UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Libertarian Party of Ohio, *et al.*,

Plaintiffs,

v. **Case No. 2:13–cv–953**

Jon A. Husted, **Judge Michael H. Watson**
Ohio Secretary of State,

Defendant.

OPINION AND ORDER

Plaintiffs and Intervener Plaintiffs are minor political parties and their officers and candidates. They bring claims under 42 U.S.C. § 1983, asserting, *inter alia*, that Ohio Senate Bill 193 ("S.B. 193") violates their rights under the First and Fourteenth Amendment to the United States Constitution by placing unreasonable burdens on the formation of minor parties and their candidates' access to Ohio election ballots. The Court preliminarily enjoined the retroactive application of S.B. 193's requirements to the 2014 election cycle and ordered the Ohio Secretary of State to provide Plaintiffs and Intervener Plaintiffs access to the primary and general election ballot in 2014 in accordance with the requirements of the Secretary's Directive 2013-02. ECF No. 47. The Court issued the injunction on the ground that changing ballot access law in the midst of an election cycle violated due process. The Court did not at that time determine whether S.B. 193 was unconstitutional on its face.

Intervener Plaintiffs now move for summary judgment on the merits of their claim that S.B. 193 is unconstitutional on its face as it applies prospectively. ECF No. 165. The original Plaintiffs join in that motion. Mot. 11 n.3, ECF No. 261-1. Intervener Defendant State of Ohio moves for summary judgment in its favor, arguing that S.B. 193 is not facially invalid. For the following reasons, the Court denies Intervener Plaintiffs' summary judgment motion and grants Intervener Defendant's motion for summary judgment.

I. BACKGROUND

Plaintiffs filed the original complaint in this case in November 2013. Intervener Plaintiffs filed their complaint in this action in December 2013. Intervener Plaintiffs include: Robert M. Hart individually, Robert Fitrakis on behalf of the Ohio Green Party ("OGP"), Max Russell Erwin individually, and Don Shrader on behalf of the Constitution Party of Ohio ("CPO").

Prior litigation by minor parties challenging Ohio's ballot access laws sets the stage for the present case. Plaintiff Libertarian Party of Ohio ("LPO") successfully challenged Ohio ballot access laws in three prior lawsuits. First, in 2004, Ohio law provided that if a party did not receive five percent of the votes for its presidential or gubernatorial candidate, the party was required to gather signatures of voters equal to one percent of the votes cast for governor or president in the previous general election and to file its registration petition 120 days in advance of the primary election, which equated to one year in advance of

the general election in presidential election years. The LPO and its members filed an action in this Court challenging the requirements on the ground that the combined effect of the requirements severely burdened their First Amendment and Fourteenth Amendment rights of free association. Another branch of this Court granted the Secretary's motion for summary judgment, and the LPO appealed. The Sixth Circuit reversed. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006). The appellate court in *Blackwell* found that the Ohio law placed severe burdens on the First Amendment rights to free speech and association of the LPO, its members, and potential voters-supporters, was not narrowly tailored, and did not serve a compelling state interest. *Id*.

The Ohio Legislature did not enact new legislation in response to the *Blackwell* decision despite requests by the Secretary to do so. The Secretary then issued Directive 2007-09 in an attempt to bring Ohio law into compliance with *Blackwell*. That directive purported to alter Ohio law by reducing the signature requirement to a number equal to .5% of the votes cast for governor or president in the prior general election and changing the filing deadline to 100 days before the primary election.

The LPO then filed another lawsuit in this Court seeking a preliminary injunction enjoining the Secretary from enforcing Directive 2007-09. A different branch of this Court held that the Secretary lacked authority to issue the directive and that the directive was in any event unconstitutional because it still placed

severe burdens on the First Amendment rights of the LPO and its supporters. *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1012–13, 1014 (S.D. Ohio 2008). The Court found that the LPO had the requisite community support and accordingly issued a preliminary injunction ordering the Secretary of State to place the LPO candidates on the ballot for the 2008 election. *Id.* at 1015–16 (citing *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976)).

Afterwards, the Secretary entered into a consent decree in which she agreed not to enforce Directive 2007-09. She then issued Directive 2009-21 which recognized the LPO as well as the OGP, the CPO, and the Socialist Party as qualified to appear on the primary and general election ballots. In January 2011, the Secretary issued Directive 2011-01, which reinstated Directive 2009-21 and provided the LPO and the other minor parties ballot access for 2011.

On July 1, 2011, the Ohio Governor signed Ohio House Bill 194 ("H.B. 194"). H.B. 194 differed from the law that the Sixth Circuit struck down in *Blackwell* only insofar as it changed the deadline for filing signatures from 120 days before the May primary to ninety days before the primary. The LPO then filed another federal lawsuit seeking a preliminary injunction blocking enforcement of H.B. 194. Suggesting the burdens of H.B. 194 were more severe than the burdens addressed in *Brunner*, another branch of this Court found that H.B. 194 violated the LPO's First Amendment rights. *Libertarian Party of Ohio v. Husted*, No. 2:11–cv–722, 2011 WL 3957259, at *6 (S.D. Ohio Sept. 7, 2011),

vacated as moot, 497 F. App'x 581 (6th Cir. 2012).[1]

On November 6, 2013, the Ohio Legislature passed, and the Governor signed, S.B. 193. S.B. 193 expressly voids the Secretary's previous directives which recognized minor parties as ballot qualified for both primary and general elections. S.B. 193 § 3 ("Directives 2009-21, 2011-01, and 2013-02 issued by the Secretary of State are hereafter void and shall not be enforced or have effect on or after the effective date of this act.").

S.B. 193 provides two distinct methods by which a political group can obtain minor party recognition by the State and qualify for ballot access. First, a minor party may obtain party status if its candidate for governor or nominee for presidential electors obtain the requisite number of votes:

> "Minor political party" means any political party organized under the laws of this state that meets either of the following requirements:
>
> (a) Except as otherwise provided in this division, the political party's candidate for governor or nominees for presidential electors received less than twenty percent but not less than three percent of the total vote cast for such office at the most recent regular state election. A political party that meets the requirements of this division remains a political party for a period of four years after meeting those requirements.
>
> (b) The political party has filed with the secretary of state, subsequent to its failure to meet the requirements of division (F)(2)(a) of this section, a petition that meets the requirements of section 3517.01 of the Revised Code.
>
> A newly formed political party shall be known as a minor political party until the time of the first election for governor or president which occurs

[1]H.B. 194 was repealed after it was challenged in a voter referendum.

> not less than twelve months subsequent to the formation of such party, after which election the status of such party shall be determined by the vote for the office of governor or president.

Ohio Rev. Code § 3501.01(F)(2). Minor parties formed under the first method are deemed established political parties, and their candidates may participate in primary elections. Ohio Rev. Code §§ 3517.013 & 3513.01(A). Second, a minor party may obtain recognition by filing a formation petition that meets the following requirements:

> (I) The petition is signed by qualified electors equal in number to at least one percent of the total vote for governor or nominees for presidential electors at the most recent election for such office.
>
> (ii) The petition is signed by not fewer than five hundred qualified electors from each of at least a minimum of one-half of the congressional districts in this state. If an odd number of congressional districts exists in this state, the number of districts that results from dividing the number of congressional districts by two shall be rounded up to the next whole number.
>
> (iii) The petition declares the petitioners' intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding general election, held in even-numbered years, that occurs more than one hundred twenty-five days after the date of filing.

Ohio Rev. Code § 3517.01(A)(1)(b). Party formation petitions must be filed more than 125 days before a general election held in even-numbered years in order for the party's candidates to appear on the ballot for that election. Ohio Rev. Code § 3517.012(A)(1). The Ohio Secretary of State or board of elections must determine the sufficiency and rule on any protests of formation petitions no later than ninety-five days before the general election. Ohio Rev. Code

§ 3517.012(A)(2)(d). Political parties formed by petition are deemed new, and their candidates do not have access to primary election ballots.

In addition to the formation petition requirements, individual minor party candidates must file nominating petitions to appear on the ballot. Under S.B. 193, nominating petitions must meet the following requirements:

> (a) If the candidacy is to be submitted to electors throughout the entire state, the nominating petition, including a petition for joint candidates for the offices of governor and lieutenant governor, shall be signed by at least fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years.
>
> (b) Except as otherwise provided in this division, if the candidacy is to be submitted only to electors within a district, political subdivision, or portion thereof, the nominating petition shall be signed by not less than five qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years.

Ohio Rev. Code § 3517.012(B)(2). Candidate petitions must be filed after the filing of the minor party's formation petition but no later than 110 days before the general election. Ohio Rev. Code § 3517.012(B)(1). The Ohio Secretary of State or board of elections must determine the sufficiency of nominating petitions no later than ninety-five days before the general election. Ohio Rev. Code § 3517.012(B)(3).

II. SUMMARY JUDGMENT STANDARD

The standard governing summary judgment is set forth in Federal Rule of Civil Procedure 56(a), which provides: "The court shall grant summary judgment if

the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must grant summary judgment if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007).

Here, both sides agree that there are no genuine issues of material fact and that the parties' dispute presents only a question of law, namely, whether S.B. 193 is unconstitutional on its face. Nevertheless, the Court is mindful that the Sixth Circuit Court of Appeals recently reversed and remanded a district court's decision that granted summary judgment to the plaintiffs in a ballot access law challenge. *See Green Party of Tennessee v. Hargett*, 767 F.3d 533, 548–49 (6th Cir. 2014). The Sixth Circuit found that the factual record was insufficient to make a determination on the magnitude of the burden the state law imposed or the state's interest. In *Hargett*, however, the submission of evidence led the district court to convert a facial challenge to the law into an as-applied challenge. In the instant case, in contrast, Intevener Plaintiffs assert *only* a facial challenge to S.B. 193 as it applies prospectively.[2] Mot. 4, ECF 165-1.

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[2]Facial attacks are disfavored even in First Amendment election cases because they often require courts to anticipate a question of constitutional law in advance of the necessity of deciding it or to formulate a rule of constitutional law broader than is

III. DISCUSSION

Plaintiff Interveners argue that S.B. 193 is unconstitutional on its face because it violates the First and Fourteenth Amendments. They assert this is so because S.B. 193 severely burdens the access of minor parties to the ballot yet the law does not advance any compelling state interests. Plaintiff Interveners contend S.B. 193 severely burdens their access to the ballot in several ways: (1) S.B. 193 eliminates minor party candidates' access to primary ballots; (2) S.B. 193 precludes minor party access to the ballot in odd-numbered years; (3) S.B. 193 requires minor party formation petitions to be filed more than 125 days before an even-numbered year general election; (4) S.B. 193 requires minor parties to field candidates for governor and president in general elections; and (5) the requirements of S.B. 193, in their totality, constitute a severe burden.

Intervener Defendant asserts that S.B. 193 does not impose severe burdens, and that its provisions mirror those of other states' ballot access statutes that have withstood constitutional challenges. Intervener Defendant also contends that Intervener Plaintiffs' claims are based on a misreading of S.B. 193. In particular, Intervener Defendant maintains that S.B. 193 does not preclude minor party candidates from appearing on odd-numbered year ballots. Moreover, Intervener Defendant argues that S.B. 193 does, in fact, provide access to

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required by the precise facts to which it is to be applied. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008).

primary ballots for minor parties' candidates.

The First Amendment provides in part: "Congress shall make no law. . . abridging the freedom of speech, . . . or right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. The Constitution does not expressly contain a right to associate. *United States v. Robel*, 389 U.S. 258, 283 (1967). Nonetheless, the Supreme Court has recognized that freedom of association is required for the people to effectively exercise their First Amendment rights to speak freely, to assemble, and to petition for redress of grievances. *Id*. Laws that limit the ability of a political party to appear on a general election ballot implicate the freedom of association of individuals to associate through political parties as well as the rights of voters to effectively cast their votes. *Anderson v. Celebrezze*, 460 U.S. 780, 786–87 (1983); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir. 2006).

The parties agree that to determine whether S.B. 193 passes constitutional muster, the Court must apply the analytical framework derived from *Anderson* and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson/Burdick* test, the Court must first consider the character and magnitude of the burdens the law places on the plaintiff's political activity. *Hargett*, 767 F.3d at 546 (quoting *Anderson*, 460 U.S. at 789). Then, the Court must examine the precise interests advanced by the State to justify the burdens the law imposes. *Id*. Last, the Court

must consider the strength and legitimacy of the State's interests and the degree to which the interests actually require the State to burden the plaintiff's rights. *Id.*; *see also Blackwell*, 462 F.3d at 585–86.

The *Anderson/Burdick* test recognizes the tension between the competing interests at stake. On the one hand, "[t]he right of individuals to associate in political organizations, and the right of citizens to cast a meaningful vote, are among the most important values in our democracy."*Hargett*, 767 F.3d at 545. On the other hand, "states may impose reasonable restrictions on ballot access to ensure that political candidates can show a significant modicum of support from the public, . . . and to avoid election- and campaign-related disorder." *Id.* (internal cites and quotations omitted). In applying the test, the Court remains mindful that "the State may not be a 'wholly independent or neutral arbiter' as it is controlled by the political parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Blackwell*, 462 F.3d at 587 (quoting *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring)).

Accordingly, the Court will first determine the magnitude of the burden S.B. 193 imposes on minor political parties and voters. In doing so, the Court will consider the combined effect of the statute's requirements. After making that determination, the Court will decide whether the State interests that S.B. 193 serves warrant the degree of burden it places on Intervener Plaintiffs' political

activity and the right of voters to effectively cast their votes.

A. Magnitude of Burden

Intervener Plaintiffs assert that the combined effect of S.B. 193's provisions places severe burdens on their right to access Ohio election ballots. Intervener Defendant argues that some of the alleged burdens that Plaintiff Interveners identify are based on a misreading of S.B. 193. Intervener Defendant also maintains that the burdens that S.B. 193 actually imposes are minimal and in line with similar statutes that have been upheld in constitutional challenges in federal courts.

The first prong of the *Anderson/Burdick* test determines the level of scrutiny that applies to the state law at issue. The degree of scrutiny often drives the outcome in constitutional challenges, so the first step is crucial. As the Sixth Circuit observed:

> The first step in this analysis is important. When the restrictions imposed by the state are "severe," they will fail unless they are narrowly tailored and advance a compelling state interest. *Burdick*, 504 U.S. at 434. If, however, the regulations are minimally burdensome and nondiscriminatory, rational-basis review applies, and the regulations will usually pass constitutional muster if the state can identify "important regulatory interests" that they further. *Id*. Of course, many regulations "fall in between these two extremes." *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). In these situations, courts engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it. *See Anderson*, 460 U.S. at 789; *Obama for Am.*, 697 F.3d at 429.

Hargett, 767 F.3d at 546. When examining the degree of burden a state law imposes on ballot access, courts have considered: (1) the nature of the

associational rights at stake; (2) whether alternative avenues exist to exercise those rights; (3) the legistlation's effect on voters, parties, and candidates; (4) evidence of how the restriction has actually impacted the ballot access process; and (5) the nature of the State's interests given the scope of the election at issue. *Blackwell*, 462 F.3d at 867. The key factor is the level of importance ascribed to the particular associational right the challenged law affects. *Id.* A statute is deemed to impose a severe burden when it affects a political party's ability to perform its primary functions, which include organizing, recruiting supporters, choosing its candidates, and voting for its candidates in a general election. *Id.* When ballot access is at issue, the inquiry "focus[es] on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Id.* at 588 (quoting *Anderson*, 460 U.S. at 793).

The Court must also consider the degree to which the challenged law burdens the rights of voters. *Id.*

> While a voter is not guaranteed that one of the political parties will reflect his or her values, "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." *Williams*, 393 U.S. at 31; *see also Anderson*, 460 U.S. at 787. "In short, the primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties." *Anderson*, 460 U.S. at 794.

Id. at 588–89.

With these principles in mind, the Court will examine whether and to what degree S.B. 193 burdens minor parties' access to Ohio election ballots as well as the rights of voters. The Court will first discuss the various burdens that Plaintiff Interveners argue S.B. 193 imposes as well as Intervener Defendant's responses concerning those alleged burdens. After doing so, the Court will assess the collective magnitude of the burdens, which in turn will determine the level of scrutiny applicable to S.B. 193.

1. Access to primary ballots

Intervener Plaintiffs assert that S.B. 193 effectively prevents minor parties from accessing primary elections and thereby eliminates the opportunity for them to identify supporters and the ability of voters to affiliate with those parties. They maintain that under Ohio law, a voter can choose to affiliate with a party only by requesting that party's ballot in a primary election. Intervener Plaintiffs also contend that eliminating primary access for minor parties deprives them of significant benefits, including the ability to obtain party membership lists and build name recognition.

Intervener Defendant responds with three arguments. First, it contends minor parties do not have a recognized constitutional right to participate in primary elections. Second, Intervener Defendant maintains that, in any event, the lack of access to primaries does not severely burden minor parties. In that regard, Intervener Defendant notes that Plaintiffs' elections expert, Richard

Winger, testified that he disfavors minor party participation in primaries. Third, Intervener Defendant avers that S.B. 193 does not completely bar minor parties from participating in primaries. That is, while minor parties formed by petition have no access to primary elections, S.B. 193 permits primary participation by parties whose candidates for governor or president have obtained the requisite three percent of the total votes cast for governor or presidential electors in the most recent general election.

Intervener Defendant is correct that the United States Supreme Court rejected an equal protection challenge to a state law that provided primaries for major parties but required minor parties to choose their candidates through conventions. *Am. Party of Texas v. White*, 415 U.S. 767, 781–82 (1974). The Court explained:

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.

Id. Intervener Plaintiffs acknowledge that minor parties do not have a constitutional right to participate in primary elections. Nonetheless, Intervener Plaintiffs aver that lack of access to primaries, combined with S.B. 193's other burdensome requirements, results in a severe burden to their participation in the election process. Intervener Plaintiffs maintain that lack of access to primaries

prevents minor parties from obtaining information about voters who would potentially support them. Moreover, Intervener Plaintiffs argue that exclusion from primaries will deprive voters of the opportunity to affiliate with a minor party because, under Ohio law, voters may change their party affiliation *only* at the polling place during a primary election.

At the outset, the Court recognizes that recruiting supporters is a core function of political parties. *Blackwell*, 462 F.3d at 867. Nonetheless, the Court finds that Intervener Plaintiffs have failed to demonstrate that lack of access to primaries significantly burdens minor parties' ability to recruit supporters. First, the Court finds no merit in Intervener Plaintiffs' assertion that the denial of access to primaries deprives them of the ability to reach potential supporters. The decision upon which Intervener Plaintiffs primarily rely for this proposition was decided when the internet was in its infancy. *See Baer v. Meyer*, 577 F. Supp 838, 843 (D. Colo. 1984). The internet has advanced exponentially since *Baer* and now includes several well known social media platforms that reach large numbers of people. At this point in history, minor parties may use current technology to reach out to and identify like-minded voters who would support them.

In addition, traditional methods of reaching potential supporters remain available to minor parties. As the Eleventh Circuit recently observed:

> It is worth noting that Plaintiffs have never maintained that Alabama's election law forecloses any other method of voter communication.

> Among the ways the Party Plaintiffs and Party Candidates could have communicated with voters were commercials, signs, speeches, debates, town-hall meetings, endorsements, canvassing, social networking, websites, newsletters, bumper stickers, handshaking, baby-kissing, robodialing, leafleting, good-old-fashioned stumping, etc. If any Alabama law restricted Plaintiffs rights to utilize those time-tested campaigning tools, they are not at issue in this case.

Stein v. Alabama Secretary of State, 774 F.3d 689, 695 n.7 (11th Cir. 2014). Intervener Plaintiffs seem to suggest that primaries are the only means for minor parties to drum up support. But they fail to explain why that is so, or why other means of identifying supporters are insufficient. For these reasons, Intervener Plaintiffs have not demonstrated that access to primaries is necessary or even particularly useful to their core function of recruiting supporters.

Second, the Court rejects Intervener Plaintiffs' argument that primaries are the only means for voters to choose to associate with minor parties. Intervener Plaintiffs' use of the term "associate" does not accurately frame the issue, which concerns party "affiliation" for purposes of Ohio law. While the Ohio statutory concept of affiliation is a form of association, the First Amendment right of association is a broader concept than "affiliation" as that term is used in Ohio's election laws.

The key interest of voters in primaries is selecting a party's candidate to run in a general election. From a practical standpoint, that interest is not severely burdened by excluding minor parties from primaries because minor parties rarely have contested primary elections. Winger Dep. 59–60, ECF No. 38-1. In

addition, while affiliation may be a form of speech by voters, the chief practical significance of "affiliation" to voters is that one who is affiliated with one political party generally cannot vote in another party's primary. *See* Ohio Rev. Code § 3513.19.[3] Since minor parties formed by petition do not participate in primaries, that particular limitation has no effect on those parties or voters. Notably, S.B. 193 does not interfere with any voter's ability to associate with a petition-formed minor party by publically declaring allegiance to it, supporting it financially, volunteering, or voting for that minor party's candidates in general elections.

Furthermore, once a minor party becomes qualified to participate in primary elections by obtaining the requisite number of votes for its gubernatorial or presidential candidate, S.B. 193 makes it relatively easy for voters to affiliate with a minor party at a primary because the law permits them to do so "regardless of prior party affiliation." Ohio Rev. Code § 3517.016. For purposes of Intervener Plaintiffs' facial challenge, the Court does not detect a severe burden on the exercise of First Amendment rights resulting from the inability of voters to declare affiliation with petition-formed minor parties at primary elections.

For the above reasons, the Court holds that lack of access to primaries by minor parties created by petition does not create a severe burden on the right of

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[3]Ohio law also provides that for purposes of signing or circulating a petition, an elector can become affiliated with a political party if the elector did not vote in any primary in the last two years. Ohio Rev. Code § 3513.05, ¶ 7; *Maschari v. Tone*, 103 Ohio St. 3d 411, 415 (2004).

association of those minor parties or the rights of voters. In addition to that conclusion, as discussed below, the Court finds that primary participation itself imposes some inherent burdens on minor parties. Thus, to the extent lack of primary access imposes some burden, that burden should be viewed with the understanding that providing primary access also poses potential downsides for minor parties.

As commonly understood, primary elections serve the purpose of permitting voters to nominate "persons as candidates of political parties for election to offices to be voted for at the succeeding general election." Ohio Rev. Code. § 35. The LPO's elections expert, Richard Winger, opined that it makes little sense for minor parties to participate in primary elections because minor parties seldom have primary contests. Winger Dep. 59–60, ECF No. 38-1.

While Intervener Plaintiffs assert primary participation provides them certain advantages, it appears potential supporters typically do not go to the polls in significant numbers to cast votes in uncontested minor party primaries. And as Defendant Intervener notes, when minor party candidates have participated in primary elections in Ohio, turnout for those candidates has been low. In fact, voter turnout for Ohio primaries is low in general. Only about twenty-five percent of registered electors vote in Ohio primary elections. The results of the May 2014 primary election in which Intervener Plaintiffs' candidates participated illustrates that reality. At the time of that primary, more than 8 million Ohioans were

registered to vote. About 1.8 million of those electors voted in the 2014 primary. Of that number, 3074 voted Constitution Party, 1,315 voted Green Party, and 5,476 voted Libertarian Party. At the very least, low voter turnout must be considered in assessing the impact of the lack of primary access on minor parties formed by petition.

Richard Winger also stated that primary participation by minor parties is not advisable even when the primary is contested because primary voters tend not to be well informed about minor party candidates. Winger Dep. 60, ECF No. 38-1. As an example, he discussed a 1986 primary election in Alaska in which uninformed voters nominated a minor party candidate who had fled the state after being indicted for fraud. *Id.* Winger indicated that nomination by convention is therefore preferable for minor parties because it offers people the opportunity to talk to nominees and make an informed choice. *Id.* at 60–61.

The *Blackwell* decision identifies another potential downside of primary participation by minor parties. In that case, the Sixth Circuit struck down Ohio's previous ballot access scheme because the petition deadline—set 120 days before the primary election—was unduly burdensome. *See Blackwell*, 462 F.3d at 586–91. The *Blackwell* court confirmed that Ohio had authority to require minor parties to participate in primary elections so long as it avoided combining the primary mandate with other requirements such that the aggregate effect severely burdened associational rights. *Id.* at 594. The court suggested that the

burden could be reduced either by moving the petition deadline closer to the primary or by eliminating the primary mandate altogether. *Id.* In S.B. 193, Ohio chose to eliminate the primary for petition-qualified minor parties, consistent with the dicta in *Blackwell*.

The court in *Blackwell* did not expressly consider whether lack of access to primaries would be burdensome for minor parties. It did, however, identify one drawback that primary participation would impose on minor parties. One of the rationales for striking down the law was the early petition requirement, which required minor parties to mobilize and expend limited resources before the voting public was focused on politics and the general election. *Id.* at 586 ("Deadlines early in the election cycle require minor political parties to recruit supporters *at a time when the major party candidates are not known* and when the populace is not politically energized." (emphasis added)).

Low voter turnout at Ohio primary elections appears to confirm that the voting public is not "politically energized" at that point in the election process. Rather, the public begins to focus its attention to politics in earnest *after* the primary, or, in case of presidential elections, the major parties' conventions. At that point, as *Blackwell* suggests, minor party candidates can distinguish their political positions from those of the major party candidates against whom they will actually compete in the general election. *See id.* In other words, the disadvantage to minor parties identified in *Blackwell* would exist to some if not to

the same degree regardless of how close a petition deadline is to the primary election. *See Stein*, 774 F.3d at 696–98 (upholding Alabama law providing for minor party formation by petition after the primary as less burdensome than requiring primary participation with a petition deadline well before the primary).

Consequently, primary participation, mandated or otherwise, imposes an inherent disadvantage to minor parties given their limited resources. While those burdens might not be severe by themselves, the Court finds it appropriate to consider them along with the degree of burden, if any, resulting from denying minor parties access to primary elections.

The Court has found that Intervener Plaintiffs have not established that lack of access to primary elections severely burdens their associational rights or the rights of voters. Even if that were not so, to the extent associational rights are burdened by lack of primary access, that burden should be evaluated with the understanding that the alternative poses its own disadvantage.

More fundamentally, Intervener Plaintiffs have failed to show that lack of access to primary elections severely inhibits minor parties' ability to perform their essential functions, such as "organizing, recruiting supporters, choosing its candidates, and voting for its candidates in a general election." *Blackwell*, 462 F.3d at 867. Minor parties can continue to perform all of those functions regardless of access to primary elections.

Last, as Intervener Defendant notes, and Intervener Plaintiffs concede, minor parties formed by obtaining the requisite percentage of votes become qualified for four years and may participate in primary elections. Ohio Rev. Code § 3517.01(A)(1)(a). While minor parties formed by petition cannot access primaries, minor parties that qualify by election have such access. Hence, while S.B. 193 limits minor parties' access to primaries, it does not foreclose it entirely.

In sum, for purposes of Intervener Plaintiffs' facial challenge to S.B. 193, the Court holds that petition-formed minor parties' lack of access to primary elections does not severely burden the associational rights of minor parties or voters.

2. Access to the ballot in odd-numbered years

Intervener Plaintiffs also argue that S.B. 193 prevents them from participating in elections that take place in odd-numbered years. Intervener Defendant does not dispute that eliminating minor parties from fielding candidates in odd-numbered year elections would constitute a severe burden to their associational rights as a well as the rights of voters. Rather, Intervener Defendant contends that S.B. 193 simply does not bar minor party candidates from participating in odd-number year elections.

Intervener Plaintiffs base their argument on a provision of S.B. 193 that states:

> When a party formation petition meeting the requirements of section 3517.01 of the Revised Code declaring the intention to organize a

> political party is filed with the Secretary of State, the new party comes into legal existence on the date of filing and *is entitled to nominate candidates to appear on the ballot at the general election held in even-numbered years that occurs more than one hundred twenty-five days after the date of filing.*

Ohio Rev. Code § 3517.012(A)(1) (emphasis added). Essentially, Intervener Plaintiffs interpret this provision to mean that the only elections in which newly formed parties are *entitled* to participate are general elections in even-numbered years.

Intervener Defendant asserts that the above-quoted language is permissive rather then restrictive. It argues a proper reading of the statute is that minor parties come into existence on the date the formation petition is filed, at which time they may participate in odd-numbered year general elections, *and* minor party candidates may participate in even-numbered year general elections provided the formation petition is filed far enough in advance. Intervener Defendant also maintains that nothing in S.B. 193 expressly prevents minor parties formed by petition from participating in odd-numbered year elections.

To the extent the issue boils down to the parties' competing interpretations of S.B. 193, the Court must apply the doctrine of constitutional avoidance. "[I]f there are two permissible statutory interpretations, a court should choose the interpretation that will save the statute." *Anderson v. Spear*, 356 F.3d 651, 668 (6th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (citing *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991)). Intevener Plaintiffs interpret S.B. 193 in a manner that

the statute might place an unconstitutional burden on the associational rights of minor parties by precluding them from participating in odd-numbered year elections. Intevener Defendant construes the statute so that it does not impose such a limit.

Viewing the statutory scheme as a whole, Intervener Defendant's construction is permissible. General elections in even-numbered years include races for governor and president. As the statute is structured, those are the elections in which a minor party may obtain recognition as well as access to primary elections for a period of four years. To that end, to participate in a general election in an even-numbered year, minor parties must file their formation petitions more than 125 days beforehand. That deadline provides county boards of elections and the Secretary of State sufficient time to verify the petitions and determine the validity of any protests before those general elections takes place. Thus, S.B. 193's specific requirements for even-numbered year general elections reflect the Ohio General Assembly's recognition of the significance of those elections to minor parties.

Furthermore, S.B. 193 provides that a minor party comes into legal existence on the date a candidate petition is filed. Ohio Rev. Code § 3517.012(A)(1). S.B. 193 does not state that such a petition could not be filed in an odd-numbered year. It would make little sense for the statute to recognize the minor party on the date of filing in an odd-numbered year only to deny it the

ability to field any candidates for that year. For these reasons, the Court finds that S.B. 193 can reasonably be read to allow minor parties to participate in odd-numbered year elections.

The principle of constitutional avoidance requires the Court to evaluate S.B. 193 in accordance with Intervener Defendant's reasonable interpretation. *Id.* Under that interpretation, S.B. 193 does not limit newly formed minor parties to elections that take place in even-numbered years, and therefore places no burden on minor parties' associational rights or the rights of voters.

Intervener Plaintiffs also assert that Intervener Defendant's argument conflicts with an assertion it made earlier in this lawsuit to the effect that without a specific law passed by the General Assembly, minor parties have no access to any ballot in Ohio. The Court rejects Intervener Plaintiffs' argument. In opposing the as-applied challenge to retroactive application of S.B. 193, Intervener Defendant argued that minor parties lacked access to the ballot in the absence of an Ohio law permitting such access. But that argument was advanced as applicable to the time period during which Ohio had *no* valid statute governing minor parties' access to the ballot, and access occurred only as a result of federal court injunctions and directives from the Secretary of State. Here, in contrast, the Court is reviewing a law that expressly provides minor parties with two avenues for ballot access.

In sum, the Court finds that S.B. 193 can reasonably be interpreted as not barring minor parties from accessing the ballot in odd-numbered year elections. Under the doctrine of constitutional avoidance, the Court determines the constitutionality of S.B. 193 in accordance with that interpretation. Accordingly, S.B. 193 does not impose any burden whatsoever on minor party's access to Ohio election ballots in odd-numbered years.[4]

3. Petition requirements

Intervener Plaintiffs also argue that S.B. 193's requirements for nominating and candidate petitions, in conjunction with its other provisions, severely burden minor parties' First Amendment rights. Intervener Defendant asserts that S.B. 193's petition requirements are less burdensome than the requirements of other States' ballot access laws that have withstood constitutional challenges in federal courts.

S.B. 193 requires party formation petitions to be "signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election for such office." Ohio Rev. Code § 3517.01(b)(I). The petition must also contain signatures of at least 500 qualified electors from each of at least half of the congressional districts in Ohio. Ohio Rev. Code § 3517.01(b)(ii). In addition, S.B. 193 requires that the

[4]In reaching this conclusion, the Court understands that the State of Ohio, as well as its elected officials, officers, and agents will not attempt at some later date to apply S.B. 193 in a manner inconsistent with the State of Ohio's representations in this case.

formation petition state the parties' intention to participate in the next general election that occurs more than 125 days after the petition is filed. Ohio Rev. Code § 3517.01(b)(iii).

Furthermore, S.B. 193 requires candidates for statewide offices to file a nominating petition "signed by at least fifty qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years." Ohio Rev. Code § 3517.012(B)(2)(a). Candidates for local offices must file a nominating petition "signed by not less than five qualified electors who have not voted as a member of a different political party at any primary election within the current year or the immediately preceding two calendar years." Ohio Rev. Code § 3517.012(B)(2)(b).

Intervener Plaintiffs assert that several of S.B. 193's petition requirements impose significant burdens on minor parties. First, Intervener Plaintiffs argue that S.B. 193 is burdensome because it requires two tiers of petitions, namely, a formation petition for the party and separate nominating petitions for each candidate. *See* Ohio Rev. Code § 3517.012(A) & (B). Second, they maintain that S.B. 193 imposes an onerous burden on minor parties by requiring them to obtain 500 signatures of qualified electors from each of at least one-half of the congressional districts in Ohio. Third, Intervener Plaintiffs contend that S.B. 193 imposes a substantial burden because the petition may be signed only by

"qualified electors who have not voted for a member of a different party at any primary election within the current year. Ohio Rev. Code § 3517.012(B)(2). Fourth, Intervener Plaintiffs assert that S.B. 193 burdens minor parties because it allows the Secretary of State to delay determining the sufficiency of party formation petitions and candidate nominating petitions until as late as ninety-five days before the general election. *See* Ohio Rev. Code § 3517.012(A)(2)(d). Intevener Plaintiffs suggest the late eligibility determination prevents them and their candidates from competing with the major parties until very late in the election cycle.

Intervener Defendant characterizes S.B. 193's petition requirements as less burdensome than ballot access statutes that have been upheld by other federal courts. Intervener Defendant also argues that the two-tier petition requirement is not burdensome in light of the low number of signatures required for the formation and nominating petitions.

Intervener Defendant also maintains that it should not be difficult for minor parties to obtain the required number of signatures because roughly only one quarter of registered Ohio electors cast votes in primary elections. As a result, about three quarters of registered Ohio voters are eligible to sign party formation petitions.

The Court agrees with Intervener Defendant that S.B. 193's petition requirements do not severely burden minor parties' right of association or the

rights of voters. Although S.B. 193 requires both party formation and candidate nominating petitions, the impact of that dual requirement must be viewed in conjunction with the modest number of signatures candidates are required to gather. In particular, the number of signatures required for candidate petitions is relatively low; statewide candidates must obtain only fifty signatures, and the requirement for local candidates is only five signatures. Consequently, requiring candidates to file nominating petitions does not constitute a significant burden.

Intervener Plaintiffs do not expressly challenge the one percent signature requirement for party formation petitions as burdensome in and of itself. As Intervener Defendant suggests, a comparatively low one percent requirement coupled with a relatively late petition deadline places these provisions of S.B. 193 in the same ballpark as similar statutes that have been upheld. *See Green Party of Arkansas v. Martin*, 649 F.3d 675, 686–87 (8th Cir. 2011) (collecting cases).

The Court also finds that the geographic component for party petitions does not impose a severe burden. Ohio currently has sixteen congressional districts. Minor parties must therefore gather signatures in at least eight of those districts. Once again, however, the number of signatures that a minor party must gather from those districts is relatively low—500 for each district, or a total 4000 signatures. Given the manner in which the Ohio congressional districts have been drawn, there are locations, such as Cuyahoga County, where several districts are within a relatively close distance. The Court finds that the geographic

component of the petition requirement does not unduly burden the associational rights of minor parties for purposes of a facial challenge to S.B. 193.

Intervener Defendant does not cogently respond to Intervener Plaintiffs' assertion that S.B. 193 burdens minor parties by allowing the Secretary of State until as late as ninety-five days before the general election to make a final decision on eligibility. *See* Ohio Rev. Code § 3517.012(A)(2)(d). Intervener Plaintiffs maintain that the late eligibility determination hinders their ability to compete with the major parties until very late in the election cycle.

Intervener Plaintiffs fail to explain how the late eligibility determination prevents them from competing with the major parties. Granted, if a minor party or candidate is deemed ineligible, it could be argued that any resources devoted to campaigning before that determination will have been wasted. The Court cannot say, however, that the mere risk of disqualification equates to a significant burden on minor parties' right to associate in these circumstances. In light of the history of this lawsuit, the Court would expect minor parties to meticulously follow Ohio law's requirements for such petitions. In any event, Intervener Plaintiffs have not shown that the date of the eligibility determination hampers minor parties' ability to compete.

Several federal courts have held that early petition deadlines are inherently burdensome and late deadlines less so. *See Blackwell*, 462 F.3d at 586 (citing decisions). Logic dictates that a late petition deadline would require a

correspondingly late eligibility determination. Here, S.B. 193 requires party formation petitions to be filed more than 125 days before the general election. The eligibility determination must be made no later than ninety-five days before the general election. Thus, if a party files its formation petition on the deadline, then the boards of election and Secretary of State have thirty-one days to complete the entire eligibility process, including ruling on any protests. Intervener Plaintiffs do not suggest that thirty-one days is an unreasonable period of time to determine eligibility. In that sense, Intervener Plaintiffs' argument puts States in a precarious "damned if you do" position; early petition deadlines are burdensome, but late petition deadlines are also burdensome if the State sets aside time to determine the validity of petitions.[5] For that additional reason, the Court rejects Intervener Plaintiffs' unsupported assertion that an eligibility determination deadline ninety-five days before the general election constitutes a significant burden.

In sum, the Court finds that for purposes of their facial challenge, Intervener Plaintiffs have failed to demonstrate that S.B. 193's petition requirements impose a severe burden on the associational rights of minor parties or the right of voters to effectively cast their votes.

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[5]In a similar vein, LPO's elections expert, Richard Winger, noted that it is difficult for states to select a reasonable petition deadline for primaries, i.e., one that is not too early but still gives the boards of election and secretary of state sufficient time to determine the validity of the petitions. Winger Dep. 60, ECF No. 38-1.

4. Mandate to field candidates for governor or president

Intervener Plaintiffs also assert that requiring them to field candidates for governor or president denies minor parties the choice of building their parties from the ground up by first competing in local elections. Intevener Defendant avers that S.B. 193 does *not* require minor party candidates to run for governor or president. Rather, minor parties can obtain four years of recognition as political parties if their candidates for governor or president receive "not less than three percent of the total vote cast for such office at the most recent regular state election." Ohio Rev. Code § 3501.01(F)(2)(a). But, as discussed at length above, S.B. 193 offers a second means of ballot access by petition. Ohio Rev. Code § 3501.01(F)(2)(b). Nothing in S.B. 193 prevents minor parties from filing successive formation petitions and pursuing the very "grass roots" strategy Intervener Plaintiffs describe. The Court finds this provision of S.B. 193 does not impose any significant burden on the core associational rights of minor parties or the right of electors to cast an effective vote.

4. Combined effect of burdens

Although the Court has determined that none of the separate requirements of S.B. 193 constitute a severe burden, the Court must examine whether the combined effect of the requirements severely burdens associational rights. *See Blackwell*, 462 F.3d at 595.

Intervener Plaintiffs' assertion concerning odd-numbered year elections was based on a misinterpretation of S.B. 193. As a result, that argument does not give rise to any burden to be considered in assessing the combined effect of S.B. 193's requirements. The same is true for Intervener Plaintiffs' contention that S.B. 193 requires minor parties to field candidates for governor or president. The statute simply does not contain such a requirement.

The Court has found that the lack of access to primary elections by minor parties formed by petition does not severely burden the associational rights of minor parties or voters. Moreover, the Court has determined that the petition requirements of S.B. 193 do not constitute a severe burden on the right to associate.

Intervener Plaintiffs have failed to show that the lack of access to primary elections "combines" with the petition requirements to create a severe burden. In that respect, the present case differs significantly from *Blackwell*, where the petition deadline and primary participation requirement operated together to create a severe burden.

The Court also finds that Plaintiffs have not demonstrated that the individual petition requirements together severely burden the primary functions of minor parties. The relatively low number of signatures required, combined with the late filing deadline, constitute relatively modest burdens on minor parties' associational rights. Moreover, Intervener Plaintiffs do not contest Intervener

Defendant's assertion that S.B. 193 is nondiscriminatory on its face.

Insofar as combined burdens are concerned, in this instance, the whole is not greater than the sum of its parts. The combined requirements of S.B. 193 do not impose severe burdens on minor parties' access to the Ohio ballot or the right of voters to cast meaningful votes; rather, the burdens S.B. 193 imposes, even in the aggregate, are minimal. Accordingly, S.B. 193 is not subject to strict scrutiny. *Hargett*, 767 F.3d at 546. Instead, the Court will evaluate S.B. 193's requirements under the rational basis test.

B. State's Interests

"'The rational basis test requires the court to ensure that the government has employed rational means to further its legitimate interest.'" *Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 592 (6th Cir. 2003) (quoting *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998)). Under that test, the challenged law will be deemed constitutional if it advances an important state interest. *Id.*; *Hargett*, 767 F.3d at 546. Courts have recognized that ballot access laws may serve a state's legitimate interests in "preserving the integrity and fairness of the electoral process and ensuring that minor parties given access to the ballot have established bona fide support." *Blackwell*, 462 F.3d at 593 (citing *Timmons*, 520 U.S. at 363–64).

Intevener Defendant asserts S.B. 193 furthers the State of Ohio's interest in preserving the integrity of the election process. It maintains that S.B. 193

advances the integrity of the electoral process by regulating the number of candidates on the ballot by requiring a preliminary showing of significant support before placing a candidate on the general election ballot. Intervener Defendant also argues that these requirements act to reduce voter confusion, ballot overcrowding, and the risk of frivolous candidacies on the ballot.

The Court finds that S.B. 193 represents a rational means to advance important state interests. First, it is rational for the State of Ohio to limit minor parties' participation in primary elections because minor party primaries are typically uncontested, voter turnout is low, and the additional costs of adding uncontested minor party candidates to a primary ballot are unwarranted.

Second, the petition requirements are rationally related to the State's interest in ensuring that minor parties demonstrate that they have a significant modicum of support before their candidates may appear on the ballot. By requiring a showing of support, the State of Ohio reduces the risk of overcrowded ballots and frivolous candidacies. The State of Ohio also has a legitimate interest in setting aside sufficient time to verify petition signatures and the other requirements for petitions. *See Stein*, 744 F.3d at 701. That interest is rationally served by allotting the boards of election and Secretary of State at least thirty-one days to make eligibility determinations.

The Court holds that S.B. 193 does not impose severe burdens on the right of minor parties to associate or the right of electors to cast meaningful votes. The

Court further finds that the requirements of S.B. 193 rationally serve important state interests. As a result of these two conclusions, Intervener Plaintiffs' facial challenge to S.B. 193 fails as a matter of law.

IV. DISPOSITION

Based on the above, the Court **DENIES** Intervener Plaintiffs' motion for summary judgment, ECF No. 165 and **GRANTS** Intervener Defendant's summary judgment motion, ECF No. 185. The Court **HOLDS** that Ohio S.B. 193 is not unconstitutional on its face. Accordingly, the Court declines to enjoin the application of S.B. 193 to future elections on the ground that the statute is facially invalid. The Court **DISMISSES** Intervener Plaintiffs' claim challenging S.B. 193 on its face **WITH PREJUDICE.**

The Clerk shall remove ECF Nos. 165 and 185 from the Civil Justice Reform Act motions report.

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT