No. 11-4066

In the United States Court of Appeals
For the Sixth Circuit

LIBERTARIAN PARTY OF OHIO; KEVIN KNEDLER; MICHAEL JOHNSTON,

Plaintiffs-Appellees,

V.

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
For the Southern District of Ohio

BRIEF FOR APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 11-4066 Case Name: Libertarian Party v. Husted

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Ohio, Kevin Knedler and Michael Johnston
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 20, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Mark R.

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATMENT IN SUPPORT OF ORAL ARGUMENT

Appellees join Proposed Intervenor-Appellant in requesting oral argument.

STATEMENT OF ISSUES

1. Whether Proposed Intervenor-Appellant, a non-party, can appeal from an award of a preliminary injunction in the absence of the District Court's having ruled on its motion to intervene?

2. Whether Proposed Intervenor-Appellant's motion to intervene in the District Court was timely?

3. Whether the case presented to the District Court was ripe for review?

4. Whether the District Court abused its discretion by awarding preliminary relief?

5. Whether the case has been mooted by suspension of the challenged law three months after the District Court awarded preliminary relief, over two months after the challenged law became effective, and two months after the filing of this interlocutory appeal?

6. Whether the District Court's preliminary injunction, assuming mootness, should be vacated?

STATEMENT OF THE CASE

Because of prior successful litigation against Ohio's Secretary of State, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008), Appellee, the

Libertarian Party of Ohio (hereinafter "LPO"),[1] has been ballot-qualified in Ohio since 2008. Because of *Blackwell* and *Brunner,* this status was confirmed by two Directives issued by the Ohio Secretary of State (Defendant below)[2] in 2009 and 2011, respectively. On December 31, 2009 the Secretary adopted Directive 2009-21, *see* Record Entry No. 2 (First Amended Complaint) Attachment C,[3] which guarantied the LPO continued ballot access for the 2010 election and beyond. On January 6, 2011 the Secretary issued Directive 2011-01, *see* Record Entry No. 2 (First Amended Complaint) Attachment D,[4] reiterating Directive 2009-21.

On June 29, 2011, five years after this Court's holding in *Blackwell,* Ohio's Republican-controlled Legislature (Proposed Intervenor-Appellant)[5] finally passed new ballot access requirements for minor parties. Am. Sub. H.B. 194 (hereinafter

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[1] The First Amended Complaint also included two LPO officers joined in that capacity and as voters. Plaintiffs/Appellees are referred to collectively as "the LPO" throughout this Brief.

[2] The Defendant below is referred to as either "the Secretary" or the "Secretary of State" throughout this Brief.

[3] *See* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2009/Dir2009-21.pdf.

[4] *See* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-01.pdf.

[5] The Proposed Intervenor-Appellant is referred to as either "the Legislature" or "the General Assembly" throughout this Brief.

"H.B. 194"),[6] as it is called, included several changes to Ohio's voting and campaign finance laws. *See* Joe Hallett & Catherine Candisky, *Elections-law foes start repeal effort*, COLUMBUS DISPATCH, August 6, 2011.[7] Of less interest to the Democratic Party (which sponsored a referendum to repeal H.B. 194),[8] H.B. 194 also altered Ohio's ballot access laws for new parties.[9] *See* 2011 Ohio Sess. Law Service 40.

Specifically, H.B. 194 changed O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1) to require that new political parties qualify for Ohio's ballots 90 days before the state's primaries, which were moved by H.B. 194 to the first Tuesday following the first Monday in May of the election year. *See* Record Entry

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[6] For simplicity's sake, the LPO omits "Am. Sub." in its references to bills passed by the Ohio Legislature throughout this Brief.

[7] *See* http://www.dispatch.com/content/stories/local/2011/08/06/elections-law-foes-restart-repeal-effort.html.

[8] The Democratic challengers sponsoring the referendum against H.B. 194 initially only challenged the many changes to voting procedures found in H.B. 194. They did not want to challenge the new ballot access law for minor parties. Only because the Secretary refused to certify their piecemeal challenge did Democrats take on the whole of H.B. 194. *See* Hallett & Candisky, COLUMBUS DISPATCH, Aug. 6, 2011, *supra*.

[9] In order to remain on Ohio's ballots, a party's candidate for governor or president must win a number of votes equal to 5% of the total vote cast in that gubernatorial or presidential election. *See* O.R.C. § 3517.01(A)(1). The LPO did not meet this requirement in 2010 and thus did not automatically qualify for Ohio's ballot in 2011 and 2012.

No. 2 (First Amended Complaint) at ¶ 11.[10] H.B. 194 did not change the number of signatures required, which under O.R.C. § 3517.01(A)(1) remained 1% of the vote cast for governor or president in the previous election--the same percentage struck down in *Blackwell*. Thus, while the primary for 2012 was moved to May 8, 2012,[11] and the qualifying deadline for new parties was moved to February 8, 2012,[12] the number of signatures required--38,525 following the 2010 gubernatorial election signatures--remained the same.

Section 5 of H.B. 194, meanwhile, stripped the LPO of the ballot access previously awarded by the Secretary in response to *Blackwell* and *Brunner*. Section 5 of H.B. 194 specifically stated that "Directives 2011–01 and 2009–21 issued by the secretary of state are hereafter void and shall not be enforced or have effect on or after the effective date of sections 3517.01 and 3517.012 of the Revised Code, as amended by this act." *See* 2011 Ohio Sess. Law Service 40, § 5.

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[10] Ohio had previously conducted its primaries in presidential election years on the first Tuesday following the first Monday in March. *See* O.R.C. § 3501(E)(2).

[11] Primary dates and qualifying deadlines are underlined throughout this Brief.

[12] In order to achieve this end, O.R.C. § 3501.01(E)(1) and (2) were simply altered to delete Ohio's March primaries during presidential election years, and O.R.C. § 3517.01(A)(1) was changed to provide that new parties must qualify ninety (90) days before primaries, rather than 120 days, which had been ruled invalid in *Blackwell. See* 2011 Ohio Sess. Law Service 40. This left Ohio with May primaries, which it previously had in non-presidential election years, and a 90 day pre-primary qualification deadline for new parties.

H.B. 194 was signed by the Governor on July 1, 2011. *See* 2011 Ohio Sess. Law Service 40. Because of Ohio's constitutional right to referendum, which guaranties that no law "passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state," *see* Ohio Const., art. II, § 1c; *State ex rel. LetOhioVote.org v. Brunner*, 916 N.E.2d 462, 470 (Ohio 2009) (stating that Ohio's "referendum applies to every law passed in the state"),[13] H.B. 194's effective date was duly delayed for ninety days (until September 30, 2011) to provide for the possibility of a referendum.[14]

Following passage of H.B. 194, Michael Johnston, LPO's vice-chair, inquired whether the LPO remained ballot-qualified for the upcoming November 2011 elections. *See* Record Entry No. 24 (Transcript of Evidentiary Hearing) at 4-5 (Testimony of Michael Johnston). By letter dated August 5, 2011, the Secretary responded that the LPO was not qualified after September 30, 2011. *See* Record Entry No. 2 (First Amended Complaint) Attachment A. The Secretary stated that

[13] Ohio's Constitution provides exceptions for appropriation and taxing measures, as well as emergency measures passed by a 2/3 vote of the Legislature. *See* Ohio Const., art. II, § 1d. None of these exceptions applied to H.B. 194.

[14] Under Ohio's Constitution, a referendum must be supported by a number of signatures equaling 6% of the vote in the last election. *See State ex rel. Ohioans for Fair Districts v. Husted*, 957 N.E. 2d 277 (Ohio 2011). The challenge to H.B. 194 required 231,147 verified signatures.

"the General Assembly declared void the 2009 and 2011 Secretary of State Directives providing ballot access to certain minor parties." *Id.* He continued:

> I cannot make the law. Therefore I am not authorized under the law to grant minor party access outside of the requirements set forth by the General Assembly in Am. Sub. 194. To do so would interfere with the prerogative of the legislature.

Id.[15]

On August 9, 2011, the LPO filed this emergency action against the Secretary under 42 U.S.C. § 1983 and the First Amendment. *See* Record Entry No.2 (First Amended Complaint). It sought immediate injunctive relief preventing the Secretary from enforcing H.B. 194 to the extent it (1) stripped the LPO of its ballot status for the November 2011 election, and (2) required that the LPO submit over 38,000 signatures by February 8, 2012 in order to qualify for the 2012 election cycle. The LPO further requested preliminary and permanent injunctive relief placing it on the November 2011 general election ballot, the May 2012 primary election ballot, and the November 2012 general election ballot.

On August 30, 2011, following a status conference and the establishment of an expedited schedule, the District Court conducted an evidentiary hearing. *See* Record Entry No. 24 (Transcript of Evidentiary Hearing). On September 1, 2011,

[15] This was confirmed by Mr. Matthew Domschroder's testimony at the hearing on the LPO's motion for preliminary injunction. See Record Entry No. 24 (Transcript of Evidentiary Hearing) at 36 (Testimony of Matthew Domschroder).

the Secretary issued Directive 2011-28, *see* Record Entry No. 11,[16] in order to cure H.B. 194's unconstitutional removal of the LPO from the November 2011 ballot. Directive 2011-28 stated that the LPO's candidates remained ballot-qualified for the November 2011 election regardless of H.B. 194.

On September 7, 2011, the District Court preliminarily enjoined the Secretary from enforcing H.B. 194's requirement that LPO submit over 38,000 signatures by February 8, 2012 to qualify for the November 2012 ballot. The District Court rejected the Secretary's argument that the matter was not ripe for review:

> This argument is not compelling. The Court makes decisions based on the realities it confronts, not on mere possibilities. As the record currently stands, the bill is to become effective in less than a month. The State has already begun taking steps to enforce the new law. In fact, it has already notified the LPO that as a result of the law, the LPO is not currently a qualified party for the 2012 election.

Record Entry No. 13 (Court Order) at 5.

Turning to the merits, the District Court concluded that the LPO's challenge to the ballot access provisions in H.B. 194 was likely to succeed, the LPO faced irreparable harm, preliminary relief would not harm others, and preliminary relief was in the public interest. *See* Record Entry No. 13 (Court Order) at 11-12. In regard to LPO's likelihood of success, the District Court observed that "[t]he state's

[16] *See* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-28.pdf.

amendments to O.R.C. § 3501.01(E) and O.R.C. § 3517.01(A)(1) do little to address the concerns of the Sixth Circuit in *Blackwell* and of this Court in *Brunner*." Record Entry No. 13 (Court Order) at 6. The District Court concluded that H.B. 194's February 8, 2012 deadline, coupled with its massive signature requirement, imposed a "severe" burden on the LPO's First Amendment rights. Record Entry No. 13 (Court Order) at 9. Applying strict scrutiny, the District Court found neither of Ohio's two arguments--that the early deadline was needed to allow state officials to do "all of this work" surrounding elections and to "avoid confusion, deception, and frustration in the democratic process"--compelling. Record Entry No. 13 (Court Order) at 9.

Because the Secretary had already placed the LPO on the 2011 ballot, the District Court noted that "the State should have no problem complying with this Court's order in 2011." Record Entry No. 13 (Court Order) at 11. As for the future, the District Court stated that it "will not instruct the State how to manage its elections in 2012, but requires it to take the steps to enact ballot access laws that address the constitutional deficiencies identified here, in *Brunner,* and in *Blackwell.*" Record Entry No. 13 (Court Order) at 11-12.

Three weeks after the District Court entered its preliminary injunction, Democratic challengers to H.B. 194 submitted approximately 300,000 signatures to the Secretary in an effort to suspend H.B. 194. Under Ohio law, once the

required signatures are timely "filed ... and verified," *see* Ohio Const., art. II, § 1c, a challenged bill is suspended until the next general election. Thus began the tedious and time-consuming task of checking hundreds of thousands of signatures--a task that was not completed for over two months. This meant that H.B. 194 became law September 30, 2011 and remained the law in Ohio until it was suspended by the referendum's verification on December 9, 2011. *See infra* at 12.

By October 7, 2011 (the deadline for taking an interlocutory appeal), the Legislature had done nothing to correct Ohio's ballot access deficiencies. Indeed, rather than correct the deficiencies identified in *Blackwell* and *Brunner*, Ohio's Legislature on September 21, 2011 passed a new measure (with the Governor's signature), H.B. 319,[17] making matters worse. Section 3 of H.B. 319 purported to move Ohio's 2012 primaries, scheduled for May 8, 2012 by H.B. 194, to March 6, 2012. *See* 2011 Ohio Sess. Law Service 49 (2011). *See also* Marc Kovac, *Ohio's primary will be in March*, THE DAILY RECORD, September 22, 2011.[18] This change,

[17] H.B. 319 also included a congressional redistricting measure that was anathema to Ohio's Democrats. *See* Joe Vardon, *Husted rejects petition to place new congressional map on ballot*, COLUMBUS DISPATCH, Oct. 13, 2011, http://www.dispatch.com/content/stories/local/2011/10/12/husted-rejects-hb-319-referendum.html.

[18] *See* http://www.the-daily-record.com/news/article/5099384.

when it became effective ninety days later,[19] would push forward the 2012 qualifying deadline for new parties to December 7, 2011.[20]

The Secretary on October 7, 2011 notified the District Court that it had solicited corrective legislation without success, and accordingly claimed that it was in compliance with the District Court's injunction. *See* Record Entry No. 14. On that same day, the Legislature moved to intervene and filed this interlocutory appeal. *See* Record Entries No. 15 & 16.

The LPO on October 9, 2011 moved to compel the Secretary[21] to comply with the District Court's preliminary injunction. *See* Record Entry No. 18. On October 17, 2011, the District Court held a status conference. Because the

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[19] H.B. 319, because of Ohio's referendum requirement, did not immediately become effective; thus, like H.B. 194, its effectiveness was delayed ninety days. Section 6 of H.B. 369, which is described below, repealed § 3 of H.B. 319, so that H.B. 319 was rendered meaningless for purposes of this litigation.

[20] This assumes the continuing operation of H.B. 194's requirement that new parties qualify 90 days before primaries. When H.B. 194 was finally suspended on December 9, 2011, the old 120-day pre-primary qualification deadline once again became the law in Ohio, pushing the LPO's qualifying deadline for the 2012 election forward another month to November 7, 2011.

[21] The LPO could not sue the General Assembly because of absolute legislative immunity. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733-34 (1980). Nor could it sue the State of Ohio, since states are not "persons" subject to suit under 42 U.S.C. § 1983, and are otherwise protected by the Eleventh Amendment. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989).

Legislature was clearly not interested in curing the constitutional wrongs found in H.B. 194, the Secretary claimed to be powerless, and qualifying deadlines were closely approaching, the District Court amended, *nunc pro tunc*, its preliminary injunction and itself restored the LPO to Ohio's 2012 primary and general election ballots. *See* Record Entry No. 23 (Court Order) at 1.

Because of another threatened referendum challenging H.B. 319's new congressional districts,[22] the Legislature on October 21, 2011 passed H.B. 318, which moved Ohio's primary date yet again. Specifically, §§ 3 and 4 of H.B. 318 bifurcated Ohio's primary so that all primary contests not involving congressional districts were to be held on March 6, 2012, while primaries for congressional candidates and presidential delegates were set for June 12, 2012. *See* 2011 Ohio Sess. Law Service 53.[23]

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[22] *See* Joe Vardon, *Husted rejects petition to place new congressional map on ballot*, COLUMBUS DISPATCH, Oct. 13, 2011 (http://www.dispatch.com/content/stories/local/2011/10/12/husted-rejects-hb-319-referendum.html). The Ohio Supreme Court on October 14, 2011, ruled that H.B. 319 was subject to popular referendum. *See State ex rel. Ohioans for Fair Districts v. Husted*, 957 N.E. 2d 277 (Ohio 2011). *See also* David Eggert, *Voters can have a say on map, court rules*, COLUMBUS DISPATCH, A1, Oct. 15, 2011.

[23] Signed by the Governor, this measure also had to be delayed 90 days because of Ohio's constitutionally-based referendum process. Section 5 of H.B. 369, which is described below, repealed §§ 3 and 4 of H.B. 318, so that they were rendered meaningless and without effect.

While Ohio's primaries, qualifying deadlines and congressional districts were moved about by the Legislature, the Secretary on November 1, 2011 issued Directive 2011-38, "recognizing the Libertarian Party as a minor party, as well as the Americans Elect Party, the Constitution Party, the Green Party and the Socialist Party as minor parties."[24] The Directive explained that it was "[c]onsistent with the Federal District Court's order on October 18, 2011," which "ordered that the Libertarian Party be a recognized minor party for the 2012 elections in Ohio."

The Secretary on November 10, 2011 then issued Advisory 2011-09,[25] which directed primary candidates running for offices other than the United States House and President to qualify by December 7, 2011. This Advisory was necessary because Ohio's primaries for non-congressional candidates had been moved to March 6, 2012 by H.B. 318, and O.R.C. § 3513.05 requires that candidates qualify 90 days before primaries.

On December 9, 2011, the Secretary verified a sufficient number of signatures to put the referendum challenging H.B. 194 on Ohio's November 2012 ballot. *See* Secretary of State Verification Letter, dated Dec. 9, 2011, to Jennifer

[24] *See* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-38.pdf.

[25] *See* http://www.sos.state.oh.us/SOS/Upload/elections/advisories/2011/Adv2011-09.pdf.

Brunner;[26] Secretary of State Press Release, *Secretary of State Husted Certifies H.B. 194 Referendum Petition Signatures*, Dec. 9, 2011;[27] Alan Johnson, *Voting law on hold till fall 2012*, COLUMBUS DISPATCH, Dec. 10, 2011.[28] Thus, H.B. 194, which went into effect on September 30, 2011, was suspended on December 9, 2011.

On December 14, 2011, the Legislature, this time with enough Democratic support to prevent a referendum, passed H.B. 369, which redrew Ohio's congressional districts and moved Ohio's June 12, 2012 primary for congressional candidates and presidential delegates back to March 6, 2012 for the 2012 election. *See* Ohio Legis. Serv. 56 (2011). Section 3(A) of H.B. 369 made clear that H.B. 369's uncodified primary date was directed only at the 2012 election:

> In the year 2012 a single primary election shall be conducted on the first Tuesday after the first Monday in March for the purpose of nominating candidates for all offices that are scheduled for election in 2012 and for the purpose of electing candidates who are scheduled for election on the day of the 2012 primary election ....

Ohio Legis. Serv. 56 (2011). Section 3(B)(1) of H.B. 369 instructed all primary candidates for offices other than the United States House and President to qualify

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[26] *See* http://www.sos.state.oh.us/sos/upload/news/20111209.pdf.

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

[28] *See* http://www.dispatch.com/content/stories/local/2011/12/10/voting-law-on-hold-till-fall-2012.html.

by December 7, 2011. Section 3(B)(2), meanwhile, stated that candidates for congressional offices, as well as presidential delegates, had until December 30, 2011 to qualify. Sections 5 and 6 of H.B. 369 repealed the primary dates included in H.B. 318 and H.B. 319. *See* Ohio Legis. Serv. 56 (2011).

While the primary dates, and thus ballot deadlines, found in H.B. 318 and H.B. 319 were repealed before ever taking effect by H.B. 369, H.B. 369 did not repeal or replace the ballot access requirements found in H.B. 194. Nor did any other bill or law in Ohio.

STATEMENT OF FACTS

The LPO was qualified for Ohio's ballot during the 2008 and 2010 general elections and ran nearly fifty candidates for local, state-wide and federal office (including the Presidency). Record Entry No. 2 (First Amended Complaint) at ¶ 17. During the 2010 general election its candidates collectively received over 1,000,000 votes in Ohio. *Id.*

Several of LPO's 2010 state-wide candidates won close to 5% of the total votes cast in their respective elections; specifically, LPO's candidates won 184,478 votes (4.91% of the total) for State Treasurer in 2010, 182,977 votes (4.88% of the total) for Secretary of State in 2010, 182,534 votes (4.87% of the total) for State Auditor in 2010. *Id.* at ¶ 18.

Relying on the rules put in place by the Secretary's November 1, 2011 Directive placing the LPO on Ohio's 2012 ballot and the Secretary's November 10, 2011 Advisory stating that party candidates must qualify by December 7, 2011, fifteen LPO candidates qualified for the March 6, 2012 primary. *See* Record Entry No. 27 (Declaration of Robert Bridges). Another nine LPO congressional candidates qualified by December 30, 2011. *Id.* Thus, the LPO has 24 candidates for state and local office in Ohio qualified for the March 6, 2012 primary.[29]

Absentee voting for military personnel began for the March 6, 2012 primary on January 21, 2012, while early voting for all Ohioans begins on January 31, 2012. *See* Directive 2011-41 (released Dec. 16, 2011);[30] Jim Siegel, *In district map tangle, ray of hope for 2020*, COLUMBUS DISPATCH, Jan. 9, 2012, at B1.

* * *

H.B. 194, the focus of this litigation, was passed on July 1, 2011 and went into effect on September 30, 2011. It required that the LPO qualify as a new party by submitting over 38,000 signatures to the Secretary on February 8, 2012. H.B. 194 was not suspended until December 9, 2011. Following the adoption of H.B 369 on December 14, 2011, Ohio's deadline for new parties seeking to gain access

[29] The LPO's presidential candidate, who will be determined later at the national Libertarian Party's nominating convention, will also be added to this list.

[30] *See* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-41.pdf

to the 2012 election was effectively pushed forward to November 7, 2011. Neither H.B. 318 nor H.B. 319 took effect; both were superseded by H.B. 369. H.B. 369, meanwhile, did not replace H.B. 194, which was suspended on December 9, 2011 by the pending referendum. Should the referendum challenging H.B. 194 be defeated in November 2012, H.B. 194's qualifying deadline for new parties will return to early-February for elections beyond 2012.

SUMMARY OF ARGUMENT

1. The General Assembly is not a party below and has no standing to appeal the District Court's preliminary injunction. The General Assembly moved to intervene on the same day it filed its notice of appeal and two months after this emergency litigation was commenced. It did not notify the District Court that it required an expedited decision, nor has it returned to the District Court to inquire of its motion to intervene. While courts can under extenuating circumstances treat a District Court's failure to rule on a motion to intervene as a denial, the General Assembly has made no showing of extenuating circumstances in this case.

2. The General Assembly's motion to intervene is not timely. The General Assembly was on notice immediately after the District Court awarded preliminary relief that the Defendant, the Ohio Secretary of State, intended to comply. Still, the General Assembly did nothing until the last day a notice of interlocutory appeal could be filed. The Legislature ignored the District Court's efforts to expedite this

litigation and has made no effort itself to bring this litigation to a timely conclusion.

3. This case was ripe when the District Court entered its preliminary relief. Ohio passed the challenged law in July of 2011. Its effective date was set for September 30, 2011. The law became effective on this date and remained effective until December 9, 2011, when it was suspended by referendum. Even assuming that H.B. 194 never took effect, it threatened the LPO's First Amendment rights. Prompt judicial review was necessary.

4. The District Court did not abuse its discretion by enjoining Ohio's February 8, 2012 filing deadline for new political parties. No court in the country has sustained a filing deadline for new parties that falls before March 1 of the election year. This Court has previously invalidated the same signature requirement challenged here. Previous litigation between the LPO and Ohio has established that deadlines as late as January are invalid. Consequently, the District Court's decision here is supported by substantial precedent.

5. The case was not mooted by the suspension of the challenged law on December 9, 2011. The Supreme Court and this Court have made clear that suspensions and moratoria cannot cause mootness.

6. Even assuming that the case has been rendered moot, the District Court's decision should not be vacated. *Vacatur* only follows mootness that is caused by

happenstance or the actions of the winner below. *Vacatur* is not proper when the losing party below, here Ohio, causes or contributes to mootness. Here, Ohio is at least partly to blame for any mootness.

ARGUMENT

I. The General Assembly is Not a Party and Does Not Have Standing To Take this Interlocutory Appeal.

The Legislature moved to intervene on October 7, 2011, the day it filed this interlocutory appeal. Because the Legislature is not a party to the proceedings below, it has no standing to appeal the District Court's injunction. Courts have routinely stated that "[t]he usual rule is that 'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.' Attempts by non-parties to appeal a district court's final judgment generally must fail." *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 968 (10th Cir. 2008) (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *Elliott Industries Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091, 1125-26 (10th Cir. 2005)).

Applying this principle in *Kempthorne*, the Tenth Circuit refused to allow non-parties who had moved to intervene, but whose motion had not been acted upon by the District Court, to appeal the merits of the District Court's decision. "[T]he only course available to Movants," the Tenth Circuit explained, "was to

appeal *after* the district court denied their motion to intervene because only then did Movants', as non-parties to SUWA's underlying lawsuit, have an order from which to appeal." 525 F.3d at 969. The Court was not sympathetic to the movants' perceived plight, since the movants "waited until after the district court rendered its merits decision to raise an objection although they knew *at least* three months prior that the district court had taken the matter under advisement." *Id.*

The Legislature asserts here that "[t]his Court can treat the district court's failure to rule on [its] motion as a denial." Brief of Proposed Intervenor-Appellant at 19 n.5.[31] The Legislature is correct to the extent appellate courts sometimes treat a district court's failure to rule on a motion to intervene as an implicit denial. However, the practice is not common and requires extenuating circumstances. *See, e.g., 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, ... [proposed intervenor's] status remains uncertain and it has no standing to take an appeal or appear as a party.").

In *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990), for example, a challenge was brought by a public interest group to a city's Menorah on public grounds. After the district court

[31] The Legislature cites *Crenshaw v. Herbert*, 409 Fed. Appx. 428, 430 (2d Cir. 2011), and *United States v. Depew*, 210 F.3d 1061, 1065 (9th Cir. 2000), neither of which support the proposition.

ruled against the city, the city indicated it would not appeal. Another organization, Chabad, then sought to intervene to appeal the decision. As explained by the court:

> On Friday, December 7, four days before the start of Chanukah, Judge Enslen scheduled a hearing on the motion to intervene on December 18, at the end of Chanukah. This action would obviously have the effect of denying Chabad judicial review at a time when such review could be meaningful.

Id. at 305. Under these circumstances, the Sixth Circuit treated the district court's failure to rule as an implicit denial. "Chabad's interest in this case will disappear when Chanukah ends. ... Delaying a hearing on Chabad's application until its interest is almost non-existent is tantamount to denying it." *Id*. at 306.

The Legislature's posture here is a far cry from that of Chabad in the *Grand Rapids* case. Here, the Legislature waited until the day an interlocutory appeal was due, October 7, 2011, to file its motion to intervene. It has not attempted to stay the District Court's injunction, expedite its ruling on its motion to intervene, or even accelerate the appellate process. Time, judged by the Legislature's inaction, is not of the essence. Consequently, the Legislature's interlocutory appeal should be dismissed.

II. The Legislature's Motion To Intervene in Order To Take This Interlocutory Appeal Was Not Timely.

Assuming the Court chooses to address the merits of intervention at this stage,[32] the Legislature's attempt to intervene at this late juncture should be denied. This Court observed in *Northeast Ohio Coalition for Homeless and Service Employees International Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006), that the Legislature has the authority to intervene in election matters under Federal Rule of Civil Procedure 24(a)(2). Still, its intervention must be timely. *See generally* 7C C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1902 (2011).[33]

According to Wright & Miller, a leading authority on Federal Practice,

> the court must consider whether the applicant was in a position to seek intervention at an earlier stage in the case. When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention.

Id. § 1916.

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[32] Illustrating the advantage of having the District Court address the motion first, this Court in *Northeast Ohio Coalition for Homeless and Service Employees International Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 n.2 (6th Cir. 2006), stated that the timeliness determination by a District Court is reviewed by an appellate court only for an abuse of discretion.

[33] Timeliness is required whether the intervention sought is mandatory under Rule 24(a) or permissive under Rule 24(b). *Id*.

The Court in *Northeast Ohio Coalition* concluded that the Legislature's motion to intervene was timely. The Legislature, after all, had moved to intervene in the District Court the day after (October 27) the District Court issued preliminary relief (October 26). *Id*. at 1004-05. An *immediate* interlocutory appeal[34] was taken by the Attorney General in the name of the Secretary, and the Legislature then moved to intervene in that appeal "within hours of the appeal by the defendant." *Id*. at 1007. The motion to intervene was therefore timely on two levels—in the District Court because it followed the challenged preliminary order by only *one day,* and in this Court because it followed an appeal taken by a party by only a *few hours*.

Unlike the Legislature in *Northeast Ohio Coalition*, the Legislature here waited a *full month* after the challenged order to intervene. Its motion is therefore not timely.

Five factors are used to assess the timeliness of a motion to intervene:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the

[34] This is reflected in the fact that the Sixth Circuit's judgment was entered on October 31, 2006, just five days after the award of preliminary relief.

> existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir.1990). "No one factor is dispositive, but rather the 'determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances'." *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (citation omitted).

Generally, motions to intervene that are filed during a case's "initial stages" are timely. In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), for example, the court granted a motion to intervene under Rule 24(a)(2) because it "was filed just two weeks after the complaint, and the case was obviously in its initial stage."

However, in the context of emergency challenges to election laws, moving to intervene within weeks may not be enough. Election challenges have short shelf-lives; they must be resolved quickly. Waiting weeks (or even days) to intervene threatens to disrupt closely-approaching election deadlines and wastes valuable judicial resources. The District Court here, for example, expedited these proceedings in order to provide both sides time to properly exhaust their judicial remedies before the expiration of Ohio's closely approaching deadlines. The General Assembly's belated motion to intervene flaunts the District Court's efforts.

Courts in emergency election proceedings commonly consider the doctrine of *laches* in deciding whether to award relief. A delay of two weeks in an election setting has been held by the Sixth Circuit to render a challenge untimely and bar relief. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (holding that because candidate "waited until nearly two weeks after he knew the choice of the candidates would be made" he was barred by *laches* from obtaining relief). *See also McClafferty v. Portage County Board of Elections*, 661 F. Supp. 2d 826 (N.D. Ohio 2009); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990).

What is good for the goose is good for the gander. Just as those seeking to challenge election laws must act expeditiously, those seeking to defend ballot access laws must act in a timely fashion. *See, e.g., Northeast Ohio Coalition*, 467 F.3d at 1007. Unnecessary and unexplained delay should not be tolerated. *See, e.g., American Association of People with Disabilities v. Herrera*, 257 F.R.D. 236, 245 (D.N.M. 2008) ("Intervention is properly denied where, for example, a case is near its end stage, and allowing a party to intervene would cause undue prejudice and delay in the proceeding.").

The Legislature cannot seek shelter in a "belated refusal" to appeal on the Secretary's part. The Secretary announced immediately after the District Court's September 7, 2011 Order that he would comply. *See* Joe Vardon, *Judge stops signature rule for minor parties*, COLUMBUS DISPATCH, Sept. 9, 2011 ("'Secretary

Husted will follow the court's ruling,' said Matthew McClellan, a spokesman for Husted.").[35] Indeed, on September 21, 2011 the Secretary sent a letter to the Legislature "respectfully request[ing] that the Ohio General Assembly work as quickly as possible to enact a constitutional statute." *See* Record Entry No. 14, at 2 and Exhibit 1.

The General Assembly was on notice within days of the District Court's order that the Secretary would not appeal. It knew two weeks before it filed its motion to intervene that the Secretary had requested action "as quickly as possible." It knew that time was of the essence. Rather than immediately intervene, the General Assembly waited. Rather than seek a stay or move to expedite this appeal, it continues to wait. The Legislature's actions are far from timely.

III. H.B. 194's Changes to Ohio's Ballot Access Laws Caused The LPO Immediate Injury and Threatened Imminent Harm.

As recently stated by the Supreme Court in *Garcia v. Texas,* 131 S. Ct. 2866, 2867 (2011), a federal court's "task is to rule on what the law is, not what it might eventually be." When the District Court issued its preliminary injunction, Ohio's law for the 2012 election required that new parties submit over 38,000 signatures

[35] *See* http://www.dispatch.com/content/stories/local/2011/09/09/judge-stops-signature-rule-for-minor-parties.html.

by February 8, 2012. The District Court's task was to rule on the validity of this law; it could not speculate on what Ohio law "might eventually be."

A. The LPO's Case Was Ripe In The District Court.

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

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

(Citation omitted).[36]

Applying these precepts in *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011), this Court recently concluded that a challenge to a federal statute, the Patient Protection and Affordable Care Act, was ripe even though the law would not go into effect for three years. The Court observed in that case that "[t]here are two potential theories of injury—'actual' present injury and 'imminent' future injury—and plaintiffs satisfy both of them." *Id.* at 535 (citation omitted).

[36] Jurisdictional issues such as standing, ripeness and mootness are reviewed *de novo*. *See Miller v. City of Cincinnati*, 622 F.3d 524, 531 (6th Cir. 2010).

> As to actual injury, the declarations ... show that the impending requirement to buy medical insurance on the private market has changed [the plaintiffs] present spending and saving habits." *Id.* at 536. "In addition to establishing a present actual injury, plaintiffs have shown imminent injury—'that the threatened injury is certainly impending.'

Id. (citation omitted).

> In regard to future injury, the Court elaborated:
>
> Imminence is a function of probability. And probabilities can be measured by many things, including the certainty that an event will come to pass. The uncertainty that the event will come to pass may be based on developments that may occur during a gap in time between the filing of a lawsuit and a threatened future injury.

Id. "The only developments that could prevent this injury from occurring," the Court observed, "are not probable and indeed themselves highly speculative. Plaintiffs, true enough, could leave the country or die, and Congress could repeal the law. But these events are hardly probable and not the kinds of future developments that enter into the imminence inquiry." *Id.*

Likewise, the LPO at the time suit was filed experienced both actual and imminent injury. In terms of actual injury, Michael Johnston, vice-chair of the Libertarian Party of Ohio, testified that H.B. 194 stripped the LPO of its qualified-party status and immediately injured the LPO. *See* Record Entry No. 24 (Transcript of Evidentiary Hearing) at 3-6 (Testimony of Michael Johnston). In particular, it

made it more difficult to raise money,[37] *id.* at 5, recruit volunteers, *id.*, and (in particular) recruit candidates: "candidates are nervous about committing to run with a party that may not exist ...." *Id.* at 6.

The LPO also had two candidates qualified for the November 2011 general election in partisan races. *See* Record Entry No. 9 (Reply to Response) Attachment E (Declaration of Michael Johnston). These candidates were left with no assurance that they could run as Libertarians, if at all. Indeed, the Secretary's August 5 letter stated that they would not enjoy this right.[38]

Perhaps most importantly, H.B. 194 became the law in Ohio on September 30, 2011. It remained the law in Ohio until it was suspended on December 9, 2011.

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[37] Under Ohio law, only "political parties" can accept unlimited money for a State Candidate Fund and a Restricted Fund (the latter of which can include corporate money). Without continuing ballot access, the LPO would be treated as a political action committee (PAC) under Ohio law, which means that it would be subjected to contribution limits that are not applied to political parties. As a PAC rather than a qualified political party, Johnston testified, the LPO would be limited in the amount of money it could raise and accept from supporters. *See* Record Entry No. 9 (Reply to Response) Attachment E (Declaration of Michael Johnston at ¶¶ 5-7); Record Entry No. 24 (Transcript of Evidentiary Hearing) at 5-6 (Testimony of Michael Johnston).

[38] Matthew Domschroder, an adviser to the Secretary, testified that in his opinion H.B. 194 would not be used to strip these two candidates of their LPO status in the November 2011 election. *See* Record Entry No. 24 (Transcript of Evidentiary Hearing) at 29 (Testimony of Matthew Domschroder). He also admitted, however, that he could not make policy. *Id.* at 33-34. The following day, the Secretary issued Directive 201-28, which stated that these two LPO candidates would continue to run under the LPO banner in the November 2011 election.

Thus, H.B. 194 actually stripped the LPO of its ballot-qualified status for over two months. But for the District Court's preliminary injunction, the LPO would not have not remained ballot-qualified during this period between September 30, 2011 and December 9, 2011, or thereafter.

Even assuming that H.B. 194 never became law, it still inflicted immediate injury by chilling the LPO's First Amendment rights. The vast majority of bills passed in Ohio, of course, are subject to the referendum process. Proposed referenda, however, seldom suspend laws by making the ballot.[39] The mere possibility that H.B. 194 might at some future time be suspended could not have lifted the chill on the LPO's First Amendment rights.

The likelihood of the referendum's success, of course, was quite small.[40] But even assuming that the referendum's success was foreseeable, it at most created

[39] Given this reality, the Secretary himself on August 22, 2011 took steps to implement H.B. 194's terms by issuing Directive 2011-26. *See* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2011/Dir2011-26.pdf. This Directive instructed county election boards to follow H.B. 194's prohibition against mailing unsolicited absentee ballots to voters. *See* Joe Vardon, *Husted forbids unsolicited absentee-ballot mailings*, COLUMBUS DISPATCH, Aug. 23, 2011, at B8. Thus, the Secretary, along with the rest of Ohio's election machinery, assumed that H.B. 194 was the law in Ohio.

[40] The vast majority of laws in Ohio are not successfully suspended by referenda. Although precise figures from Ohio are not available, studies from other states prove that the vast majority of volunteer popular efforts (including those that have several months as opposed to only six weeks to collect signatures) do not survive the initial signature-collection stage. *See, e.g.*, Richard J. Ellis, *Signature*

uncertainty surrounding the LPO's First Amendment right to ballot access. The LPO could not know with any degree of certainty that H.B. 194 would be suspended. The best that anyone could do was guess at the outcome. Government cannot constitutionally expect its citizens to gamble with their First Amendment rights. It cannot require that they delay their political activities, "even for a minimal period of time." *See Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002) (stating that deprivation of First Amendment rights even "for a minimal period of time, constitutes irreparable harm") (describing the holding in *Connection Distribution Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)). Wait-and-see in the First Amendment context is not acceptable.

Because of the chilling effect of uncertainty, ripeness is rarely a problem when plaintiffs press facial First Amendment challenges to state election laws. *See*

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

North Carolina Right to Life, Inc. v. Leake, 344 F.3d 418, 431 (4th Cir. 2003) (stating that the "Court [in *Riley v. National Federation of the Blind*, 487 U.S. 781, 785-86 (1988),] concluded ... that the uncertainty and risk created by '[t]his scheme must necessarily chill speech in direct contravention of the First Amendment's dictates.'"); *American Federation of Government Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 759 (D.C. Cir. 1984). In *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), for example, the plaintiffs challenged Virginia's open primary in 2005, two years before the next election. Because the next primary election was not scheduled until 2007, and because the requisite number of candidates needed to cause a primary might not even run, the District Court dismissed the action as premature. The Fourth Circuit in *Miller*, 462 F.3d at 317-18, reversed:

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

In *Anderson v. Spear*, 356 F.3d 651, 669 (6th Cir. 2004), to use another example, this Court ruled that a challenge to Kentucky's limitations on candidate contributions was ripe even though the limitations had never been applied to the

plaintiffs. Indeed, the Sixth Circuit found the complaint ripe even though the state claimed it would not apply the limitations. *Id.*

This Court explained in *Anderson* that facial First Amendment challenges to state laws are routinely entertained notwithstanding uncertainty surrounding their application: "because a party may challenge a statute based upon the 'assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression[,]' the facial challenge is ripe for adjudication." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). *See also Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377, 399 (6th Cir. 2001).

Uncertainty placed the LPO on the classical "horns of a dilemma." Waiting for an "ultimate judicial determination of the action's validity [would] ... change [its] course of day-to-day conduct, ...; alternatively, if [it did] not comply, [it] risk[ed] sanctions or injuries ...." *A.O. Smith Corp. v. Federal Trade Commission*, 530 F.2d 515, 524 (3d Cir. 1976). *See also Coastal States Gas Corp. v. Department of Energy*, 495 F. Supp. 1300, 1307 (D. Del. 1980) (observing that "the 'horns of a dilemma' characteristic of pre-enforcement review cases [can] overcome ripeness challenges"); *Standard Oil Co. v. Federal Energy Administration*, 440 F. Supp. 328, 369 (N.D. Ohio 1977) (same).

B. No Principle Prohibits Challenges To Laws That Are Put To Referendum.

Citing cases that support only the proposition that courts sometimes abstain from enjoining votes on popular measures,[41] the Legislature erroneously asserts that "most courts facing a challenge to an act subject to vote have declined to address it [*i.e.*, the act] before the election." *See* Brief of Proposed Intervenor-Appellant at 24. The Legislature cites no case to support this claim, and the LPO has been unable to locate any holding supporting it.

Indeed, as observed by the New Jersey Supreme Court in *Committee to Recall Robert Menendez from the Office of the U.S. Senate v. Wells,* 7 A.3d 720, 733 n.4 (N.J. 2011), "many courts including New Jersey's subscribe to the view that judicial review is permitted when the pre-election objection concerns the facial constitutional validity or form of the measure." (Citations omitted). Consequently, the court in *Wells* entertained a pre-election challenge to the popular recall of a

[41] *Ranjel v. City of Lansing,* 417 F.2d 321 (6th Cir. 1969), is not on point. *See* Brief of Proposed Intervenor-Appellant at 23-24. The Court in *Ranjel* merely observed that federal courts should avoid enjoining ongoing local referenda. Likewise, the only other federal precedent cited by the Legislature, *Diaz v. Board of County Commissioners,* 502 F. Supp. 190 (S.D. Fla. 1980), refused to enjoin an ongoing local referendum. Of the three state cases cited, the court in *O'Kelley v. Cox,* 604 S.E.2d 773 (Ga. 2004), also refused to enjoin a popular initiative. In the other two state cases, *O'Connell v. Kramer,* 436 P.2d 786 (Wash. 1968), and *City of Rocky Ford v. Brown,* 293 P.2d 974 (Colo. 1956), the state courts actually ordered government officials to include initiatives on ballots.

sitting United States Senator. It concluded that because "[t]he issues in dispute are 'purely legal,'," *id.* at 731, "there is a sufficient showing of harm that the parties would suffer if we were to abstain from resolving this case," *id.* at 732, and "[t]he recall initiative ... injects uncertainty and instability into the State's electoral scheme," *id.*, the case was ripe for resolution before the referendum was held.

Of course, the LPO here does not challenge the referendum or its upcoming vote; it challenges H.B. 194. But even if the LPO here challenged the referendum (as opposed to H.B. 194), its First Amendment claim would still be ripe. *See Wells,* 7 A.3d at 732. There is simply no general rule barring pre-election challenges to popular measures. Indeed, where a popular measure "injects uncertainty and instability into the State's electoral scheme," *Wells*, 7 A.3d at 732, it can be immediately challenged.[42]

[42] The Legislature quotes from *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). *See* Brief of Proposed Intervenor-Appellant at 4. *Arizonans for Official English* did not address ripeness. Rather, the Court there dismissed the action on mootness grounds. The language quoted by the Legislature, meanwhile, was directed not at standing, ripeness, or mootness, but at federal abstention. The Court was advising lower courts to make use of abstention and (better yet) state certification procedures to avoid unnecessary federal litigation. Of course, the Court has concluded that First Amendment challenges are not particularly strong candidates for abstention, because "in a First Amendment case ... plaintiffs have a special interest in obtaining a prompt adjudication of their rights, despite potential ambiguities of state law." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2662 (2011) (citing *City of Houston v. Hill,* 482 U.S. 451 (1987); *Zwickler v. Koota*, 389 U.S. 241 (1967)). Neither the Secretary nor the Legislature suggested to the District Court that it should abstain pending the outcome of the referendum. In any case, a

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In the end, of course, enough signatures were collected to suspend H.B. 194. But this was not known until December 9, 2011. Had the District Court awaited the outcome of the referendum process, as the Legislature argues, the LPO would have missed Ohio's December 7, 2011 deadline for qualifying candidates.[43] The District Court's immediate action was necessary to preserve the LPO's First Amendment rights.

IV. The District Court Did Not Abuse Its Discretion By Issuing The Preliminary Injunction.

In considering a request for preliminary injunction, a district court considers: (1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction. *See Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.,* 119 F.3d 393, 399 (6th Cir.1997). These are

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district court's decision not to abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), is not the proper subject of an interlocutory appeal, *see Gulfstream Aerospace v. Mayacamas*, 485 U.S. 271 (1988), and when properly appealed following final judgment is only reviewed for an abuse of discretion. *See, e.g., Literary Association v. City of New Orleans,* 42 F.3d 1483 (5th Cir. 1995).

[43] The LPO could not qualify candidates for its primary if it were not recognized as a qualified political party.

“factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985).

A district court's preliminary injunction is reviewed for abuse of discretion. *See, e.g., Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). Weighing the four factors described above, the District Court below did not abuse its discretion in granting injunctive relief.

A. LPO Is Likely To Prevail On The Merits.

The First and Fourteenth Amendment prohibit all but constitutionally reasonable restrictions placed on political parties' ballot access. *See Anderson v. Celebrezze,* 460 U.S. 780, 793-94 (1983). In *Norman v. Reed,* 502 U.S. 279, 288 (1992), for example, the Supreme Court "recognized the constitutional right of citizens to create and develop new political parties." It explained that this "right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." *Id.* (Citing *Anderson v. Celebrezze,* 460 U.S. 780, 793-794, (1983); *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979); *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968)).

Providing no mechanism[44] for independent or minor party access violates the Constitution, *per se*. *See, e.g., McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (striking down Texas's preclusion of independent presidential candidates). States therefore must provide a constitutionally acceptable mechanism for minor party access. *See also Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984) (observing that because Michigan had no valid access law for independent candidates the court was "compelled to again declare, in absolute terms, that the Michigan election laws, so far as they foreclose independent candidates access to the ballot, are unconstitutional").[45]

Unduly restrictive ballot access requirements likewise violate the First Amendment, as made clear by this Court's ruling in *Libertarian Party of Ohio v.*

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[44] This is where Ohio law effectively stands following the suspension of H.B. 194. Ohio law presently requires that new parties qualify 120 days before the primary, *see* O.R.C. § 3517.01(A)(1), which for 2012 is now on March 6, 2012. *See* H.B. 369, discussed *supra* at 13-14. Together, these measures push Ohio's deadline forward in time to November 7, 2011, which this Court in *Blackwell* has already ruled to be unconstitutional.

[45] H.B. 194 overrides the Secretary's previous Directives qualifying the LPO for Ohio's 2010, 2011 and 2012 election ballots. While it created a mechanism for gaining access to the 2012 ballot, it left Ohio with absolutely no mechanism for minor parties, like the LPO, to gain access to Ohio 2011's election ballot. To the extent H.B. 194 achieved this result, it was clearly unconstitutional, *see McCarthy v. Briscoe*, 429 U.S. 1317 (1976); *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6th Cir. 1984), which explains the Secretary's quick action in restoring the LPO's candidates to the 2011 ballot following the District Court's hearing on the preliminary injunction.

Blackwell, 462 F.3d 579 (6th Cir. 2006). There, this Court ruled that O.R.C. § 3517.01(A)(1)'s requirement that minor parties collect a number of signatures equal to 1% of the vote cast in the last gubernatorial or presidential election--which was retained by H.B. 194 and is being challenged here--was unconstitutional when combined with a November filing deadline. The court ruled that together the early deadline and high signature requirement violated the First and Fourteenth Amendments.

Relying on *Blackwell, Libertarian Party of Ohio v. Brunner,* 462 F. Supp.2d 1006 (S.D. Ohio 2008), likewise invalidated Ohio's late-November deadline for new parties, which was put in place in 2008 in an effort to correct Ohio's constitutional difficulties.[46] The requirement Ohio agreed not to enforce required that new parties qualify 100 days before the primary, which in 2008 (a presidential election year) was held in March. Because Ohio law at that time prescribed a May[47] primary for non-presidential election years, like 2010, the consent decree

[46] The Secretary adopted this interim deadline moving Ohio's deadline back twenty days into late-November. It did so by simply requiring that new parties submit signatures 100 days before the primary, which in a presidential election year (2008) was at that time to be held in March. The Secretary's rule, moreover, only demanded half the number of signatures required by O.R.C. § 3517.01(A)(1), and was still ruled invalid.

[47] During non-presidential election years, like 2010, Ohio held its primaries in May. This meant that the new-party filing deadlines were pushed back by O.R.C. §§ 3501(E) and 3517.01(A)(1) to early January.

prevented Ohio from requiring that new parties qualify for the 2010 election in January of 2010. For that reason, the Secretary issued Directive 2009-21, which simply guaranteed the LPO ballot access in 2010.

Ohio has conceded through its consent decree (entered in *Brunner*) and the resulting Directive 2009-21 that it cannot constitutionally impose either a November or January deadline on new parties. Now it argues that by adding just another thirty days, H.B. 194's February deadline somehow survives strict scrutiny.

It is not the LPO's intent to rehash Ohio's dreadful history of denying access to minor parties and candidates, *see Blackwell,* 462 F.3d at 589 ("in Ohio, elections have indeed been monopolized by two parties, and thus, the burdens imposed by the state's election laws are 'far from remote'"), nor is it necessary to fully canvass how other states approach ballot access. *Id.* ("of the seven states that require all political parties to nominate their candidates in the state's primary election, Ohio imposes the most burdensome restrictions of both automatic qualification and petition qualification; as a result, it has seen the fewest number of minor parties on the ballot."). Suffice it to say that this Court in *Blackwell* did both. It found that Ohio's requiring the collection and submission of tens of thousands of signatures several months before its general election is constitutionally unacceptable.

Indeed, no federal court has sustained a pre-March deadline for new parties or independent candidacies. For its part, the Supreme Court in *Anderson v.*

Celebrezze, 460 U.S. 780 (1983), invalidated Ohio's March 20 filing deadline for independent presidential candidates.[48] Prior to this decision, the Court in *Tucker v. Salera*, 424 U.S. 959 (1976), *summarily affirming*, 399 F. Supp. 1258, 1266 (E.D. Pa. 1975), affirmed a three-Judge District Court's decision invalidating a March deadline for independent congressional candidates. Similarly, in *Lendall v. Jernigan,* 433 U.S. 901 (1977), the Supreme Court summarily affirmed an unreported three-Judge District Court opinion that invalidated an April qualifying deadline for independent candidates for local offices.[49]

Since *Anderson*, lower courts have uniformly agreed that pre-March filing deadlines are unconstitutional.[50] Three District Courts have struck down January, February, and March filing deadlines, respectively. *See Libertarian Party of Kentucky v. Ehrler,* 776 F. Supp. 1200, 1205-06 (E.D. Ky.1991); *Cripps v. Seneca*

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[48] Anderson did not decide to run as an independent candidate for President until April 24. *Id.* at 782.

[49] *See Lendall v. Jernigan,* 424 F. Supp. 951, 952 (E.D. Ark. 1977) (describing the unreported decision that invalidated "the [April] filing deadline for independent candidates for district offices"); *Lendall v. Jernigan*, 45 U.S.L.W. 3438 (1976) (listing questions presented to the Supreme Court).

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

County Board of Elections, 629 F. Supp. 1335, 1338 (N.D. Ohio 1985); *Libertarian Party of Tennessee v. Goins*, 793 F. Supp. 2d 1064, 1086 (M.D. Tenn. 2010). Four Circuits, the Third, Fourth, Eighth and Eleventh, have invalidated February, March, and April deadlines. *See Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (*Hooks I*) (enjoining New Jersey's enforcement of an April 10 qualifying deadline); *Cromer v. State of South Carolina*, 917 F.2d 819, 821 (4th Cir. 1990) (invalidating March 30 filing deadline for independent candidates); *MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir.1977) (invalidating February filing deadline); *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991) (invalidating April 6 qualifying deadline for minor-party candidates).[51]

None of these case turned on the volume of signatures required. The courts' concerns were that the deadlines were too soon, not that too many signatures were required. Indeed, the number of signatures required only exceeded the number

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

required by H.B. 194 in one of the cited cases.[52] The wealth of precedent invalidating pre-March deadlines therefore cannot be explained by pointing to unusually large signature-collection requirements.[53]

The earliest deadline that has been sustained by any court was Ohio's March 1 deadline for independent congressional candidates. *See Lawrence v. Blackwell*, 430 F.3d 368 (7th Cir. 2006). The Court in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 590, distinguished *Lawrence* on the ground that Ohio's March 1 filing

[52] Only in *Libertarian Party of Ohio v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010), did the number of signatures required, 2.5% of the vote in the last election, exceed that required here. Still, the court did not rely on the volume of signatures to strike down the law; its focus was the deadline.

[53] In *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (*Hooks I*), for example, the signature requirements topped out at 800 signatures. In *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991), the maximum number of signatures required was 12,033. In *Cromer v. State of South Carolina*, 917 F.2d 819, 821 (4th Cir. 1990), only 2000 signatures were required. In *Tucker v. Salera*, 424 U.S. 959 (1976), *summarily affirming*, 399 F. Supp. 1258, 1266 (E.D. Pa. 1975), the lower court opinion indicates that 35,000 signatures were required. In *Lendall v. Jernigan*, 433 U.S. 901 (1977), it appears from the lower court's opinion in *Lendall v. Jernigan*, 424 F. Supp. 951, 952 (E.D. Ark. 1977), a related case, that the signature requirements did not extend beyond hundreds of signatures. In *Libertarian Party of Ky. v. Ehrler*, 776 F. Supp. 1200, 1205-06 (E.D. Ky.1991), only 5000 signatures were required. In *Cripps v. Seneca County Bd. of Elections*, 629 F. Supp. 1335, 1338 (N.D. Ohio 1985), although the opinion does not state the number of signatures, because local offices in Ohio were at stake the number had to be well short of the number required in the present case. In *MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir. 1977), signatures equaling 1% of the vote cast in the last gubernatorial election were required. Although this is the same percentage that is found in the present case, the raw number of signatures was likely smaller.

deadline for independent candidates was contemporaneous with the primary; indeed, it was only one day before the primary. *Lawrence* "follow[ed] the great weight of authority that has distinguished between filing deadlines well in advance of the primary and general elections and deadlines falling closer to the dates of those elections." *Blackwell*, 462 F.3d at 590. Where a deadline is months before the primary, as here, it cannot withstand constitutional scrutiny.

This Court in *Blackwell* concluded that the combined effects of Ohio's signature requirement and early filing deadline the First and Fourteenth Amendments. This remains true today with H.B. 194. Ohio has put in place once again the same signature requirement invalidated in *Blackwell.* Its new deadline, meanwhile, is only 30 days later than the deadline Ohio conceded was invalid following *Brunner.* Given that no court has sustained a deadline this early, the conclusion that Ohio's combination of signatures and deadline violates the First and Fourteenth Amendments is solid. The District Court acted well within its discretion.[54]

[54]This is doubly so given that 2012 involves a presidential election. The Court in *Lawrence* distinguished *Anderson*'s application of heightened scrutiny as a function of the presidential contest at stake. Where presidential elections are at issue, courts (including the Sixth Circuit) are more likely to apply a stricter level of scrutiny to restrictive state laws. For example, then-Judge Alito's opinion in *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 72 (3d Cir. 1999) (*Hooks II*), which sustained New Jersey's June deadline for independents and alternative party candidates, distinguished *Anderson* in this same way: "the [*Anderson*] Court

Given the absence of a constitutionally-acceptable ballot access law for minor parties in Ohio, and especially in light of the Legislature's recalcitrance, the District Court likewise acted well within its discretion in ordering the LPO restored to Ohio's ballot. In the absence of constitutionally-acceptable ballot access laws, courts have no choice but to place on ballots the names of parties and candidates that have "the requisite community support." *See Goldman-Frankie v. Austin,* 727 F.2d 603, 607 (6th Cir. 1984); *McCarthy v. Briscoe,* 429 U.S. 1317, 1323 (1976).

The election returns from 2010 demonstrate that the LPO is more popular today than in 2008 when the court in *Brunner,* 567 F. Supp. 2d at 1015-16, placed it on Ohio's ballot. It won nearly 5% of the vote for several state-wide offices in 2010, including State Treasurer, Secretary of State, and State Auditor. *See* Record Entry No. 2 (First Amended Complaint) at ¶ 15. During the 2010 general election its candidates collectively received over 1,000,000 votes in Ohio. *See* Record Entry No. 2 (First Amended Complaint) at ¶ 17. It ran nearly fifty candidates for local,

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stressed that the Ohio statute regulated *presidential* elections and not *state or local* elections." (Emphasis original). The Tenth Circuit in *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,* 844 F.2d 740, 746 n.9 (10th Cir. 1988), which upheld a May 31 qualifying deadline for new-party candidates, likewise distinguished *Anderson* as involving a "challenge [that] arose in the context of an independent candidacy for national office." Because the Oklahoma deadline did not deal with presidential contests, "[t]he state thus has a correspondingly greater interest in imposing restrictions to provide 'assurance that the particular party designation has some meaning.' " *Id.*

state-wide and federal office (including the Presidency) during the 2008 and 2010 elections. *See* Record Entry No. 2 (First Amended Complaint) at ¶ 17. It has qualified 24 candidates for Ohio's 2012 primaries. The LPO clearly has the 'requisite community support' needed to appear on Ohio's ballots.[55]

B. H.B. 194 Caused The LPO Irreparable Harm.

As stated by the court in *Brunner,* 462 F. Supp.2d at 1014, "[t]he irreparable harm to the Libertarian Party and its candidates is denial of access to the ballot." The District Court there found that "the violation of Plaintiffs' First Amendment rights constitutes irreparable injury for which injunctive relief is an appropriate remedy." *Id.* Here, the District Court found that "[t]he irreparable harm to the Libertarian Party and its candidates is denial of access to the ballot. This Court finds that this constitutes irreparable injury that is not compensable by monetary damages. Thus, injunctive relief is appropriate." Record Entry No. 13 (Order of the Court) at 11. Because this Court has long recognized that a deprivation of First Amendment rights, even "for a minimal period of time, constitutes irreparable

[55] Ohio argues that it "needs" 90 days to verify signatures. *See* Brief of Proposed Intervenor-Appellant at 36 ("The State has asked only for the time it needs to run the primary election."). That Ohio can peruse the 300,000 signatures found in a referendum petition in order to verify a quarter million of them in 70 days, *see supra* at 12-13, however, proves that 90 days are not needed to verify the 40,000 signatures found on a party-petition. Even putting aside the very early deadline found here, Ohio simply cannot prove H.B. 194's 90-day-before-the-primary requirement is necessary to achieve any legitimate state interests.

harm," *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002) (describing the holding in *Connection Distribution Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)), the District Court's conclusion in this regard does not reflect an abuse of discretion.

C. No Harm Was Caused By The Preliminary Injunction To Others Or The Public.

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

In the present case, the District Court below likewise concluded that "[t]he harm to others and the public is the damage to 'political dialogue and free expression' that is done when political parties are unnecessarily restricted from participating in the public discourse." Record Entry No. 13 (Court Order) at 11.

"In this case, the State has not shown that the laws at issue further compelling state interests. In fact, they inhibit the ability of the citizens of Ohio to organize into political parties and to make their voice heard at the level necessary to effect political change." *Id.*

Ohio here has made no showing that voters in Ohio will be prejudiced by preliminary relief. Rather, it is in the public interest that there be "political dialogue and free expression." The District Court's conclusion therefore does not reflect an abuse of discretion.

V. Suspension Of H.B. 194 After The Interlocutory Appeal Was Docketed Does Not Moot The Case.

As explained above, H.B. 194 was suspended on December 9, 2011, two months after the District Court issued its preliminary Order and one month after the Legislature lodged its interlocutory appeal. The Legislature now claims that this suspension moots the LPO's case. It does not.

The District Court's preliminary injunction does two things; first, it enjoins enforcement of H.B. 194's ballot access provisions; second, it orders the Secretary to place the LPO on the 2012 election ballot.

In regard to the latter, the case is not moot for the simple reason that the District Court's Order remains necessary to provide the LPO access to the 2012 election. Now that H.B. 194 has been suspended, Ohio law requires that new

parties submit over 38,000 signatures by November 7, 2011 in order to qualify for the 2012 ballot. Because of the District Court's Order placing it on the 2012 ballot, the LPO did not, and now does not, have to satisfy this requirement.

The Secretary's Directive 2011-38 (which restored the LPO to the ballot), meanwhile, was not a voluntary change; it was issued two weeks after the injunction to bring Ohio into compliance with the District Court's order. Because the Directive was a response to the District Court's Order, it was "involuntary" and cannot cause mootness.[56]

In regard to the former, the Legislature's mootness argument is equally unavailing. The Supreme Court in *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), ruled that temporary suspensions of preliminarily enjoined policies and practices do not moot controversies. In *Lyons,* a district court had preliminarily enjoined a city's use of chokeholds to subdue criminal suspects. While the matter

[56] Even voluntary changes do not necessarily moot cases. *See League of Women Voters of Ohio v. Brunner,* 548 F.3d 463, 473 (6th Cir. 2008) ("A defendant's 'voluntary cessation of a challenged practice' does not moot a case. Rather, voluntary conduct moots a case only in the rare instance where 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' What is more, the party asserting mootness bears the 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again.") (citations omitted). In the present case, the Legislature cannot plausibly claim that the Secretary's Directive placing the LPO back on the ballot was voluntary. Even if it could, given Ohio's history and the events that occurred in this case, it cannot satisfy its heavy burden of proving that LPO would not be excluded again.

was pending before the Supreme Court, the city passed a "six-month moratorium on the use" of the enjoined chokeholds. *Id.* at 100. The Supreme Court ruled that this moratorium did not moot the controversy: "the moratorium by its terms is not permanent. Intervening events have not 'irrevocably eradicated the effects of the alleged violation.'" *Id.* at 101 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

This Court in *Leonardson v. City of East Lansing*, 896 F.2d 190 (6th Cir. 1990), applied *Lyons* to hold that a suit filed under the First Amendment was not mooted by the challenged ordinance's "lapse." Just after the plaintiffs lodged an appeal challenging the district court's order upholding the measure ("Ordinance 653"), the ordinance lapsed by its terms. *Id.* at 194. The Court, parenthetically citing *Lyons* for the proposition that "claim for injunctive relief [are] not moot when allegedly illegal police practices are under moratorium," concluded that the case was not moot:

> We find that this case is properly before this court. Although the use of Ordinance 653 appears to have accomplished its goal ..., a similar event could cause its reenactment. ... [T]he law has not changed because of an amendment, but lies dormant, ready to be brought back to life if the need for it reoccurs. For this reason, this appeal will not be dismissed as moot.

Id. *See also Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir. 2002) ("Mishawaka has stated that it will 'suspend enforcement' of the provisions only until the 'matter is resolved.' As in *Lyons*, the Mishawaka moratorium is not

permanent and could be lifted at any time. Therefore, we turn to the merits of plaintiffs' claim.").

In the present case, the suspension of H.B. 194's ballot access provisions is only temporary. It lasts only until the November 2012 election. If the referendum fails to pass this coming November, H.B. 194 will again be the law in Ohio.[57] New parties will have to submit tens of thousands of signatures in early February to qualify for future elections.[58] Because Ohio's suspension has not "irrevocably eradicated the effects" of H.B. 194, H.B. 194 cannot be moot. H.B. 194 lies "dormant, ready to be brought back to life." *See Leonardson,* 896 F.2d at 194. Ohio's suspension of H.B. 194's ballot access restrictions does not render this matter moot.[59]

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[57] H.B. 194 was not repealed or amended by H.B. 318, H.B. 319, or H.B. 369. *See supra* at 14.

[58] H.B. 369 established the March 6, 2012 primary date, and consequently a November 7, 2011 qualifying deadline for new parties, for only the 2012 election. *See supra* at 13-14.

[59] Although the LPO's case remains alive, the Legislature's interlocutory appeal of the preliminary injunction could very well be moot. The Legislature has not sought to expedite this interlocutory appeal and has not moved to stay the preliminary injunction. Minor-party candidates, including the LPO's, have relied on the District Court's order and Directive 2011-38 to qualify for the March 6, 2012 primary. It therefore seems likely that it is now too late to "undo" the District Court's order placing the LPO and its candidates on the 2012 ballot. Under these same circumstances, this Court in *Bogaert v. Land,* 543 F.3d 862, 864 (6th Cir. 2008), ruled the government's interlocutory appeal in an election challenge was moot:

V. The District Court's Order Should Not Be Vacated.

The Legislature argues that not only is the LPO's case moot, but *vacatur* of the District Court's preliminary injunction is required. *See* Brief of Proposed Intervenor-Appellant at 28. The Legislature is mistaken.

Vacatur, the Supreme Court has ruled, is only proper when mootness is caused by either "happenstance" or the actions of the winning party below. Mootness that is caused by, or attributable to, the losing party below (here Ohio) does not justify *vacatur*. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 23 (1994). As explained in *Bonner Mall,* 513 U.S. at 25, "'happenstance' must be understood as an allusion to this equitable tradition of *vacatur*. 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 the judgment." The Court continued:

> Where mootness results from settlement, however, 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*. The judgment is not unreviewable, but simply unreviewed by his own

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"All parties agree that the specific steps required by the preliminary injunction have been completed and that those steps cannot be undone at this time." It further ruled that dismissing the interlocutory appeals did not moot the case in the District Court: "Dismissal of these preliminary-injunction appeals, of course, does not render moot the underlying district court litigation." Likewise, here should the Court find that it is too late in the day to remove the LPO's candidates from the ballot, the Legislature's interlocutory appeal should be dismissed as moot.

> choice. The denial of *vacatur* is merely one application of the principle that "[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."

Id.

Consequently, courts have routinely ruled that mootness attributable to the losing party will not justify *vacatur*. This can be because the losing party agreed to settle, as in *Bonner Mall,* or because of the operation of state law, as in *Karcher v. May,* 484 U.S. 72 (1987) (holding that legislators' being replaced in office is not happenstance but is attributable to state).

Assuming the Secretary's Directive 2011-38 (restoring the LPO to the November 2011 ballot) was voluntarily adopted following the District Court's preliminary injunction (and thus caused mootness), it clearly cannot justify *vacatur*. After all, if it were voluntarily adopted by the Secretary it would be attributable to him and Ohio. Ohio would be the cause of mootness and would not be entitled to *vacatur*. *See, e.g., Sierra Club v. Glickman,* 156 F.3d 606 (5th Cir. 1998) (holding that city's removal of religious display following an injunction was action attributable to the city and thus would not support *vacatur* on appeal).

Assuming that the suspension of H.B. 194 somehow moots LPO's case, it likewise would necessarily be attributable to Ohio. Suspension, like repeal, cannot be considered happenstance. Here, Ohio created the referendum process. It is part of Ohio law. It is not an accident. Courts have routinely ruled that the repeal of a

law is not happenstance. *See, e.g., Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613 (5th Cir. 2000) (holding that city's repeal of challenged ordinance was attributable to city and therefore did not constitute happenstance justifying *vacatur*).

It must be remembered, moreover, that here the Legislature here made absolutely no effort to stay the District Court's Order or expedite this interlocutory appeal. The appeal was lodged on October 7, 2011. H.B. 194 was suspended on December 9, 2011. Had the Legislature moved to expedite this interlocutory appeal, it could have obtained a decision from this Court before H.B. 194 was suspended. That it did not attempt to do so renders it to blame, in part, for any mootness caused by H.B. 194's suspension. Because it is partly to blame for mootness, the Legislature cannot have *vacatur*.

Blankenship v. Blackwell, 429 F.3d 254 (6th Cir. 2005), where Ralph Nader challenged Ohio's ballot access laws during the 2004 presidential election, is illustrative. Nader lost his case in the district court, and after the election continued to press his argument before the Sixth Circuit. The Sixth Circuit concluded that the matter was moot and then refused Nader's motion to vacate the district court's judgment. It explained:

> we cannot conclude that [Nader is] entitled to the extraordinary equitable remedy of *vacatur*. ... [Nader] could and should have acted more

> expeditiously in asserting [his] legal rights to ensure that [his] case was resolved prior to that election.

Id. at 258.

The Court therefore concluded that "[b]ecause at least some of the blame for the mootness of this case lies with [Nader], we cannot grant [him] the extraordinary equitable remedy of vacating the district court's judgment." *Id.*

For this same reason, the Legislature's inexplicable failure to move for expedited consideration of this appeal before H.B. 194 was suspended forces it to shoulder "at least some of the blame for the mootness." And because it is partly to blame, it is not entitled to the "extraordinary equitable remedy" of *vacatur*.

CONCLUSION

The appeal should be DISMISSED. Alternatively, the District Court's preliminary injunction should be AFFIRMED.

Respectfully submitted,

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/s/ Mark R. Brown
Mark R. Brown

DESIGNATION OF RELEVANT DOCUMENTS
UNDER 6TH CIRCUIT RULE 30(b)

Record Entry No.	Description of District Court Document
2	First Amended Complaint
13	Order Granting Preliminary Injunction
14	Notice of Compliance with Court Order
15	Motion to Intervene By Legislature
16	Notice of Appeal By Legislature
18	Motion to Compel Expedited Relief
23	Nunc Pro Tunc Order of the Court
24	Transcript of Evidentiary Hearing
27	Declaration of Robert Bridges