303 E. Broad Street
Columbus, OH 43215

July 20, 2012

Leonard Green
Clerk of Court
United States Court of Appeals
for the Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, OH 45202-3988

Re: Supplemental Letter Brief in Libertarian Party of Ohio v. Husted, No. 11-4066

Dear Mr. Green,

Plaintiffs-Appellees (hereinafter "the LPO"), pursuant to the Court's July 13, 2012 order, respectfully submit the following supplemental letter brief in the above-styled case:

I. The Appeal Should Be Dismissed.

Defendant-Appellant's (hereinafter "the General Assembly") repeal of H.B. 194 constitutes an abandonment of its interlocutory appeal and should result in its dismissal. The General Assembly's interlocutory appeal only contested the District Court's ruling on September 7, 2011, *see* Record Entry No. 13, that H.B. 194 should be preliminarily enjoined. The General Assembly has not challenged the District Court's supplemental preliminary order, entered on October 18, 2011, *see* Record Entry No. 23, directing that the Libertarian Party of Ohio (LPO) be restored to Ohio's ballot. The General Assembly makes this clear in its Reply Brief:

> 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*.

Reply Brief of Proposed Intervenor-Appellant at 18 n.3 (emphasis added). The directives referenced by the General Assembly (Directive 2011-38, in particular) were put in place by the

Secretary to bring Ohio into compliance with the District Court's October 18, 2011 order. *See* Brief for Appellees at 12. The General Assembly's concession that it is not challenging Ohio's compliance drains its appeal of any challenge to the October 18, 2011 order.

Nor could the General Assembly challenge LPO's 2012 ballot access. H.B. 194's repeal restores Ohio's ballot access laws--O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1)--to the precise position they occupied when invalidated by this Court in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); that is, minor parties must submit a number of signatures equal to 1% of the total votes for governor or president by early November of the calendar year before the election. For 2012, this required that the LPO submit 38,525 signatures by November 7, 2011 in order to qualify. *See* Brief for Appellees at 15-16.

Ohio is thus left without a constitutionally acceptable means for achieving access. As demonstrated by *Libertarian Party of Ohio v. Brunner*, 462 F. Supp. 2d 1006 (S.D. Ohio 2008), in the absence of a constitutionally acceptable ballot access mechanism, federal courts have no choice but to order that parties with the requisite "modicum of support" be placed on the ballot. The District Court's October 18, 2011 order placing the LPO on Ohio's ballot fulfilled this federal duty,[1] and the General Assembly has not challenged it.[2]

[1] When the District Court entered this order, of course, H.B. 194 had not been finally repealed. But it had been suspended, *see infra* note 3, thereby returning Ohio to the precise requirements (including a November 7, 2011 deadline) that had been invalidated in *Blackwell*. While a new measure, H.B. 319, was passed on October 7, 2011 purporting to move the deadline to December 7, 2011, it never took effect before being quickly repealed. *See* Brief for Appellees at 9-13.

[2] The Ohio Secretary of State, "[c]onsistent with the Federal District Court's order on October 18, 2011," issued its Directive 2011-38 on November 1, 2011 to bring Ohio into compliance with the District Court's order. Acting pursuant to the District Court's order and Directive 2011-38, the LPO has qualified 21 state and local candidates, as well its presidential ticket, in Ohio.

This Court in *Bogaert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008), a challenge to Michigan's election laws, observed that where "[a]ll parties agree that specific steps required by the preliminary injunction have been completed and that those steps cannot be undone at this time," dismissal of the preliminary-injunction appeal is the proper course. Further, "[d]ismissal of [the] ... preliminary-injunction appeal[] ... does not render moot the underlying district court litigation." *Id*.

The same procedure should be followed in the present case. The General Assembly here could have timely challenged the District Court's October 18, 2011 order. It instead made a conscious decision to leisurely contest the merits of H.B. 194. As in *Bogaert*, 543 F.3d at 864, the LPO's candidates' ballot lines "cannot be undone at this time." With the repeal of H.B. 194, there is simply nothing left to this interlocutory appeal. As in *Bogaert*, 543 F.3d at 864, it should be dismissed without prejudice to "the underlying district court litigation."

II. The Question of Mootness Should Be Directed to the District Court.

The General Assembly asserted in its Supplemental Authority, filed June 12, 2012, that its repeal of H.B. 194 provides "an additional ground for mootness." For the reasons discussed above, Appellees agree that the repeal of H.B. 194 requires dismissal of this appeal.

Still, as observed in *Boegart*, 543 F.3d at 864, dismissal of a preliminary-injunction appeal "does not render moot the underlying district court litigation." And while the repeal of H.B. 194 could conceivably moot part of the underlying litigation below--that is, the challenge to H.B. 194, *see, e.g., Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 980-81 (6th Cir. 2012) (finding that repeal of law mooted case); *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004) (same); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (1997)

(same)--it does not moot the entire case. The LPO's claim to ballot access is not mooted by the repeal of H.B. 194.

The District Court ordered the LPO onto Ohio's 2012 ballot, after all, because Ohio had no constitutionally acceptable ballot access law on October 18, 2011, just weeks before candidates were required to file for Ohio's primaries. This was as true on October 18, 2011because on September 29, 2011 H.B. 194 was suspended by the pending referendum. *See* Reply Brief of Proposed Intervenor-Appellant at 9 (citing *Thornton v. Salak,* 858 N.E.2d 1187 (Ohio 2006)).[3] H.B. 194's repeal only solidifies what the District Court faced on October 18, 2011. And notwithstanding Directive 2011-38, [4] the October 18, 2011 order remains necessary to insure that the LPO participates in the 2012 election.[5]

Because the General Assembly chose to voluntarily repeal H.B. 194, moreover, even the challenge to H.B. 194 is not necessarily moot. "A defendant's 'voluntary cessation of a challenged practice' does not moot a case. Rather, voluntary conduct moots a case only in the

[3] *Thornton*, 858 N.E.2d at 1190, holds under Ohio law that the filing of a referendum immediately suspends a challenged bill: "upon the filing of a referendum petition, the effective date of new legislation is stayed pending the outcome of the referendum vote." Then, "when the Secretary of State finally determines that a referendum petition contains an insufficient number of valid signatures for the matter to be submitted to the electorate for approval or rejection, the constitutional stay ends and the new law takes effect at that time." *Id*. at 1191. Thus, H.B. 194 was stayed on September 29, 2011 when the referendum was filed; this stay was never lifted because the Secretary on December 9, 2011 found a sufficient number of signatures to support it.

[4] Compliance with an injunction does not cause mootness. *See Fialka-Feldman v. Oakland University Board of Trustees*, 639 F.3d 711, 717 (6th Cir. 2011) (citing *Constangy, Brooks & Smith v. National Labor Relations Board*, 851 F.2d 839 (6th Cir. 1988)).

[5] Were the Court to vacate the District Court's October 18, 2011 order placing the LPO on the 2012 ballot, the Secretary of State would be free to repeal its Directive and remove the LPO and its candidates.

rare instance where 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) (citations omitted). "What is more, the party asserting mootness bears the 'heavy burden of persuading ' the court that the challenged conduct cannot be expected to start up again." Id. (citations omitted).

A heavy burden rests on the General Assembly, which has been aligned as a defendant in the District Court,[6] to demonstrate that it is "absolutely clear" that the objectionable requirements found in H.B. 194 will not be put in place again by the General Assembly. Only if it can satisfy this burden will the LPO's challenge to H.B. 194's ballot access requirements be rendered moot.[7]

Further, as this Court recently made clear in *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 583 (6th Cir. 2012), "legal and factual questions raised" in the context of mootness "are best addressed to the district court ...." The Court in *Englewood* therefore refused to consider

[6] The District Court on March 12, 2012, granted the General Assembly's motion to intervene. See Record Entry No. 30.

[7] The General Assembly's past actions cast a large measure of doubt over whether it will ever voluntarily relax deadlines for minor parties. The General Assembly, after all, has not since the District Court's September 7, 2011 order enjoining H.B. 194 passed any measure purporting to relax H.B. 194's February deadline for minor parties. It did, however, pass a measure demanding an earlier deadline. H.B. 319, passed on October 7, 2011, moved the deadline for minor parties forward to December 7, 2011. See Brief for Appellees at 9-10. Then on June 26, 2012, when the General Assembly, through H.B. 509, relaxed the filing deadline for the two major parties' presidential candidates--giving them an extra month--*it expressly excluded minor parties' presidential candidates from this later deadline's reach. See* 2012 Ohio Laws 141 (Am. Sub. H.B. 509). Not only has the General Assembly therefore evinced no intent to relax deadlines for minor parties, it has exhibited a willingness to make the deadlines for minor parties as early and difficult as possible. Given that the General Assembly must pass some new deadline to escape federal supervision, it is not unreasonable to believe that it will pass one that is no better than that found in H.B. 194.

a city's claim that the case had been mooted by subsequent legislative action; it instead referred the matter to the lower court. This logic has even more force here, where the appeal is from a preliminary injunction rather than a final judgment (as in *Englewood*). The General Assembly's motion to intervene, after all, was granted by the District Court. See Record Entry No. 30 (March 12, 2012). The General Assembly is free to raise mootness and make its evidentiary proffer there. Time is certainly not of the essence, as the General Assembly has never sought expedited relief and is not challenging the LPO's access in 2012. There is no need for this Court to put the General Assembly to its proof.

III. The District Court's Orders Should Not Be Vacated.

Assuming the Court concludes that this interlocutory appeal is effectively moot, the LPO's challenge to H.B. 194 is actually moot, or that the LPO's suit is completely moot, neither of the District Court's orders should be vacated. *Vacatur* is an equitable remedy that should not be used to reward or encourage mooting behavior by losing parties. As explained in *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18, 23 (1994), *vacatur* is proper when mootness is either caused by "happenstance" or is solely attributable to the winning party below.[8] "Absent exceptional circumstances, *vacatur* is inappropriate where the party that lost at the

[8] For example, the Supreme Court in *Camreta v. Greene*, 131 S. Ct. 2020 (2011), which involved a child's (S.G.) challenge to her warrantless seizure by child abuse investigators, concluded the matter was moot by the time it arrived in the Supreme Court: the child, who had prevailed in the court below, was about to turn 18 and had moved to another state. The Court accordingly vacated the Ninth Circuit's decision: "In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived [the petitioner] of his appeal rights."

district court caused the mootness by settlement *or other actions of its own*." *Hughes v. Zurz*, 298 Fed. Appx. 404, at *13 (6th Cir. 2008).[9]

In the present case, mootness is solely attributable to the General Assembly's repeal of H.B. 194. It can hardly be said that it did not occur through "actions of its own" or "through no fault of the losing party." *Stewart v. Blackwell*, 473 F.3d 692, 693 (6th Cir. 2007) ("*vacatur* is generally appropriate to avoid entrenching a decision rendered unreviewable through no fault of the losing party"). And because it is attributable to the General Assembly--indeed, it is attributable *only* to the General Assembly--any mootness in the present case should not result in the reward of *vacatur*.

Ford v. Wilder, 469 F.3d 500 (6th Cir. 2006), is controlling here. There, a state senate candidate ostensibly won election sued the Tennessee Senate. The state senate, however, passed a resolution to void the election. The District Court awarded relief to the candidate preventing the senate from pursuing its resolution, and though the senate thereafter took no further action on it, it did take an appeal. Meanwhile, another resolution was adopted by the senate voiding the election. Because of this second resolution, the Sixth Circuit ruled that the senate's appeal was moot. Notwithstanding this mootness, the Court ruled that the senate's responsibility for the mooting event rendered *vacatur* improper:

> Because the defendants were responsible for the mooting of this case, the precedent ... supports dismissal of the appeal, rather than *vacatur*. The defendants' only argument in

[9] In *Bonner Mall* the Supreme Court specifically ruled that even the joint actions of the parties--that is, a settlement--do not justify *vacatur*. "Where mootness results from settlement ... the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of *vacatur*." 513 U.S. at 23.

> favor of vacatur is the "possibility that the judgment of the court below could influence the litigation of this issue in the future." However, this argument could apply to every case that becomes moot pending appeal, and the defendants have not shown that the public interest would be furthered by *vacatur*.

Id. at 506 (footnotes omitted).

The Court in *Wilder*, moreover, made clear that it was not addressing a situation where a differing governmental body takes action to moot a case:[10] "In this case, the defendants' legislative action mooted a case brought directly against them in circumstances that they should have known would moot the appeal." Id. at 506 n.10.

Nor did the Court in *Wilder* see the senate's motivation in passing the mooting resolution to be controlling. It specifically rejected Judge Rogers' dissenting argument that the objective behind the second resolution should control. *See* 469 F.3d at 507 (Roger, J., dissenting). It instead concluded that the senate was responsible within the meaning of *Bonner Mall* no matter its objective or motivation:

> This determination of "responsibility" does not, as the dissent suggests, ignore the intent of the parties. The voluntary action of the defendants occurred soon after the district court granted declaratory relief against those very parties, raising the inference that "mootness was [their] purpose or that [they] knew *or should have known* that [their] conduct was substantially likely to moot the appeal."

Id. at 506 n.10 (emphasis added and citation omitted).

[10] For example, in *Alvarez v. Smith*, 130 S. Ct. 576, 581 (2009), a case involving the constitutionality of Illinois's procedures for challenging forfeitures of property, after concluding that the case had been mooted (on appeal) by the state's ordered return of the forfeited property, the Court vacated the lower court's decision in favor of the plaintiffs: "[T]his case more closely resembles mootness through 'happenstance' than through 'settlement' …. The six individual cases [that resulted in the return of the property] *proceeded through a different court system without any procedural link to the federal case before us*." (Emphasis added).

Because the senate at bare minimum *should have known* that the second resolution would cause mootness, it was responsible within the meaning of *Bonner Mall*--and thereby not entitled to *vacatur*.[11] For these same reasons, *vacatur* is not appropriate here. Regardless of whether H.B. 194's repeal was motivated by a desire to moot the LPO's challenge or to simply avoid an upcoming referendum, the General Assembly must have known that it was likely to cause mootness. To the extent it has, under *Wilder* it is not entitled to *vacatur*.[12]

Lastly, Appellees are aware of no binding authority supporting the proposition that unilateral legislative changes constitute "extraordinary" or "exceptional" circumstances" that support *vacatur*. Binding precedent in this Circuit, *Wilder,* holds to the contrary. There is no precedent from the Supreme Court[13] suggesting that a mooting legislative change or repeal can

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[11] *See also Staley v. Harris County*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc) (concluding that county's voluntary act mooting case did not justify *vacatur* and rejecting argument that motivation was relevant: "the Supreme Court has never required, or even suggested, such an approach although it has had ample opportunity to do so. Whether a party's voluntary conduct was not done with specific intent to moot the case is certainly one factor we may consider, but the absence of such specific intent does not outweigh other equitable factors.").

[12] H.B. 194's repeal cannot even charitably be attributed to chance or happenstance. This Court, like the Supreme Court, has taken a limited view of the happenstance exception. In *Blankenship v. Blackwell*, 429 F.3d 254, 259 (6th Cir. 2005), for example, it rejected a candidate's claim that an intervening election constituted happenstance justifying *vacatur*. It stated that the candidate (and his supporters), given their delay, could hardly be deemed "mere victims of the 'vagaries of circumstance'." *Id*. Similarly, the General Assembly here is hardly a victim of "vagaries of circumstance." It chose not to expedite this appeal and then itself repealed the law. It, and only it, caused mootness. For its part, the Supreme Court has employed a similar approach to happenstance--one that asks whether mootness is "attributable" to one of the parties. In *Karcher v. May*, 484 U.S. 72 (1987), refused to vacate a lower court order that became moot when the legislative officials who challenged the order were replaced in office by others who chose not to pursue the appeal. Rather than vacate, the Supreme Court simply dismissed their appeal: "This controversy did not become moot due to circumstances unattributable to any of the parties." *Id*. at 84.

[13] The Supreme Court has applied the "extraordinary" or "exceptional" circumstances exception only once, in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). There, however, the

escape the holding of *Bonner Mall* based on "exceptional" circumstances. Because the General Assembly unilaterally repealed H.B. 194, it is responsible within the meaning of *Bonner Mall* for mootness. As the losing party below, it cannot be rewarded through *vacatur*. *See also Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

CONCLUSION

For the foregoing reasons, the interlocutory appeal should be dismissed.

Respectfully submitted,

/s/ Mark R. Brown

Mark R. Brown
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
mbrown@law.capital.edu
Attorney for Appellees

CERTIFICATE OF SERVICE

I certify that the foregoing supplemental letter brief was filed with the Court on July 20, 2012 using the Court's electronic filing system and will thereby be electronically served on all parties to this appeal.

*/s/ Mark R. Brown*_____
Mark R. Brown
Dated: July 20, 2012

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plaintiff who prevailed in the District Court resigned from her public sector employment and participated in mooting the case. She was at least partly responsible. Thus, the Supreme Court decided on equitable grounds to vacate the judgment in her favor, notwithstanding that partial blame may have also rested with the government.