

No. 15-4270
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIBERTARIAN PARTY OF OHIO, ET AL.,	:	On Appeal from the United States
Appellants-Plaintiffs,	:	District Court for the
v.	:	Southern District of Ohio
	:	
JON HUSTED, IN HIS OFFICIAL	:	District Court Case No. 2:13-cv-00953
CAPACITY AS OHIO SECRETARY OF	:	
STATE,	:	
Appellee-Defendant,	:	
v.	:	
THE STATE OF OHIO,	:	
Appellee-Intervenor-	:	
Defendant.	:	

RESPONSE OF APPELLEES-DEFENDANTS
JON HUSTED AND STATE OF OHIO TO APPELLANTS'
MOTION FOR EMERGENCY INJUNCTION AND EXPEDITED APPEAL

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INTRODUCTION

If ever there was a bootstrapped emergency, this is it. Months after knowing that their substantive requests for injunctive relief were doomed in district court, and a full month after the District Court made that failure explicit, the Libertarian Party of Ohio (“Party”) asks this Court to countermand the District Court’s considered analysis, invalidate Ohio election statutes (parts of Ohio Rev. Code §§ 3501.01, 3517.01, and 3517.012, although the emergency motion never specifies) (“Statutes”), and mandate that the Party have one kind of access to next year’s general election. All the while, they have a still-open (though different) path to the ballot available. An injunction pending appeal is unwarranted.

Every factor relevant to an injunction pending appeal disfavors one here. On the merits, the Party’s two claims are destined for appellate failure. The argument that the Statutes violate the Equal Protection Clause finds no purchase in Supreme Court or circuit precedent. Equally uphill is the argument that Ohio (but not its chief election officer) has waived sovereign immunity such that a federal court can enjoin the Statutes as violating the *Ohio* Constitution. There is no waiver here because the State intervened to defend a *different* statute *before* the Statutes challenged here were even enacted. Further, the claim fails on the merits because the plain text of the Ohio Constitution authorizes the change that the Statutes enact.

The remaining factors also disfavor an emergency injunction. There is no harm to the Party because it can access the general-election ballot up through July 2016. The Party's own conduct in this case belies its newfound urgency. This motion comes months after the District Court explained why the Statutes survive a constitutional challenge. And the present motion follows by more than a month the District Court Order rejecting the arguments that the Party now wants this Court to credit. Finally, an emergency injunction *would* harm the State and its citizens by striking a law that reflects the people's choice about how and when minor parties get access to the ballot. The motion for an emergency injunction should be denied.

As for the motion to expedite, the motion for an injunction serves as the equivalent given the Party's professed need for a result by December 16, 2015. Once that day passes, any further need for a fast-track appeal can be reassessed.

STATEMENT

The Statutes. Effective in 2014, S.B. 193 reformed Ohio's system for determining political party status and for establishing new political parties. As relevant here, the Bill voided the Secretary of State's ("Secretary") previous directives (issued pursuant to court order) recognizing minor parties as qualified for primary and general elections. It instead created two methods by which a political group could obtain minor-party recognition and qualify for the ballot: by

achieving 3 percent of the total vote in a gubernatorial or presidential election, *see* Ohio Rev. Code § 3501.01(F)(2)(a), or by petition, *see* Ohio Rev. Code § 3501.01(F)(2)(b). Formation by petition requires the signatures equal in number to 1 percent of the total vote for Governor or President at the State's most recent election. Ohio Rev. Code §§ 3513.05; 3517.01(A)(1)(b)(i). The signatories must include 500 qualified electors from each of at least half of the congressional districts in Ohio. Ohio Rev. Code § 3517.01(A)(1)(b)(ii). This petition must be submitted no later than 126 days before the November general election. Ohio Rev. Code § 3517.01(A)(1)(b)(iii).

Minor parties who achieve status by the vote-counting method may hold primaries to nominate their candidates, and retain their status for at least four years. *See* Ohio Rev. Code § 3501.01(F)(2)(a). Minor parties who achieve status by petition select their candidates through nominating petitions. *See* Ohio Rev. Code § 3517.012(A)(1). A new party's candidate for statewide office must submit a petition signed by at least 50 qualified electors. Ohio Rev. Code § 3517.012(B)(2)(a). A new party's candidate for local office need only be signed by 5 qualified electors. Ohio Rev. Code § 3517.012(B)(2)(b).

Procedural History. The Party's initial Complaint, filed in September 2013, challenged an Ohio statute governing petition circulators and named the Secretary

as a defendant. *See* Compl., R. 1. In October 2013, the State of Ohio intervened to defend that statute. *See* Mot. to Intervene, R. 5.

After the passage of S.B. 193 in November 2013, the Party amended its Complaint to add three counts challenging provisions of the new law (the “Statutes”). *See* Am. Compl., R. 16. (The operative complaint is now the Third Amended Complaint. *See* R. 188.) Those new counts included the two claims at issue here: Count 4 (a 42 U.S.C. § 1983 claim) and Count 5 (a challenge under Article V, § 7 of the Ohio Constitution). Later that month, several other plaintiffs (who are not part of this appeal) intervened, arguing that the Statutes facially violated the First Amendment. *See* Mot. to Intervene, R. 19.

After the Party and Intervener-Plaintiffs sought a preliminary injunction, the District Court enjoined enforcement of the Statutes for the 2014 election. *See* Order, R. 47. The litigants then moved for summary judgment, with the Party filing its First Motion for Summary Judgment in October 2014. *See* R. 261.

In March 2015, the District Court rejected the Intervener-Plaintiffs’ facial First Amendment challenge, which the Party joined, and granted summary judgment to the State on that claim. *See* Order, R. 285.

On October 14, 2015, the District Court issued an Opinion and Order in which it addressed the Party’s as-applied challenge (Count 4) and its claim under the Ohio Constitution (Count 5). *See* Order, R. 336. Noting that the Party had

merely parroted the arguments presented in the failed facial challenge, the Court denied the Party's motion for summary judgment on Count 4. *Id.* at PageID # 8698-8700. With respect to Count 5, the Court determined that the State had "not waived its immunity under the Eleventh Amendment" and that it therefore lacked jurisdiction to adjudicate the Party's claim. *See id.* at PageID # 8700-05. One count of the operative complaint remains pending below.

Nine days after the October 14 Order, the Party moved for a finding that there was "no just reason" to delay its appeal of the District Court's decision on Count 5. *See* R. 339. It there explained that it wanted a final decision before the December 16, 2015 deadline to qualify for primary elections. *See id.* at PageID # 8730. It then moved for a stay of the October 14 Order and an emergency injunction pending its appeal to this Court. *See* R. 352. The Party appealed to this Court on November 18, over a month after the District Court's decision.

ARGUMENT

A request for an injunction pending appeal seeks extraordinary relief, often on the exact grounds rejected in the district court. It is among the tallest orders a party can make. "The factors this court considers in determining whether to grant an emergency injunction include: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm without relief; (3) the probability that granting relief will cause substantial

harm to others; and (4) whether the public interest is advanced by granting relief.” *Blankenship v. Blackwell*, No. 04-04259, 2004 WL 2390113, at *1 (6th Cir. Oct. 18, 2004) (denying request to place candidates on ballot). The combination of showing a strong chance of winning the appeal, harm that cannot be undone, and lack of harm to others makes for a tough standard. Unsurprisingly, successful requests for emergency injunctions on appeal, even for elections, are rare. *See, e.g., Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers) (denying injunction requesting ballot access because “the legal rights at issue [were not] indisputably clear”) (internal quotation marks omitted); *Estill v. Cool*, 295 F. App’x 25, 27 (6th Cir. 2008) (denying injunction pending appeal).

The factors here run decidedly against an injunction. The Party has a slim chance of success on the merits, of either claim. There is no irreparable harm because the Party can still get its candidates on the ballot next November without an injunction now (and, in fact, with no court intervention at all). The final two factors tilt against an injunction: the relief sought will restrain a valid state law representing Ohioan’s legislative judgment about how political parties access the ballot. Add to all that, the appeal is untimely (see the separate motion to dismiss).

I. The Party has no chance of success on either count

A. The challenged provisions of S.B. 193 do not violate the Equal Protection Clause of the U.S. Constitution

The Party has not shown a strong likelihood of success on the merits of its claim that the Statutes violate the Equal Protection Clause. The Party alleges that the Statutes place “new parties . . . at a political disadvantage.” Mot. at 12. But as the District Court found, the Party’s “amended complaint and motion for summary judgment fail to provide *any* specific evidence to support their as-applied claim.” Order, R. 336, PageID # 8699 (emphasis added). Instead, the current challenge merely re-packages an earlier facial challenge that the District Court rejected. *Id.*, PageID # 8698-99; *see also* Order, R. 285. Where, as here, a plaintiff has not “suppl[ied] an argument or an evidentiary basis for [its] bare allegations,” Order, R. 336, PageID # 8698, it cannot meet the stringent proof required to obtain a preliminary injunction, let alone an injunction pending appeal.

In ballot-access challenges grounded in equal protection, this Court applies the tests set forth in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015). The *Anderson-Burdick* test contains three steps. First, the court must “consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate.” *Anderson*, 460 U.S. at 789. Second, the court will “identify and evaluate the precise interests put forward by

the State as justifications for the burden imposed by its rule.” *Id.* And last, the court must “determine the legitimacy and strength of each of those interests,” and “consider the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* When “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions,’” then “‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (citation omitted). The challenged Statutes meet this test because they are reasonable, nondiscriminatory, and similar to other ballot-access regulations that have passed constitutional muster.

The short way to that conclusion is that the Supreme Court’s decision in *White* forecloses the argument that requiring a minor party to nominate candidates by petition (not primary) violates equal protection. *See Am. Party of Tex. v. White*, 415 U.S. 767, 781-82 (1974) (“The procedures are different, but the Equal Protection Clause does not necessarily forbid the one in preference to the other.”); *see id.* at 781 (“Neither can we take seriously the suggestion made here that the State has invidiously discriminated against the smaller parties by insisting that their nominations be by convention, rather than by primary election.”). The longer answer is that the Statutes impose modest burdens, the State has a valid interest in channeling ballot access, and the State’s interest outweighs those burdens.

1. The Statutes do not severely burden the Party's rights

The District Court examined the Statutes in the context of an earlier facial challenge and concluded that “the burdens” they impose, “even in the aggregate, are minimal.” Order, R. 285, PageID # 7519. As relevant here, the District Court concluded that, although newly formed parties do not automatically participate in primaries, they may do so once they obtain the requisite percentage of votes cast for governor or presidential candidates in the most recent general election. *See id.*, PageID # 7499, 7502. It further noted that the Statutes leave new parties ample opportunities to recruit members because only about one quarter of registered electors cast primary votes in Ohio, leaving “three quarters of registered Ohio voters” to affiliate with new parties. *See id.*, PageID # 7513-14. Nothing in the Statutes prevents new or minor parties from recruiting supporters or associating with voters. *See id.*, PageID # 7500-7503.

The District Court also examined the option for parties to form by gathering signatures (rather than garnering votes in certain elections). The court looked to the “relatively late petition deadline” and concluded that this alternate route to the ballot “places these provisions . . . in the same ballpark as similar statutes that have been upheld.” *See id.*, PageID # 7514 (citing *Green Party of Ark. v. Martin*, 649 F.3d 675, 686-87 (8th Cir. 2011)).

Finally, with respect to the signature requirements for new-party candidate nominations, the District Court termed them “modest.” *See id.* A candidate of a newly formed party needs 50 signatures to run for statewide office; a major party’s candidate needs 1,000. *See* Ohio Rev. Code §§ 3517.012(B)(2)(a), 3513.05.

In light of these conclusions, the Party fails to explain why a primary is “the only means for minor parties to drum up support” generally or in this particular case. *See* Order, R. 285, PageID # 7501. Indeed, the Party has adduced no “evidentiary basis,” for its “bare” allegations that the Statutes impede associational rights, Order, R. 336, PageID # 8698-99, so there is no foundation for this Court to impose an injunction pending appeal. The Statutes are simply not a severe burden on the Party. *See* Order, R. 285, PageID # 7517-7519.

The Party’s cases cited in the injunction request are distinguishable. The statutes in those cases awarded major parties a specific *benefit*, as opposed to merely creating alternate procedures. Here, Ohio has created a different candidate-nomination procedure for newly formed parties. It has not foreclosed new parties from any benefit available to other parties.

2. The State has a compelling interest in ensuring the integrity of elections

The State has a strong interest in protecting the integrity of its elections. The Supreme Court has recognized the State’s “interest in requiring some preliminary showing of a significant modicum of support” before granting ballot access.

Jenness v. Fortson, 403 U.S. 431, 442 (1970). This state interest is rooted in a need to “avoid[] confusion, deception, and even frustration of the democratic process at the general election.” *Id.* at 442. The Statutes here all support the State’s interest in ensuring that candidates have a baseline level of support.

3. The challenged provisions are tailored to advance the State’s compelling interest in preserving the integrity of elections

The challenged Statutes advance the State’s compelling interest in preserving the integrity of the election process. Because the Party has not shown a “severe” burden, this Court should evaluate the challenged provisions using rational basis review. *See Hargett*, 791 F.3d at 693. Although the State need only “identify ‘important regulatory interests’ to justify” these statutes, even under strict scrutiny the State can show that its statutes are “‘narrowly tailored and advance a compelling state interest.’” *Id.* (citation omitted). The Statutes’ modest requirements ensure that new or minor parties have a significant modicum of support before they appear on the ballot. *See Jenness*, 403 U.S. at 441 (recognizing “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”). And given constraints on the State to afford primaries to minor parties, *see, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), it makes sense for the State to limit new parties’ participation in primaries. This is particularly so because, as the District

Court found, “minor party primaries are typically uncontested” and experience low voter turnout. *See* Order, R. 285, PageID # 7520. Taken together, the Statutes advance the State’s interests while imposing minimal burdens. The Party has no chance of success as to Count 4.

B. The State is immune from the Ohio constitutional challenge, but that challenge fails on the merits as well

Nor will the Party will succeed on the merits of its state constitutional challenge: (1) the appeal is either tardy or incomplete; (2) the Party lacks standing; (3) the State did not waive its immunity; (4) the relevant part of the Ohio Constitution is not self-executing; and (5) the Ohio Constitution permits, rather than prohibits, the Statutes. To top it all off, consider this: The Party seeks an injunction that could run only against the State itself, as it has not argued that the Secretary of State has waived his acknowledged immunity. That is hard to fathom. What would such an injunction mean if the Secretary can continue enforcing the law? This is just one more reason that the emergency injunction should be denied.

1. Either the appeal is untimely or it involves a pre-merits question, so the Party will not succeed on the merits

The Party did not appeal within 30 days the District Court’s October 14, 2015 Order effectively rejecting the request for injunctive relief on the theory that the Statutes violate the Ohio Constitution. The State has separately moved to dismiss the appeal on that basis. Alternatively, if the appeal is somehow timely, it

asks only a preliminary question about immunity that will not resolve the merits for the Party. Even if the Party could succeed on that point, it would yield no more than a remand to the District Court to resolve the merits of that state-law challenge. The thrust of the appeal is that the “District Court possessed jurisdiction to consider” the state-law challenge. Mot. at 16. The Party thus asks for *greater* relief through emergency injunction than it could secure in its pending appeal.

2. The Party has no standing to challenge a state law that *increases* its ballot access

The Party’s theory of Count 5 is that a state law that increases minor-party ballot access by creating an alternative to primary-election contests is incompatible with the Ohio Constitution. The Party has no standing to make that challenge because it suffers no “‘actual’” injury, *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013), from the challenged feature of State law. Without an injury tied to the challenged law, plaintiffs have no standing. *See, e.g., Wright v. Dougherty Cnty., Ga.*, 358 F.3d 1352, 1355 (11th Cir. 2004) (plaintiffs challenging voting law had “not suffered any harm”; “in fact they [had] benefitted” from the law). Without standing, the Party has no chance of success on the merits. *See, e.g., Ne. Ohio Coal. for Homeless & Serv. Emps. Int’l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006) (examining standing as part of likelihood of success on the merits and vacating election-eve TRO); *see also id.* at

1012 (McKeague, J., concurring) (noting “disturbing expansion” of standing where lower court’s TRO frustrated the “will of the people” absent evidence of injury).

The Party nowhere explains why the state statute, which offers a route to the ballot for its candidates *beyond* primaries, causes injury. The statute does not supplant the primary election, it merely supplements it. *See* Ohio Rev. Code § 3501.01(K) (party candidate includes those who have “won the primary election of the candidate’s party” and those who have “been nominated” under the provisions challenged here). The Party’s attack on this alternate route to the ballot simply repeats the argument it levels against the requirements to hold a primary. *See* Mot. at 16 (contending that the statute disallows minor political parties from holding primaries).

3. The State has not waived its immunity against a federal injunction forcing compliance with state law

The Party admits that it has zero chance of success on the merits unless the State has waived immunity here. *See* Mot. at 18 (Party “concede[s]” that it could not have proceeded against the State or Secretary absent waiver). The Party further admits that the Secretary has not waived immunity. *See id.* As relevant here, the State can waive immunity if it “voluntarily invokes” federal jurisdiction or makes a “clear declaration” that it intends to submit to federal jurisdiction. *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (citation omitted). As to these waivers, a “federal court must

examine each *claim* in a case to see if the court’s jurisdiction over *that claim* is barred by the Eleventh Amendment.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (emphasis added). The theory of waiver here fails on both scores.

For one thing, the State never *invoked* federal *jurisdiction*. It simply intervened to assure that a state defendant would litigate the signature-gathering statute. *See, e.g., Ne. Ohio Coal.*, 467 F.3d at 1008 (recognizing that the State has an interest “independent” from Secretary of State when Secretary did not appeal). Intervening in an existing suit simply does not invoke federal-court jurisdiction. That is especially true when the “legally operative complaint,” *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000), that added Count 5 and named the State as a defendant post-dated the State’s intervention. The State’s actions here simply do not pass the “‘stringent’” test for waiving the State’s federal-court immunity. *College*, 666 U.S. at 675 (citation omitted).

For another, the State’s intervention as to one claim does not waive its immunity as to another. That is true here for two reasons. First, when the State intervened on October 3, 2013 to defend the signature-gathering statute, Count 5 could not have been pleaded because the statute was not passed (let alone effective) at that time. *Compare* Compl., R. 1 (Sept. 25, 2013) (both counts address signature-gathering statutes) *with* First Am. Compl., R. 16 (Nov. 8, 2013)

(adding Count 5). Second, the claim that birthed the State's intervention is distinct from the claim that the 2014 statute violates the Ohio Constitution. *Pennhurst* itself is instructive here. The Supreme Court there *separately* considered whether the State had immunity as to a 42 U.S.C. § 1983 claim to enforce state law, 465 U.S. at 104-06, and as to a pendant state-law claim, *id.* at 120-21. *See also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 51 (1981) (White, J., dissenting) (lawsuit was “brought” under § 1983); *id.* at 6 (listing pendant state-law cause of action).

A similar pattern to this case arose in a district court in Connecticut, which found no waiver. There, a plaintiff added state-law claims after the State removed to federal court. *See, Faghri v. Univ. of Conn.*, Case No. 3:06-cv-01957, 2010 WL 2232690, at *1-2 (D. Conn. June 3, 2010). That series of events, the court reasoned, meant that the State had not “waived its Eleventh Amendment immunity as to” the amended allegations because those new claims related to “a set of factual circumstances distinct from the underlying suit.” *Id.*, at *9-10.

No case the Party cites changes this analysis. None of those cases involved intervention followed by a new, unrelated claim. The State's intervention to assure a defense of a federal claim about one statute did not waive its immunity to a state-law challenge to a different statute not even passed when the State intervened.

4. The Party will not succeed on the merits because Ohio Constitution Art. V § 7 is not self-executing

Yet another problem with the Party's merits argument is that the relevant section of the Ohio Constitution is not self-executing. The Ohio Supreme Court has repeatedly held that parts of the Ohio Constitution are not self-executing. *See, e.g., State v. Jackson*, 102 Ohio St. 3d 380 (2004) (Art. V, § 2). It is far from obvious that Article V, Section 7 is enforceable without implementing legislation. It reads: "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law." The "provided by law" language contemplates implementing legislation; it does not contradict it. It is odd to ask this Court to enforce Article V, Section 7 to *strike down* the very legislation *implementing* the Clause.

5. The Statutes comply with the Ohio Constitution

A final merits problem with the Party's argument—greatly amplified by the emergency-injunction posture here—is that the Statutes simply do not transgress the Ohio Constitution. The provision's plain text contemplates legislation—primaries or petitions as "provided by law"—that details the nomination process. Indeed, the Ohio Supreme Court has recognized that this part of the Constitution "provides that all nominations must be by direct primary *or* by petition." *State ex rel. Gottlieb v. Sulligan*, 175 Ohio St. 238, 241 (1963) (emphasis added). That is exactly what the Statutes do here. The Party therefore challenges as

unconstitutional a law that implements the Constitution as historically interpreted by the Ohio Supreme Court. That is no basis for an emergency injunction pending appeal.

Any doubt about the meaning of the Ohio Constitution counsels against an injunction. *Lux*, 131 S. Ct. at 6 (Roberts, C.J., in chambers) (denying injunction even though “more recent decisions” may have “undermined” lower court’s decision); cf. *Hamilton v. Ashland Cnty. Bd. of Elections*, 320 Fed. App’x 307, 308 (6th Cir. 2008) (declining supplemental jurisdiction over possible “viable” state-law claim about election law because task “more appropriately undertaken” in state court). Doubt is not the currency for an emergency injunction pending appeal.

II. Other factors favor rejecting requested injunction

The other factors for an injunction pending appeal equally doom the request.

A. The party will not suffer irreparable harm without an emergency injunction

The Party gives scant attention to this factor. It argues only that, absent an injunction, it “will not be allowed to participate” in Ohio’s 2016 primary-election process. Mot. at 31. What that omits, however, is the Party’s ability to nominate candidates for the November 2016 election through another mechanism. *See* Ohio Rev. Code § 3517.012. Through that process, the Party has many months to still nominate candidates for the general election. *See* Oh. Sec’y of St. Advisory 2015-

02, <http://www.sos.state.oh.us/SOS/Upload/elections/advisories/2015/Adv2015-02.pdf>.

Even absent the nominating-petition process, the Party could secure access to the ballot through an injunction (not an emergency injunction pending appeal) after a court has considered the Party's constitutional claims more deliberately than will be required by the Party's manufactured urgency here. A court could later conclude that the Statutes must be enjoined and still grant relief giving the party access to the 2016 general election. This Court need not make that decision now.

And the need for this Court to act now is undercut by the Party's own conduct. The Party has known since March 2015 that its arguments against Count 4 would not succeed in the District Court. Indeed, the Party waited over a month to appeal the District Court's *definitive* rejection of the very arguments it makes in this Court as to both Counts. The Party's own actions betray any claim that December 16 is a critical moment such that this Court must act now. The Court has seen this movie before. On the eve of the 2012 election, a party sought relief in a district court "days before" a critical deadline, even though it had bypassed the "opportunity" to seek that relief in the "months" leading up to that deadline. *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012). This Court held that the "failure to act earlier" in pursuing these claims "significantly" undermined the claim of "irreparable harm in the absence of the injunction" and

vacated a district-court injunction. *Id.* at 346. If that kind of delay supports reversing an injunction below, it certainly supports denying a request for an injunction pending appeal.

B. Harm to others shows that no emergency injunction should issue

Finally, the factor assessing harm to the State and its citizens cuts against an emergency injunction. The Statutes express the represented desire of the people about minor-party ballot access. Enjoining the Statutes on an emergency basis silences the voice of the citizens and their representatives because “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). Suspending this law is more significant as “the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections.” *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks omitted). There is no need to visit that harm on the State and its people when the merits plainly favor the State, the Party will suffer no irreparable harm, and the Party has only recently decided that this case requires emergency relief.

CONCLUSION

The Court should deny the motion for an injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Response of Appellees-Defendants Jon Husted and State of Ohio to Appellants' Motion for Emergency Injunction and Expedited Appeal* has been served through the Court's CM/ECF system November 25, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Eric E. Murphy
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