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

REPLY BRIEF OF PROPOSED INTERVENOR-APPELLANT

Michael DeWine
Attorney General of Ohio

Jeannine R. Lesperance (0085765)*
Assistant Attorney General
**Lead Counsel*
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
jeannine.lesperance@ohioattorneygeneral.gov

Counsel for Ohio General Assembly

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I. INTRODUCTION

In opposing this appeal, Appellees Libertarian Party of Ohio, *et al.* (collectively "LPO") admit that the district court "could not speculate on what Ohio law 'might eventually be.'" LPO Brief at 26. Yet speculate is precisely what the district court did by preliminarily enjoining Am. Sub. H. B. 194 ("HB 194" or the "Act"), Ohio's proposed election reform law, *before* that law became effective and despite evidence that the law, more likely than not, would not take effect during the 2011 or 2012 election cycles.

The preliminary injunction should be reversed and vacated, with instructions to dismiss the case as moot. The General Assembly has standing to bring this appeal; the district court's failure to rule on the General Assembly's motion to intervene was tantamount to denial, and the General Assembly easily meets the requirements for intervention under Fed. R. Civ. P. 24. The district court lacked jurisdiction to hear LPO's claim because it was not ripe; moreover, the case, if ripe, became moot when Fair Elections Ohio, a non-party, filed a referendum petition with Ohio's Secretary of State ("Secretary") on September 30, 2011, thereby postponing the law's operation. Even if the court had jurisdiction, it erred as a matter of law in granting preliminary relief because HB 194's minor-party ballot access provisions are constitutional, and the order interferes with Ohio's legislative process, causing harm to the public that outweighs any harm to LPO.

II. THE GENERAL ASSEMBLY IS A PROPER PARTY TO THIS APPEAL.

The General Assembly properly brought this appeal. The district court's failure to rule on the General Assembly's motion to intervene can be treated as a denial and the motion was timely.

A. This Court may treat the district court's failure to rule on the General Assembly's motion to intervene as a denial because it was tantamount to a denial.

LPO concedes that appellate courts may treat failure to rule on a motion as a denial. LPO Brief at 19. LPO argues, however, that the Court may do so only in "extenuating circumstances." *Id.* The cases cited by the General Assembly demonstrate that failure to rule on a motion may be treated as a denial. *Crenshaw v. Herbert*, 409 Fed. Appx. 428, 430 (2d Cir. 2011) ("For the purposes of this appeal, we assume the timeliness of these motions and treat any failure to rule as a denial."); *United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000) ("We treat the district court's failure to rule on Depew's motion as a denial of it."). This Court's precedent is in accord. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (failure to rule treated as a denial whenever it "amount[s] to an effective denial of the motion.").

LPO's cases do not demonstrate that "extenuating circumstances" are required. *See Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir. 1990)("The question we must decide is

whether [the court's delay in ruling] is the practical equivalent of a denial of Chabad's application [to intervene]."); *Toronto-Dominion Bank v. Central National Bank & Trust Co.*, 753 F.2d 66, 69 (8th Cir. 1985) ("Although failure to rule on a motion to intervene can be interpreted as an implicit denial, . . . in the present case the district court entered an order in August 1984 specifically reserving ruling on the motion to intervene."); *see also Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 969 (10th Cir. 2008) (reciting generally the rule that non-parties may not appeal, and *affirming the denial* of the non-parties' motion to intervene). Rather, the only relevant query is whether the failure to rule was tantamount to a denial. *Coalition to Defend Affirmative Action*, 473 F.3d at 244; *Americans United*, 922 F.3d at 305.

This case is precisely on point with *Americans United*. There, the court determined that delay in ruling on the motion to intervene was tantamount to denial. 922 F.2d at 305-306. The delay had the effect of a denial because the movant wished to appeal a ruling adverse to its interests that the party-defendant City chose not to appeal. *Id.* Absent intervention and appeal, the movant's rights would be compromised. Here, the General Assembly filed its motion to intervene and notice of appeal on the last day for taking an appeal of the preliminary injunction, after the General Assembly became aware that the Secretary of State was not going to appeal. The General Assembly could *not* have waited until after

the court decided the motion to intervene to file the appeal, as LPO suggests, or the appeal would have been untimely under Fed. R. App. P. 4. Nor could the General Assembly have preserved its rights by ignoring the preliminary injunction ruling and litigating the matter to final judgment where, as here, the issue was likely to, and in fact did, become moot within days of the filing of the notice of appeal.

B. The General Assembly's motion to intervene was timely.

LPO attempts to hold the General Assembly to an impossibly high standard of timeliness that is not supported by any applicable precedent. LPO also rests its analysis on factual assertions that find no support in the record. Specifically, LPO asserts that the General Assembly "was on notice within days of the District Court's [September 7, 2011] Order that the Secretary would not appeal." LPO Brief at 25. LPO also suggests that this Court's ruling in *Northeast Ohio Coalition for the Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell ("NEOCH")*, 467 F.3d 999, 1007 (6th Cir. 2006) is inapposite because the General Assembly did not file an "immediate" appeal of the preliminary injunction and did not move to intervene "within hours" of such appeal. LPO Brief at 22. While those facts easily met the timeliness standard under Rule 24, they do not set the legal standard. The General Assembly has already explained that its motion to intervene was timely. GA Brief at 20.

LPO focuses on two factors. First, LPO asserts that in elections cases "waiting weeks (or even days)" to intervene may render such motion untimely. LPO Brief at 23. The only cases LPO cites for this proposition, however, are *laches* cases that nowhere mention intervention. *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980)(original action barred by *laches*); *McClafferty v. Portage County Bd. of Elections*, 661 F. Supp. 2d 826, 839-40 (N.D. Ohio 2009)(same); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 & caption (7th Cir. 1990)(even though original action was dismissed on grounds of *laches*, a defendant was permitted to intervene). LPO then asserts that those defending elections challenges should be held to the same standard as those prosecuting them. To support that assertion, they cite *NEOCH*, which simply recites that Fed. R. Civ. P. 24 requires motions to intervene to be "timely," finding that the rule was "easily met." *NEOCH*, 467 F.3d at 1007. LPO also cites a case holding that intervention is not timely when the case is "near its end stage." LPO Brief at 24, citing *American Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 245 (D.N.M. 2008). This Court has recognized that "the absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important" factors to consider when weighing timeliness of the motion. *Stupak-Thrall v.* Glickman, 226 f.3d 467, 475 (6th Cir. 2000). Rather, the focus must be on "what steps occurred" during that time. *Id.* Here, the General Assembly moved to intervene following the district court's

preliminary injunction and before the parties had answered the complaint. R. No. 15, 15-1, 16. The only proceedings that had taken place were the preliminary injunction briefing and hearing. *See* R. No. 13. Moreover, the Secretary of State actively defended the Act during those proceedings. *See id.* Thus, no cause existed for the General Assembly to intervene at that stage.

Second, LPO avers that the General Assembly was on notice that the Secretary would not appeal the preliminary injunction as early as September 9, 2011. LPO cites to a news article that quotes a Secretary of State spokesman for the unremarkable proposition that the Secretary will "follow the court's ruling." LPO Brief at 24-25. Of course it is the duty of any party to follow an order of the court unless or until that order is set aside on appeal or reconsideration. The quote on which LPO relies does not suggest that the Secretary had made any final decision with respect to appealing the order. LPO also cites a letter from Secretary Husted to the General Assembly dated September 21, 2011, requesting that the General Assembly enact a new minor-party ballot access law. R. No. 14, Exh. 1. Again, this letter nowhere states that the Secretary would not appeal the preliminary injunction. *Id.* Moreover, even if the General Assembly knew with absolute certainty on September 9 or September 21 that the Secretary would not appeal the order, its motion to intervene and notice of appeal filed on October 7, within the time provided by the rules for appeal, were timely.

LPO appears to concede that the General Assembly meets all of the other requirements for intervention in this case. *See Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)(setting out four factors). Because the motion was timely, and the district court's failure to act effected a denial, the General Assembly has standing to bring this appeal.

III. THE DISTRICT COURT ERRED IN HOLDING THAT LPO'S CLAIMS WERE JUSTICIABLE.

A. LPO's claims were not ripe on September 7, 2011.

LPO's claims were not ripe when the district court entered the preliminary injunction order because LPO failed to prove by a preponderance of the evidence that it had suffered, or was likely to suffer, any injury from the Act.

1. LPO's asserted injuries were speculative.

While LPO concedes that the Act was not scheduled to become effective until September 30, 2011, LPO nonetheless asserts that, as of September 7, the Act had "stripped the LPO of its qualified-party status and immediately injured LPO." LPO Brief at 27, citing R. No. 24 (testimony of Michael Johnston). LPO's argument regarding actual injury fails for at least two reasons. First, Mr. Johnston's testimony is entitled to no weight because whether the Act was effective is a question of law, not fact. *See United States v. Safa*, 484 F.3d 818, 821 (6th Cir.) (testimony on legal issue "improperly invade[s] the province of the court"). Second, as a matter of Ohio law, an Act that is not legally effective is, by

definition, of no force or effect. *Patterson Foundry & Machine Co. v. Ohio River Power Co.*, 124 N.E. 241, 243 (Ohio 1919) ("It is well settled that where a time in the future is stated in an act when it shall take effect and be in force it has effect and speaks only from that time."). Here, as explained more fully below, the bill never took effect. Under Ohio's constitutionally mandated system, bills of this nature do not take effect until 90 days after filing by the Governor (here, September 30, 2011), and then are further stayed upon the filing of a referendum petition pending approval of the voters. Ohio Const., art. II, §§ 1c, 1g. The referendum will not occur until November 2012; the bill has not taken effect and, thus, it could not have "stripped" the LPO of anything as of September 7, 2011.

LPO also asserts that the mere possibility that HB 194 might become law harmed the party because unidentified volunteers, donors and potential candidates might be afraid to affiliate with LPO if the party's status was in question. LPO Brief at 28, citing R. No. 24 at 5-6. But their speculations do not address the crux of the ripeness issue—whether LPO proved by a preponderance of the evidence that HB 194 would become effective in the immediate future. LPO did not.

2. HB 194 did not become effective on September 30, 2011

LPO also errs as a matter of law in its repeated assertion, citing nothing in support, that HB 194 became effective on September 30, 2011. LPO Brief at 9, 15, 28. Section 1c, Article II of the Ohio Constitution provides:

> When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed with the governor in the office of the secretary of state, . . . no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same.

Section 1g, Article II, Ohio Constitution, further provides that "The petition and signatures upon such petitions shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition."

Construing these provisions together, the Ohio Supreme Court has held that:

> "The Ohio Constitution contains references to three dates when a law passed by the General Assembly shall go into effect: 90 days after it shall have been filed by the Governor in the office of the Secretary of State, Section 1c, Article II, Ohio Constitution; upon approval by a majority of those voting upon a referendum, Section 1c, Article II, Ohio Constitution; and, as contemplated by Section 1g, Article II, Ohio Constitution and R.C. 3519.16, upon proof that a referendum petition contains an insufficient number of valid signatures to have the matter submitted to the electorate of the state of Ohio."

State ex rel. Heffelfinger v. Brunner, 876 N.E.2d 1231, 1236 (Ohio 2007), quoting *Thornton v. Salak*, 858 N.E.2d 1187, syllabus (Ohio 2006). In *Thornton*, the Ohio Supreme Court explained that an act is effective ninety days after the Governor files the act with the Secretary of State *unless* a referendum petition is filed with the Secretary. 858 N.E.2d at 1190 ("[U]pon the filing of a referendum petition, the effective date of new legislation is stayed pending the outcome of the referendum

vote. . . . If the referendum vote is successful, the new law never goes into effect, and the old law remains."). Thus, a statute can have only one effective date. LPO's assertion that the Act became effective on September 30, 2011, despite the filing of a referendum petition, regular on its face, is contrary to the Ohio Supreme Court's binding construction of the Ohio Constitution. *See Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 472 (6th Cir. 2008) (Ohio Supreme Court is the "ultimate arbiter" of Ohio law.); *C&H Entertainment, Inc. v. Jefferson County Fiscal* Court, 169 F.3d 1023, 1025 (6th Cir. 1999); 28 U.S.C. § 1652.

3. LPO's reliance on post-effectiveness, pre-enforcement challenges is misplaced.

LPO's "chilling effect" arguments are inapposite because HB 194, unlike the statutes challenged in the cases LPO cites, never became effective. *Anderson v. Spear*, 356 F.3d 651, 668 (6th Cir. 2004) involved a post-effective date, pre-enforcement challenge to a law. *See also Deja-Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davison County*, 274 F.3d 377, 399 (6th Cir. 2001) (same as *Anderson*, but with regard to an ordinance). In *North Carolina Right to Life, Inc. v. Leake*, 344 F.3d 418, 421(4th Cir. 2003), *vacated and remanded*, 541 U.S. 1007 (2004), the plaintiffs challenged fully enacted and effective campaign finance laws, and the court did not discuss ripeness. In *American Fed'n of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 757 (D.C. Cir. 1984), the court *dismissed* the First Amendment claims of the plaintiffs

for lack of ripeness; LPO's pin cite is to the *dissent* in that case. Similarly, *Miller v. Brown* involved a challenge to a statute that was fully effective; at issue was whether the statute would have an imminent impact on the plaintiffs. 462 F.3d 312, 319 (4th Cir. 2006). Regarding ripeness, the *Miller* court opined that "A case is fit for judicial decision when the issues are purely legal and **when the action in controversy is final and not dependent on future uncertainties**." *Id.* (emphasis supplied). The only uncertainty in that case was whether a candidate would file for office. *Id.* Here, whether HB 194 would *ever* be effective was in question, due to the referendum drive. In *Miller*, the court also held that the case was ripe because waiting until the uncertain event occurred would result in a judgment coming too late to address the alleged unconstitutionality. Here, LPO has not shown that the district court could not have waited a mere 24 days (from September 7 to September 30) to rule on LPO's motion for preliminary injunctive relief, at which point any uncertainty regarding HB 194's effectiveness would have been resolved.

All of LPO's post-effective, pre-enforcement cases are inapposite because they involved statutes that were of legal effect and could be enforced against the plaintiffs. *See A.O. Smith Corp. v. Federal Trade Comm'n*, 530 F.2d 515, 524 (3d Cir. 1976); *Coastal States Gas Corp. v. Department of Energy*, 495 F. Supp. 1300, 1307 (D. Del. 1980); *Standard Oil Co. v. Federal Energy Admin.*, 440 F. Supp. 328, 369 (N.E. Ohio 1977). Thus, LPO never faced the "horns" of any "dilemma"

because HB 194 could not be enforced before it became effective, an event which has not occurred and may never occur.

4. Courts disfavor reviewing the constitutionality of acts subject to initiative and referendum.

Courts disfavor constitutional review of acts subject to initiative and referendum because, except for rare cases, such review constitutes an advisory opinion, and interferes with the rights of voters and the legislative process. LPO characterizes such cases as "abstention" cases. None of the cases cited by the General Assembly involved any doctrine of abstention. Rather, they turn on justiciability, whether a case or controversy exists over which the court may exercise jurisdiction under Article III, U.S. Constitution, and on separation of powers principles, respecting the legislative power of the state as reserved to the people. *See Ranjel v. Lansing*, 417 F.2d 321, 324 (6th Cir. 1969) (citizens should not be "deprived of their right of suffrage" by enjoining referendum in the face of a constitutional challenge); *Mulkey v. Reitman*, 413 P.2d 825, 829 (Cal. 1966) (court refused to grant mandamus to stop initiative off the ballot based on a constitutional challenge, but addressed the merits of the challenge after the measure was passed); *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.").

LPO's single case cited in opposition, *Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 7 A.3d 720 (N.J. 2010), is inapplicable. In that case, New Jersey citizens adopted an amendment to the state constitution providing for recall of federal legislators. *Id.* at 723-24. The constitutional amendment was implemented through a statute. *Id.* After both the constitutional amendment and the statute were effective, a citizen's committee attempted to use those adopted procedures to recall one of New Jersey's senators. *Id.* At issue in *Wells* was whether the procedures for recall set forth in the New Jersey constitution and code were constitutional. *Id.* at 734-735. Holding that they were not, the New Jersey Supreme Court held that Senator Menendez should not be put through the

expense and trouble of an unconstitutional recall election. *Id.* at 743-44. As with all of LPO's other precedent, *Wells* involved a challenge to a fully effective law.[1]

Moreover, the fact that LPO has not sought to enjoin the referendum does not distinguish this case from the weight of the foregoing authority. The district court's order declaring HB 194 to be unconstitutional, before it is put to vote, interferes with Ohio's legislative process, which anticipates the use of initiative and referendum as a step in a law's enactment. It could affect the voters' exercise of their vote in favor of or against the measure, or could dissuade voters from casting any vote, believing their vote to be of no consequence. More significantly, because HB 194 is not effective and may never become effective, the district court's declaration that the law is unconstitutional constitutes an advisory opinion: a remedy that lies outside the powers of federal courts. *See* pp. 17-18, *infra.* Through this referendum process, the people of Ohio will decide whether to enact the provisions of HB 194. The people have not yet made that determination and will not make it until November 2012. The federal courts would not be likely to "enjoin" operation of an unpassed bill being deliberated in the legislature, and the courts should not take analogous action here. *See Ranjel*, 417 F.2d at 324; *Rocky Ford*, 133 Colo. at 265-26.

[1] The court's discussion of ripeness regarding challenges to ballot measures, set forth in footnote 4, cited by LPO, is thus *dicta*. *Id.* at 733 n.4.

B. LPO's claims are moot.

The filing of the referendum petition and signatures on September 30, 2011, rendered this case moot. LPO asserts that the case is not moot because the fact that it has access to the 2012 ballot resulted either "involuntarily" due to the district court's ruling or "voluntarily" due to the Secretary's issuance of new directives.

LPO's arguments about whether specific relief was voluntary or involuntary miss the point. LPO brought this challenge on one basis only—that HB 194's minor party access provisions were unconstitutional. R. No. 2, Cmplt. In fact, LPO states quite emphatically that "But for H.B. 194's changes to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1), and Ohio's retention of the signature requirements in O.R.C. § 3517.01(A)(1), the LPO would have been automatically qualified to field and run candidates . . . during Ohio's 2011 general election and its 2012 primary and general elections." *Id.* at 8, ¶ 29. LPO also admits that, due to the decisions in *Blackwell* and *Brunner*, the signature requirement in R.C. 3517.01(A)(1) is not enforceable standing alone. *Id.* at 3, ¶¶ 9-10; *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Oh. 2008). As a result, as LPO also must concede, Ohio's Secretaries of State have issued a series of directives recognizing minor parties, without requiring a petition, since 2010. R. Nos. 5-5; 5-6; 11-1; LPO Brief at 12 (citing Directive 2011-38). As recognized by the Secretary in his

letter to LPO, R. No. 5-3, HB 194 would have voided prior directives granting minor parties ballot access. Because HB 194 was stayed by referendum, however, its terms invalidating those directives never took effect. Thus, the preliminary injunction was not necessary to give LPO ballot access for 2011.[2] In addition, nothing in the record supports that, absent HB 194, minor parties would not have the same ballot access via directive in 2012 that they had in 2010 and 2011. Indeed, the record reflects that Ohio's Secretaries of State have provided consistently for minor party ballot access through directive, following *Brunner*, when Ohio law makes no provision for such access. R. Nos. 5-3 (Letter); 5-5 (Directive 2009-21); 5-6 (Directive 2011-01); LPO Brief at 12 (Directive 2011-38). Because HB 194 was stayed by referendum, judicial relief was unnecessary.

More importantly, LPO's argument that "voluntary" changes never cause mootness is inapposite. Notably, LPO cites no authority for this proposition. LPO Brief at 48. The cases cited by LPO stand, rather, for the proposition that *temporary* suspensions of enjoined acts, or voluntary cessation of certain conduct, may not moot a controversy. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95,

[2] On October 18, 2011, eleven days after the General Assembly filed this notice of appeal, the district court entered a *nunc pro tunc* order amending the order on appeal to extend relief through 2012. R. No. 23. This appeal deprived the district court of jurisdiction to enter the *nunc pro tunc* order. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Pittock v. Otis Elevator Co.*, 8 F3d 325, 327 (6th Cir. 1993). However, the General Assembly does not dispute that LPO is ballot qualified for 2012 pursuant to the Secretary's directives.

109 (1983) (noting "normal rule" that case is not automatically moot because unlawful conduct has ceased, but holding that claim for injunctive relief was moot where no evidence existed that challenged behavior was likely to recur); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) (voluntary cessation of alleged unlawful conduct does not moot a case *unless* events make it clear that such conduct will not recur).

LPO does not address the crux of the issue. A case is moot when the court cannot grant "any effectual relief whatever" in favor of the claimant. *Mills v. Green*, 159 U.S. 651, 653 (1895); *see also Fowler v. McNutt*, 802 F.2d 457, 457 (6th Cir. 1986) (action is moot when "it is no longer possible to grant the relief [] requested."). LPO's complaint challenges the minor-party ballot access provisions of HB 194. HB 194 never became effective, and will not become effective until November 2012, at the earliest, and then *only* if the Ohio electorate adopts the legislation. Because LPO challenges a "law" that does not yet exist, this Court cannot grant any effective relief. Moreover, the actual relief requested by LPO was to be placed on the ballot for the 2011 and 2012 election cycles. R. No. 2, Cmplt. at 13. The provisions of HB 194 that allegedly affected LPO cannot possibly take effect during these election cycles. No court can fashion any "effective relief" because HB 194's effective date was stayed by referendum.

This case also is easily distinguished from the cases cited by LPO because it

does not involve *behavior* by government officials that could, at any time, be repeated. The State engaged in no conduct which thereafter "ceased." Rather, this case involves a constitutional challenge to a proposed law. Thus, cases holding that such challenges amount to advisory opinions, beyond the jurisdiction of the courts, are directly on point. *See, e.g., Fletcher v. Housing Auth. of Louisville*, 525 F.2d 532, 534 (6th Cir. 1975) (where provisions of act were "not yet effective," court "will not render an advisory opinion on how it may affect our Judgment at some future time."); *Truckers United For Safety v. Mead*, 251 F.3d 183, 191 (D.C. Cir. 2001) (declining to construe statute that was not in effect at time of challenged conduct; any construction would be an advisory opinion); *Save Our Aquifer v. San Antonio*, 108 Fed. Appx. 863, 865 (5th Cir. 2004) (court could not entertain challenge to ordinance that was repealed after challenged on referendum because it would be an advisory opinion); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 884-885 (N.D. Tex. 2008) (request for declaration regarding constitutionality of "not-yet-effective" ordinance amounts to request "for the quintessential advisory opinion"); *Ajax Gaming Ventures, LLC v. Brown*, No. 06-336S, 2006 U.S. Dist. LEXIS 58905, *4-9 (D. R.I. August 8, 2006).[3]

[3] LPO's footnote comment that its case remains alive while this appeal is moot is not well-taken. The General Assembly concedes that LPO is entitled to ballot access in the absence of applicable state law providing for a means to such access. The General Assembly does not seek to overturn the Secretary of State's directives which fully provide such access in 2012. The General Assembly seeks only to

LPO's "voluntariness" argument is further off-point in that Ohio's referendum system provides in this context: (1) that a bill does not take effect for 90 days, so as to allow for potential circulation of referendum petitions; and (2) that, when a referendum petition is filed, a bill does not and will not take effect unless approved by a majority of voters at the next general election. Ohio Const. art. II, §§ 1c, 1g. That system governs how a bill becomes a law—HB 194 has *not* become effective, and State officials have taken no "voluntary" action to alter its constitutionally prescribed status.

C. Vacatur is the appropriate remedy.

LPO also asserts that vacatur is inappropriate because, if the case is moot, it was mooted by the Secretary of State and not by "happenstance." This case is moot for one reason: HB 194's effectiveness was stayed by Fair Elections Ohio's filing of a referendum petition on September 30, 2011. *See* LPO Brief at 8-9. The case was not mooted by the Secretary's issuance of directives—directives that were necessitated *not* by this lawsuit, but by Ohio's lack of a minor party ballot access law. The Secretary's issuance of such directives, whether voluntary or involuntary, is not relevant to the inquiry. Because the case was mooted by the happenstance of the referendum petition filed by Fair Elections Ohio, vacatur is

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overturn a preliminary decision of the district court declaring a *proposed* law unconstitutional. The General Assembly was not obliged to inconvenience this court by requesting expedited relief to preserve its right to appeal.

required. *Camreta v. Greene*, 1231 S. Ct. 2020, 2035 (2011).

IV. THE DISTRICT COURT ERRED IN ISSUING THE PRELIMINARY INJUNCTION.

While the district court's weighing of factors for a preliminary injunction is reviewed for abuse of discretion, any matters of law, including whether the plaintiff is likely to succeed on the merits, are reviewed *de novo*. *Hunter v. Hamilton County Bd. of Elections*, 635 F.2d 219, 233-34 (6th Cir. 2011). Findings of fact are reviewed for clear error. *Id.*

Defending the merits of the preliminary injunction, LPO again misses the key issue. LPO did not file this action because Ohio lacked proper minor party ballot access laws. R. No. 2, Cmplt. The General Assembly concedes that in the absence of any law providing for a means of ballot access, LPO is entitled to be on the ballot by directive. This action concerns the alleged unconstitutionality of HB 194's proposed minor party petition and signature requirements. *Id.* HB 194 did not "override" the directives giving LPO ballot access because it is not in effect. Moreover, Ohio never conceded that a November or January deadline for new party petitions is unconstitutional. Directive 2009-21, R. No. 5-5, simply reflects the Secretary's determination to follow the law, as declared by *Brunner*, absent enforceable minor party access laws in Ohio. *See also* R. No. 5-6.

LPO also misconstrues *Blackwell* to hold that a 1% signature requirement is unconstitutional. LPO Brief at 43. *Blackwell* held that the signature requirement

in combination with a November filing deadline was unconstitutional. 462 F.3d at 595. Moreover, LPO's construction conflicts with binding precedent upholding larger signature requirements. *See Burdick v. Takushi*, 504 U.S. 428, 435 (U.S. 1992) (describing Hawaii's new party access law, including filing a petition containing the signatures of 1% of *all* of the state's registered voters, as "easy").

LPO also errs in suggesting that any petition filing deadline that occurs prior to March 1 prior to a November election is unconstitutional. *See* LPO Brief at 39-40. No court has drawn March 1as a "bottom line" for petition deadlines. Instead, each court addressing minor-party ballot access issues has, as this Court did in *Blackwell*, considered the extent of any burden by looking at the requirements as a whole, considering the number of signatures required, the date the petition is due, and any other mitigating or aggravating factors. *See Anderson v. Celebrezze*, 460 U.S. 780, 800-801 (1983); *Jenness v. Fortson*, 403 U.S. 431, 442 (1974).

Comparing the access provisions in HB 194 to those described as "easy" in *Burdick* illustrates the point. HB 194 would have required LPO to file signatures equal to .48% of all registered voters by February 8, 2012. R. No. 8-1, Damschroeder aff. ¶¶ 20a, 21; R. No. 13, Order at 3. Hawaii's access scheme required signatures of 1% of all of the state's registered voters by early April. *Burdick*, 504 U.S. at 435; H.R.S. § 12-2. Neither the district court nor LPO explains how an "easy access" rule becomes a "severe burden" when the minor

party is given two fewer months to gather signatures but the number of signatures is cut more than in half. The district court thus erred as a matter of law in holding that HB 194's requirements "severely burdened" LPO's rights.

The district court likewise erred in holding that LPO established irreparable harm, because, as of September 7, 2011, HB 194 was unlikely to take, and, in fact, never took, effect. LPO's claims of harm arose from a *fear* that the statute would take effect. *See* LPO Brief at 27-28. No precedent supports that the alleged "chilling effect" arising from fear that a proposed law might become effective violates the First Amendment.

The district court also abused its discretion in weighing the harm. While LPO's alleged harm was founded on fear of a proposed statute, the court's order caused actual harm to Ohio voters, who will be asked to vote HB 194 up or down at the November 2012 election. The district court's ruling casts a cloud over the Act that may well be used by the proponents of the referendum to affect its chance of passage. Referendum and initiative are a cherished part of Ohio's legislative process, and a ruling declaring an act unconstitutional when it has not yet been adopted via that process interferes with the rights of voters and their legislative power to the same extent that declaring unconstitutional a bill not passed through the General Assembly impermissibly interferes with the legislative process. *Ranjel*, 417 F.2d at 324; *Ajax*, 2006 U.S. Dist. LEXIS 58905, *4-9.

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.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

/s/ Jeannine R. Lesperance
JEANNINE R. LESPERANCE (0085765)*
Assistant Attorney General
**Lead Counsel*
Constitutional Offices Section
30 East Broad Street, 17th Floor
Columbus, OH 43215-3400
(614) 466-2872
(614) 728-7592 (FAX)
jeannine.lesperance@ohioattorneygeneral.gov

Counsel for the Ohio General Assembly

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, the pertinent parts of this brief contains 5887 words in Times New Roman 14 point font.

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

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 February 3, 2012.

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