurring in the two months before the primary. The court also relied on its finding that the New Jersey electorate is not politically engaged in the months before the primary. However, as noted previously, the Ohio electorate is very engaged in politics. The last three referenda efforts in Ohio qualified for the ballot even in the dead of winter in an off-year.[9] (R. No. 8-1, Damschroeder aff., Exh. A-C)(S.B. 5: 915,456 valid signatures; H.B. 1: 321,389 valid signatures; H.B. 545: 279,174 valid signatures). *Hooks* is thus inapposite.

IV. The district court also erred in granting the preliminary injunction because LPO failed to meet the other requirements for such relief.

A. LPO has failed to demonstrate any irreparable harm.

LPO failed to prove irreparable harm for two different reasons. First, H.B. 194 will not be effective until after the November 2012 election – if it becomes

[9] These signatures must be collected over 90 days. Ohio Const. art. II, § 1c.

effective at all. The LPO candidates will be on the ballot with their party cue for 2011 and 2012. Therefore, there is no immediate harm that needs to be addressed. Second, the statute itself is constitutional and, therefore, LPO is not harmed.

B. LPO has failed to show that an injunction is in the public interest or that an injunction will not harm others.

Public interest requires constitutional statutes to take effect. Likewise, the public has a powerful interest in its ability to ensure an orderly election process, to ensure that new parties enjoy a modicum of support, to require primaries to reserve the general election ballot for "major struggles," and to give Ohio's Secretary of State a reasonable amount of time to process the necessary paperwork so that no errors are made. *Burdick*, 504 U.S. at 439; *American Party of Texas*, 415 U.S. at 782; *Wood*, 207 F.3d at 715.

CONCLUSION

The preliminary injunction issued below should be vacated and the case dismissed because LPO's constitutional challenge to the ballot access provisions of H.B. 194 was not ripe and, if it was ever justiciable, is now moot. Should this Court reach the merits of the district court's ruling, the preliminary injunction must

also be reversed and vacated because the ballot access provisions proposed in H.B. 194 are constitutional under binding Supreme Court precedent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 6 Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2010, and in accordance with the provisions of Federal Rule of Appellate Procedure 32(a)(7)(B), this brief contains 10,500 words.

/s/ Jeannine R. Lesperance
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 21st day of December, 2011.

/s/ Jeannine R. Lesperance
Jeannine R. Lesperance (#0085765)
Assistant Attorney General

STATUTORY APPENDIX

The challenged provisions of H.B. 194 would amend Ohio law as follows:

> **Sec. 3517.01.** (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.
>
> **Sec. 3501.01 *****
> (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.~~

PROPOSED-INTERVENOR/APPELLANT'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Proposed-Intervenor/Appellant Ohio General Assembly, pursuant to Sixth Circuit Rule 30(b), hereby designates the following documents in the district court's record as relevant to this appeal.

Date Filed	R. No.	Docket Text
08/09/2011	1	COMPLAINT against Jon Husted filed by Libertarian Party of Ohio, Kevin Knedler, Michael Johnston. [ELECTION ISSUE(S) CITED] (Brown, Mark) Modified on 8/9/2011 to correct parties.
08/09/2011	2	AMENDED COMPLAINT against Jon Husted, filed by Libertarian Party of Ohio, Kevin Knedler, Michael Johnston. (Brown, Mark) Modified on 8/9/2011 to add filers.
08/15/2011	5	MOTION for Preliminary Injunction *and Expedited Proceedings* by Plaintiffs Michael Johnston, Kevin Knedler, Libertarian Party of Ohio.
	5-1	Memorandum in Support of Motion for Preliminary Injunction and Expedited Proceedings
	5-2	Text of Proposed Order Proposed Order
	5-3	Letter from Jon Husted to Michael Johnston, LPO, dated 8/5/2011
	5-4	Declaration of Michael Johnston (pursuant to 28 U.S.C. §1746)
	5-5	Secretary of State Directive 2009-21
	5-6	Secretary of State Directive 2011-01 (re-issue of 2009-21)

Date Filed	R. No.	Docket Text
08/15/2011	7	ORDER Setting Hearing on Motion [5] MOTION for Preliminary Injunction *and Expedited Proceedings* : Motion Hearing set for 8/30/2011 at 9:00 AM in Courtroom 1 - Columbus before Judge Algenon L. Marbley. Signed by Judge Algenon L. Marbley on 08/15/2011.
08/22/2011	8	RESPONSE in Opposition re [5] MOTION for Preliminary Injunction *and Expedited Proceedings* filed by Defendant Jon Husted. (Coglianese, Richard)
	8-1	Affidavit of Matthew M. Damschroder
08/25/2011	9	REPLY to Response to Motion re [5] MOTION for Preliminary Injunction *and Expedited Proceedings* filed by Plaintiffs Michael Johnston, Kevin Knedler, Libertarian Party of Ohio. (Brown, Mark)
	9-1	Affidavit/Declaration of Michael Johnston
09/01/2011	11	NOTICE by Defendant Jon Husted re 8 Response in Opposition to Motion *Of Supplemental Authority informing the Court and Parties of Directive 2011-28* (Coglianese, Richard)
	11-1	Secretary of State Directive 2011-28
09/01/2011	12	Motion to file a Supplemental Memorandum Supporting re [5] MOTION for Preliminary Injunction *and Expedited Proceedings Reply to Defendant's Supplemental Filing* filed by Plaintiffs Michael Johnston, Kevin Knedler, Libertarian Party of Ohio. (Brown, Mark) Modified on 9/2/2011 to correct text and event
09/07/2011	13	ORDER granting [5] Motion for Preliminary Injunction. Signed by Judge Algenon L. Marbley
10/07/2011	14	NOTICE by Defendant Jon Husted *of Compliance with Court Order Granting the Plaintiff's Motion for a Preliminary Injunction* (Coglianese, Richard)

Date Filed	R. No.	Docket Text
	14-1	Letter from Jon Husted dated 9/21/2011 : Ballot Access for Minor Parties
10/07/2011	15	MOTION to Intervene by Defendant Ohio General Assembly. (Lesperance, Jeannine)
	15-1	Answer of Proposed Intervenor General Assembly
10/07/2011	16	NOTICE OF APPEAL as to [13] Order on Motion for Preliminary Injunction by Defendant Ohio General Assembly. (Lesperance, Jeannine)
10/08/2011	17	RESPONSE to Motion re [15] MOTION to Intervene filed by Plaintiffs Michael Johnston, Kevin Knedler, Libertarian Party of Ohio. (Brown, Mark)
10/09/2011	18	First MOTION to Compel *Expedited Relief Requested* by Plaintiffs Michael Johnston, Kevin Knedler, Libertarian Party of Ohio (Brown, Mark)
	18-1	Memorandum in Support of Emergency Motion to Compel Compliance with Preliminary Injunction
10/11/2011		USCA Case Number 11-4066 for [16] Notice of Appeal filed by Ohio General Assembly.
10/11/2011	19	ANSWER to [2] Amended Complaint filed by Jon Husted. (Coglianese, Richard)
10/14/2011	21	RESPONSE in Opposition re [18] First MOTION to Compel *Expedited Relief Requested* filed by Defendant Ohio General Assembly. (Lesperance, Jeannine)
10/16/2011	22	REPLY to Response to Motion re [18] First MOTION to Compel *Expedited Relief Requested* filed by Plaintiffs Michael Johnston, Kevin Knedler, Libertarian Party of Ohio. (Brown, Mark)
10/18/2011	23	NUNC PRO TUNC ORDER re [13] Order on Motion for Preliminary Injunction. Signed by Judge Algenon L. Marbley on 10/18/2011.

Date Filed	R. No.	Docket Text
11/08/2011	24	Transcript of Motion for Preliminary Injunction Proceedings held on 8/30/2011 before Judge Algenon L Marbley. Court Reporter/Transcriber Shawna J Evans, Telephone number 614-719-3316.

s/*Jeannine R. Lesperance*
Jeannine R. Lesperance
Assistant Attorney General