No. 16A181

In the Supreme Court of the United States

LIBERTARIAN PARTY OF OHIO, KEVIN KNEDLER, CHARLES EARL, AND AARON HARRIS,

Petitioners,

v.

JON HUSTED, OHIO SECRETARY OF STATE,

Respondent,

v.

STATE OF OHIO AND GREGORY FELSOCI,

Intervenor-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION TO APPLICATION FOR STAY AND EMERGENCY INJUNCTION

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INTRODUCTION

This case concerns (1) S.B. 193 (the "Ballot-Access Law"), which made changes to the Ohio election laws regulating the ability of political parties to obtain (and keep) ballot access, and (2) the 2014 primary election in which the Libertarian Party candidate for governor was disqualified from the ballot because of violations of state requirements for petition circulators. Petitioners (collectively, the "Libertarian Party") seek an emergency injunction pending certiorari, apparently to change the now certified designation of the Johnson-Weld presidential ticket from "Independent" to "Libertarian" on Ohio ballots. The request should fail.

To begin with, the Libertarian Party cites the wrong standard. The Party asks not merely that judicially ordered action be *stayed* while it pursues certiorari, but that this Court—contrary to every other court to look at these questions—grant affirmative *injunctive* relief. Such extraordinary relief "'demands a significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (citation omitted). The Party must show that its right to the injunction is "'indisputably clear.'" *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) (citation omitted).

The Libertarian Party has not shown an indisputably clear right to an injunction on any of the three theories it advances. *First,* its constitutional challenge under the "*Anderson-Burdick*" framework suggests that it has a right to a primary election. That is foreclosed by precedent and rests on a misunderstanding

of Ohio law. This Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974), rejects any argument that a minor party has a constitutional right to a primary. And, contrary to the Party's argument, Ohio law does not use primaries to assign party affiliation to voters for anything beyond the limited purpose of who may vote in primary elections and sign petitions. Rather, Ohio law allows political parties and potential members to associate in any other way.

Second, the Libertarian Party's right to relief on its selective-enforcement claim is far from indisputably clear because the Party does not even address two elements of that claim. Nor does the Party explain how an injunction against the State and the Secretary of State is proper when the Party admits that the Secretary did not selectively enforce Ohio election law. The idea that actions by the Ohio Republican Party are state action such that it would trigger an injunction against the State and the Secretary are novel, not indisputably clear.

Third, the Libertarian Party's *state-law* claim involves only an argument about the order of operations in the lower courts, not an outcome-dispositive argument that would justify injunctive relief. Indeed, the Party makes no argument in this Court that it should prevail on this claim on the merits (or that it can avoid the res-judicata bar after a state court rejected the identical claim).

Finally, equitable factors run against the Libertarian Party. It is grounded in arguments that have been on the table since 2014, yet is filed days ahead of a ballot-finalization deadline. And it asks this Court to trump Ohio law not for ballot access, but for changing the label on a presidential ticket currently on the ballot.

STATEMENT

A. The Ballot-Access Law Made Various Changes To The Rules For Gaining Ballot Access In Ohio

In 2006, the Sixth Circuit struck down Ohio's previous ballot-access laws for minor parties in a split decision. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). Secretaries of State thereafter repeatedly issued directives (to implement court orders) that recognized minor parties as qualified for primary and general elections. *See Libertarian Party of Ohio v. Husted*, No. 16-3537, Slip Op. 3-4 (6th Cir. July 29, 2016) (hereinafter "App. Op."). The Ballot-Access Law repealed those directives, and created two general methods by which a political party can obtain minor-party recognition and qualify for the ballot.

First, a minor party that is already on the ballot may qualify for future years by receiving three percent of the total vote cast in a gubernatorial or presidential election. *See* Ohio Rev. Code § 3501.01(F)(2)(a). If a minor party surpasses this three-percent threshold, the minor party retains minor-party status and ballot access for the next four years. *Id.* For each election that it meets this threshold, the party continues to obtain this four-year access period. *Id.*

Second, any new party, or a minor party whose gubernatorial or presidential candidate fails to meet the 3% threshold may file a party formation petition. *See id.* § 3501.01(F)(2)(b). Formation by petition requires the party to obtain qualified signatures equal in number to one percent of the total vote for governor or president at the most recent election for either. *Id.* § 3517.01(A)(1)(b)(i). The signatures must include 500 qualified electors from each of at least half of the sixteen Ohio

congressional districts. *Id.* § 3517.01(A)(1)(b)(ii). This formation petition must be submitted no later than 126 days before the November general election that the party wishes to be on the ballot. *Id.* § 3517.01(A)(1)(b)(iii). A minor party that files a successful formation petition will earn recognized party status for at least twelve months, and will retain that party status by passing the three-percent vote threshold at the first election for governor or president that occurs at least twelve months after it forms. *Id.* § 3501.01(F)(2)(b).

The Ballot-Access Law also establishes the method through which minor parties nominate their candidates for the general-election ballot. On the one hand, minor parties that achieve this status by the *vote-counting* method may hold primary elections to nominate their candidates to appear on the general-election ballot. *Id.* § 3501.01(F)(2)(a). On the other hand, minor parties that achieve this status by the *petition* method determine their general-election candidates through nominating petitions. *Id.* § 3517.012(A)(1). A new party's candidate for statewide office must submit a petition signed by a mere 50 qualified electors. *Id.* § 3517.012(B)(2)(a). A new party's candidate for local office need only be signed by 5 qualified electors. *Id.* § 3517.012(B)(2)(b).

In contrast, major parties select their general-election candidates solely via primaries. *Id.* § 3513.05. To be a "major political party," the party's candidate for governor or president must receive "not less than twenty per cent of the total vote cast for such office at the most recent regular state election." *Id.* § 3501.01(F)(1). Thus, a major political party must pass the applicable vote test every two years. *Id.*

§ 3501.01(C). A person wishing to become a candidate for major-party nomination at a primary must file a declaration of candidacy and petition. *Id.* § 3513.05. Major-party candidates must obtain 1,000 signatures for statewide office and 50 for local office. *Id.* They may obtain those signatures only from those who have not voted in another party's primary in the last two years. *Id.*

For purposes of eligibility to vote in a primary and to sign party candidate petitions, Ohioans may affiliate with a party by casting that party's ballot at a primary election. *Id.* §§ 3513.05, 3513.19, 3513.20. Ohio Rev. Code § 3513.19 sets forth the framework for challenging whether a person is legally entitled to vote in a party's primary. One of the bases upon which a person may be challenged is that "the person is not affiliated with or is not a member of the political party whose ballot the person desires to vote." *Id.* § 3513.19(A)(3). A person is considered affiliated with a party if the person has voted in that party's primary or has not voted in any other party's primary during the last two years. *Id.* § 3513.05. Section 3513.19's limitations, however, do not apply to the first primary in which a new party participates after it has formed via petition. Ohio Rev. Code § 3517.016 provides that "any qualified elector who desires to vote the new party primary ballot is not subject to section 3513.19 of the Revised Code and shall be allowed to vote the new party primary ballot regardless of prior political party affiliation." Other than set limits on who may participate in political-party primaries and sign petitions, Ohio law does not govern party membership in general.

In November 2013, soon after Ohio passed this Ballot-Access Law, the Libertarian Party filed an amended complaint to challenge it in a pending lawsuit addressing another matter. First Am. Compl., R.16, PageID#87. The Party alleged three claims against the Ballot-Access Law. *First*, the Party alleged that the Ballot-Access Law's elimination of the prior Secretary of State directives violated due process as applied to the upcoming 2014 election by retroactively depriving the Party of access to the ballot too soon before that election. *Id.*, PageID#101. *Second*, the Party alleged that the Ballot-Access Law violated Equal Protection and the First Amendment under the "*Anderson-Burdick*" line of cases by denying the Party (but not major parties) the ability to hold a primary (and gain access to the party-membership privileges that allegedly came with a primary). *Id.*, PageID#101-02; *see Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Third*, the Party alleged that the Ballot-Access Law violated Article V, § 7 of the Ohio Constitution—which the Party interpreted to require all parties to nominate their candidates via primaries—because the Ballot-Access Law required newly formed parties to nominate their candidates via petitions rather than primaries. First Am. Compl., R.16, PageID#103-04.

The district court preliminarily enjoined the Ballot-Access Law's enforcement for the 2014 election cycle based on the Libertarian Party's retroactivity claim. It concluded that applying the Ballot-Access Law retroactively to the 2014 election cycle would be unconstitutional. Order, R.47, PageID#819-834. It ordered that the Libertarian Party be granted access to the 2014 primary and general ballots in

accordance with the requirements of Secretary of State Directive 2013-02, which recognized it as a minor party. *Id.*, PageID#811. Pursuant to that prior Secretary of State Directive, therefore, the Libertarian Party candidates submitted nominating petitions in order to qualify for Ohio's 2014 primary ballot.

B. The Libertarian Party Candidate For Governor, Charlie Earl, Was Disqualified From The 2014 Primary Ballot For Failure To Obtain A Sufficient Number of Valid Signatures

After Secretary of State Husted certified Charlie Earl as the Libertarian Party's gubernatorial candidate, Intervener-Defendant Gregory Felsoci filed a protest against Earl's candidacy. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 405-12 (6th Cir. 2014). Ohio law provides that "[u]pon the filing of such protest, the election officials with whom it is filed shall promptly fix the time and place for hearing it[.]" Ohio Rev. Code § 3513.262. At the hearing, the election official "shall hear the protest and determine the validity or invalidity of the petition." *Id.* Accordingly, once the protest was filed, Ohio law required the Secretary to hold a hearing and determine the validity of the petition.

Law Professor Bradley A. Smith, a former Chairman of the Federal Elections Commission serving as Hearing Officer, conducted the required protest hearing. He issued a report recommending that the protest be upheld because signatures for Earl were obtained by circulators who had been paid but who had failed to disclose who paid them on their petition forms, in violation of Ohio Rev. Code § 3501.38(E)(1). *Libertarian Party*, 751 F.3d at 409. The main issue presented by the protest was a legal one: whether independent contractors are statutorily required

to disclose those who pay them under Ohio Rev. Code § 3501.38(E)(1). *Id.* at 410. Professor Smith concluded that they are. *Id.*

Secretary Husted adopted the Hearing Officer's report and recommendation. *Id.* Ultimately, the Secretary was the *sole* decisionmaker regarding the validity of the protest and the removal of Earl from the ballot. Husted Depo., R.203-1, PageID#4181, 4206, 4222, 4225. And the Libertarian Party's own lawyer conceded that the Party was "not attempting to cast any shadow of a doubt on [Secretary Husted's] particular decision." *Id.*, PageID#4250. Secretary Husted was indifferent as to the outcome of the protest hearing. *Id.*, PageID#4222. He simply expected everyone—the petition circulators, his staff, and the Hearing Officer—to follow the law. *Id.*, PageID#4222, 4224-25, 4249. Due to the Secretary's decision, the signatures obtained in violation of § 3501.38(E)(1) were invalidated and Earl lacked a sufficient number of signatures to qualify as the Libertarian Party candidate for the primary ballot. *Libertarian Party*, 751 F.3d at 410.

In March 2014, the Libertarian Party filed another amended complaint challenging Earl's removal from the ballot. It sought a preliminary injunction on the ground that Ohio Rev. Code § 3501.38(E)(1)'s disclosure requirements violated the First Amendment and the Due Process Clause's void-for-vagueness doctrine. *Libertarian Party*, 751 F.3d at 411. The district court denied a preliminary injunction, *id.*, and the Sixth Circuit affirmed, *id.* at 412-24. The Libertarian Party sought relief in this Court, which Justice Kagan and later the full Court denied. *Libertarian Party v. Husted*, 134 S. Ct. 2164 (2014). (In addition, the Libertarian

Party candidate for Attorney General had filed a writ of mandamus in the Ohio Supreme Court challenging Secretary of State Husted's interpretation of Ohio Rev. Code § 3501.38(E)(1), but the Ohio Supreme Court upheld his interpretation. *State ex rel. Linnabary v. Husted*, 8 N.E.3d 940 (Ohio 2014).)

Ahead of the 2014 general election, the Libertarian Party added a "selective-enforcement" claim arising from the enforcement of the disclosure requirements in Ohio Rev. Code § 3501.38(E)(1) during the 2014 primary election. It moved for a preliminary injunction to give it ballot access on this ground, but the district court denied the request. Order, R.260, PageID#7074. The Party did not appeal that loss to the Sixth Circuit or this Court in an effort to get on the general ballot.

C. After The 2014 Election, The District Court And The Sixth Circuit Rejected All Of The Libertarian Party's Challenges In Final Judgments

After further discovery and the addition of a "selective-enforcement" claim by the Libertarian Party arising from the enforcement of Ohio Rev. Code § 3501.38(E)(1)'s disclosure requirements for the 2014 primary election, the district court issued two opinions resolving all remaining claims.

The first opinion, issued in October 2015, addressed (as relevant here) the Libertarian Party's *Anderson-Burdick* and state-law challenges to the Ballot-Access Law (but left unresolved the selective-enforcement claim). Order, R.336, PageID#8696-8700. The court granted summary judgment to the State on the merits of the *Anderson-Burdick* claim. *Id.*, PageID#8705. And it dismissed the Party's challenge to the Ballot-Access Law under the Ohio Constitution on sovereign-immunity grounds (because the Libertarian Party sought an injunction

against the State for allegedly violating *state law*). *Id.*, PageID#8705. The Libertarian Party filed an untimely notice of appeal from this decision, which the Sixth Circuit dismissed for lack of jurisdiction. *Libertarian Party of Ohio v. Husted*, 808 F.3d 279, 280-81 (6th Cir. 2015). Justice Kagan denied an application for relief from that decision. *Libertarian Party of Ohio v. Husted*, No. 15A725 (U.S. Jan. 14, 2016) (Kagan, J., in chambers).

After that appellate cycle, the only claim left unresolved was the Libertarian Party's selective-enforcement claim arising from Earl's disqualification for the 2014 primary. On May 20, 2016, the district court granted summary judgment in favor of the State on this claim and entered a final judgment. Order, R.369, PageID#8931. The Libertarian Party appealed. In the meantime, the Party sought a stay and emergency injunction pending appeal from the district court, which the court denied on June 10. Order, R.374, PageID#8971. On May 23, the Party filed a motion for emergency relief pending appeal and /or to expedite briefing in the Sixth Circuit. On June 7, 2016, the Sixth Circuit ordered expedited briefing.

Around the same time, in January 2016, the Libertarian Party also filed a lawsuit against the Ballot-Access Law in state court raising *both* a state-law claim under Article V, § 7 of the Ohio Constitution *and* an equal-protection claim under the state constitution similar to the Libertarian Party's *Anderson-Burdick* claim in federal court. On June 7, 2016, the state court granted summary judgment to the State on both of these claims. It held, among other things, that Article V, § 7 of the Ohio Constitution does not require the State to allow all parties to nominate their

candidates via primaries rather than petitions. *See Libertarian Party of Ohio v. Husted*, No. 16-cv-554, Slip. Op. at 25 (Ohio Ct. Com. Pl. June 7, 2016) (available at Appellant's Br., R.21, Addendum 3 (6th Cir. June 21, 2016)).

On July 29, 2016, the Sixth Circuit affirmed the district court on all claims. App. Op. 11-30. As for its challenge to the Ballot-Access Law under *Anderson-Burdick*, the Sixth Circuit explained that the Libertarian Party "misstate[d] Ohio law" when it argued that Ohio officially registers voters' political affiliations through primaries, thereby "grant[ing] a benefit to major parties that is denied to minor parties" (which cannot use primaries when they form via petition). App. Op. 23. The Sixth Circuit explained that Ohio law does not "govern party registration or affiliation in general," but rather refers only to "'party affiliation' for a specific purpose: establishing who may vote in a partisan primary." *Id.* at 24 (internal quotation marks omitted). Because the Libertarian Party had "not demonstrated that Ohio law deprives it of membership or affiliation in a general sense," the Sixth Circuit concluded that the Ballot-Access Law's requirement that the Party nominate candidates by petition, rather than by primary, was not a severe burden, but also was "not [a] non-existent" one. *Id.* at 26. The court then concluded that Ohio's legitimate interest in ensuring that candidates have sufficient support before appearing on any ballot justified this burden, and affirmed the district court's summary judgment on the *Anderson-Burdick* claim. *Id.* at 26-28.

In next affirming dismissal of the Libertarian Party's selective-enforcement claim, the Sixth Circuit noted that the Party did not "contend that Secretary Husted

himself selectively enforced or applied" the law and rejected its arguments that the Ohio Republican Party engaged in state action by protesting the Party's candidates. *Id.* at 14-16. The Ohio Republican Party, said the Circuit, had not been assigned an "integral part" of Ohio's election process related to candidate protests. *Id*. at 15.

Finally, as for the Libertarian Party's state constitutional challenge, the Sixth Circuit concluded that the Party's litigation of that claim to final judgment in state court barred any appeal from the district court's dismissal of it. *Id.* at 28-30.

On August 1, 2016, the Party sought a stay and an emergency injunction from the Sixth Circuit, which the Sixth Circuit denied on August 22, 2016.

Since then, Secretary Husted has certified the Libertarian Party's presidential ticket—Gary Johnson and William Weld—for the November 2016 Ohio ballot as *independents* rather than as the candidates for the Libertarian Party. That happened in two steps. First, petitions were submitted for the independent candidacy of Charlie Earl and Kenneth Moellman. *See* Ohio Rev. Code § 3513.257. Then, Earl and Moellman withdrew and Johnson and Weld were substituted for them. *See* Ohio Rev. Code § 3513.31(F). On August 24, 2016, Secretary Husted certified Johnson and Weld as independent presidential candidates to the November 2016 ballot. The deadline for protests to be filed against Johnson's independent candidacy is August 26—tomorrow. Ohio Rev. Code § 3513.263. No protests are pending.

ARGUMENT

I. CONTRARY TO THE LIBERTARIAN PARTY'S CLAIM, IT MUST MEET A MORE DEMANDING TEST TO OBTAIN AN *INJUNCTION* RATHER THAN A *STAY*

To obtain the relief it seeks, the Libertarian Party must satisfy the test for an *injunction* pending the filing of a writ of certiorari—a standard it has not identified. The Party purports to pursue both a stay of the Sixth Circuit's judgment and an emergency injunction directing the Secretary to "restor[e]" its presidential ticket to Ohio's 2016 general-election ballot. *See* Application for Stay and Emergency Injunction Addressed to Justice Kagan ("Appl.") 1-2. Yet because the Sixth Circuit *affirmed* the district court's *rejection* of the Party's claims, a stay would simply maintain the status quo in which the Ballot-Access Law governs minor parties in Ohio. In other words, a stay could not "restore" the Party to a ballot that it is not on and has no right to be on under state law. Thus, the governing standard for the requested relief is not the more lenient rule for a *stay* pending certiorari, *see* 28 U.S.C. § 2101(f), but rather the more difficult one for an *injunction* pending certiorari, *see Respect Maine PAC v. McKee*, 562 U.S. 996 (2010); 28 U.S.C. § 1651.

A. The "only source of this Court's authority" to grant an injunction pending further appellate review is the All Writs Act, 28 U.S.C. § 1651(a). *See Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) (denying request for an injunction pending writ of certiorari); *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 642 (2012) (Sotomayor, J., in chambers) (denying request for an injunction pending appeal). Such a request "'demands a significantly

higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *McKee*, 562 U.S. at 996 (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). This Court's "own rules require[] that injunctive relief under the All Writs Act is to be used 'sparingly and only in the most critical and exigent circumstances.'" *Brown*, 533 U.S. at 1303 (Rehnquist, C.J., in chambers) (quoting *Ohio Citizens*, 479 U.S. at 1313 (Scalia, J., in chambers); *see also* S. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.").

This Court employs a two-factor test to determine whether an injunction pending certiorari or appeal should issue. "[A] Circuit Justice may issue an injunction only when [1] it is 'necessary or appropriate in aid of our jurisdiction' and [2] 'the legal rights at issue are indisputably clear.'" *Hobby Lobby*, 133 S. Ct. at 642-43 (Sotomayor, J., in chambers) (quoting *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers)) (alteration deleted); *see also Brown*, 533 U.S. at 1303-04 (Rehnquist, C.J., in chambers) (declining to issue an injunction pending certiorari because the applicants' "position [was] less than indisputable"); 28 U.S.C. § 1651(a).

B. The Libertarian Party nowhere cites these standards. It instead incorrectly recites a test allegedly for "emergency relief pending certiorari" that

closely tracks the test for a *stay* of a lower court's actions. *See* Appl. 10 (citing *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers)). For both precedential and logical reasons, however, the Party has mistakenly identified a more lenient standard for obtaining the injunctive relief that it seeks here.

Relying on the in-chambers opinion in *Lucas*, the Party suggests a two-part test that tracks the test for a stay—a showing that there is "'a fair prospect that five Justices will'" reverse and that "'irreparable harm will likely result from the denial of equitable relief.'" *See* Appl. 10 (quoting *Lucas*, 486 U.S. at 1304). "Recently," however, "the full Court"—in a binding decision—"has stated that an injunction is more difficult to justify than a stay." Stephen M. Shapiro et al., *Supreme Court Practice* 879 (10th ed. 2013); *see McKee*, 562 U.S. 996. Since then, moreover, more recent opinions ruling on requests for injunctions pending appeal have applied this heightened standard. *See, e.g.*, *Hobby Lobby*, 133 S. Ct. at 642-43; *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers) ("To obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are 'indisputably clear.'" (citation omitted)); *Brown*, 533 U.S. at 1303-04; *Wis. Right to Life*, 542 U.S. at 1306 (injunction pending appeal "appropriate[]" only where "'necessary or appropriate to aid our jurisdiction'" and "the legal rights at issue are 'indisputably clear'" (citations omitted)).

Requiring "a significantly higher justification than that described in the § 2101(f) stay cases" makes sense given the procedural posture. *See Ohio Citizens*, 479 U.S. at 1313. The Libertarian Party does not merely seek a pause in the

judicial proceedings while its rights are adjudicated. It seeks, on an emergency basis while facing discretionary review, irreversible relief that *every judge* in these proceedings has withheld from it. More than a "fair prospect" of harm is required to justify such extraordinary intervention at this late stage. *See id.*

II. THE LIBERTARIAN PARTY HAS NOT EVEN ALLEGED, LET ALONE SHOWN, THAT AN INJUNCTION IS NECESSARY TO AID THIS COURT'S JURISDICTION

The Libertarian Party does not cite § 1651's requirement that an injunction be "necessary or appropriate in aid of [the Court's] jurisdiction[]," nor has it met it. The Libertarian Party's presence or absence on Ohio's 2016 general-election ballot has no bearing on this Court's power to consider the Party's petition for a writ of certiorari from the Sixth Circuit's final judgment. *See Hobby Lobby*, 133 S. Ct. at 643. Indeed, Petitioner Charlie Earl did not qualify for the 2014 general-election ballot, *see* App. Op. 10-11, yet the lower courts have maintained jurisdiction over the Libertarian Party's various claims arising solely from that election, *see id.* at 12-13. (Ohio and the Secretary continue to believe that the conclusion of the 2014 election mooted the Libertarian Party's selective-enforcement claim, but an injunction in the form of *2016* ballot access would in no way "aid" this Court's jurisdiction with respect to that claim.) In any event, the Court need "not consider [the Libertarian Party's] counsel to have asked for such extraordinary relief where, as here, he has" not "addressed the peculiar requirements for its issuance." *Ohio Citizens*, 479 U.S. at 1314.

III. THE LIBERTARIAN PARTY HAS NOT SHOWN THAT IT HAS AN "INDISPUTABLY CLEAR" RIGHT TO AN INJUNCTION

On the merits, the Libertarian Party argues that it is reasonably likely to obtain review and reversal on three grounds: (1) because the Ballot-Access Law violates the *Anderson-Burdick* line of cases; (2) because the Ohio Republican Party engaged in state action; and (3) because the Sixth Circuit mistakenly addressed Ohio's argument that res judicata barred the Libertarian Party's state-law claim before resolving whether Ohio was entitled to sovereign immunity on that claim. Appl. 10-27. None of these arguments proves that the Libertarian Party's rights to an *injunction* are "'indisputably clear,'" *Hobby Lobby*, 133 S. Ct. at 643 (Sotomayor, J., in chambers) (citation omitted), or, indeed, meets the lower standards for a *stay* pending certiorari.

A. It Is Not Indisputably Clear That The Challenged Provisions Of The Ballot-Access Law Violate The Fourteenth Amendment

The legal rights at issue here under *Anderson-Burdick* are indisputably clear, but to the detriment of the Libertarian Party. All four judges to have considered this challenge below have correctly rejected it. Likewise, an Ohio state court granted summary judgment against the Party on a similar equal-protection challenge under state law. *Libertarian Party*, No. 16-cv-554, Slip Op. at 13-25.

The *Anderson-Burdick* standard requires that the Court "weigh 'the character and the magnitude of the asserted injury to the rights protected by the First and the Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests

make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Applying this sliding-scale analysis, if a state election law imposes "only 'reasonable nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

The Ballot-Access Law readily satisfies this *Anderson-Burdick* analysis and is similar to other ballot-access regulations that have passed constitutional muster. It is a reasonable, nondiscriminatory law that does not severely burden the Libertarian Party and is more than amply justified by legitimate state interests.

1. *Burdens*. The Libertarian Party claims that a minor party forming via petition is burdened by the lack of a primary because primaries in Ohio "wed" members to the parties with whom they vote. Appl. 11-12. This argument both conflicts with this Court's precedent and misconstrues state law.

Start with precedent. This Court's decision in *White* forecloses the argument that requiring a minor party to nominate candidates by petition, rather than primary, violates the *Anderson-Burdick* framework. 415 U.S. at 781-82. Indeed, the Court went so far as to suggest that it cannot "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." *Id.* at 781. "The procedures are different, but the Equal Protection Clause does not necessarily forbid the one in preference to the other." *Id.* at 781-82.

Under *White*, a State need not provide minor parties a primary. Yet the Libertarian Party does not even cite *White*, which makes "indisputably clear" that their claim fails.

Indeed, several circuits have upheld *more* onerous ballot-access laws after *White*. *Green Party of Ark. v. Martin*, 649 F.3d 675, 677-78 (8th Cir. 2011) (Arkansas law defining "political party" as a group with at least 3% of vote in most recent gubernatorial election or allowing minor parties access to the ballot via petition with 10,000 signatures collected over 90 days); *Rogers v. Corbett*, 468 F.3d 188, 190-91 (3d Cir. 2006) (Pennsylvania statute requiring minor-party candidate to gather signatures of at least 2% of the vote total of the candidate who obtained highest number of votes for statewide office over a five month period of time paired with condition that one of the minor party's candidates have polled 2% of vote total of highest-polling candidate in previous election); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Bd.*, 844 F.2d 740, 744-46 (10th Cir. 1988) (Oklahoma law requiring a new political party to submit a petition containing the signatures of at least 5% of the total votes cast in the last general election for either Governor or President and requiring that the petitions be filed no later than May 31 of an even numbered year).

Turn to state law. The Libertarian Party's argument that Ohioans affiliate with political parties at partisan primaries misconstrues Ohio's election laws. For purposes of eligibility to vote in a primary or signing candidate petitions, Ohioans may affiliate with a party by casting that party's ballot at a primary election or by

signing a new-party candidate's petition. *See* Ohio Rev. Code §§ 3513.05; 3513.19; 3513.20. These statutes do not govern registration or affiliation *in general*. Rather, they address party affiliation for *limited purposes*.

In addition, the Libertarian Party makes no arguments that the Ballot-Access Law's provisions regarding party formation and ballot access are themselves unconstitutional. It does not, for example, contend that the number of signatures required to form or for candidates to get on the ballot are too burdensome. Rather, the Party contends it is disadvantaged because voters who voted in another parties' primary cannot sign its candidate-nomination petitions. Under the Ballot-Access Law, any registered Ohio voter who requests an "issues-only" primary ballot (one without partisan candidates) or who does not vote in the primary during the preceding two years is eligible to sign a minor-party candidate's nominating petition. Ohio Rev. Code § 3517.012(B)(2)(a)-(b). For the 2012 primary election, Ohio had over 7.7 million registered voters. Certified Records, R.40-1, PageID#609-612 (S.D. Ohio). Of those, only approximately 1.9 million people voted in that primary election, just over twenty-five percent. *Id.*, PageID#612. In 2010, Ohio had 8,013,558 registered voters. Certified Records, R.40-1, PageID#613-616. Only 1,814,244 of those, or approximately 23%, cast a ballot in the May primary. *Id.*, PageID#616. Even assuming that every single one of those individuals cast a partisan primary ballot (as opposed to an issues-only ballot), that would have left at least 75 percent of all registered voters able to sign petitions for Libertarian Party candidates in 2010, 2012, and 2014, respectively. This is hardly a small pool.

Moreover, considering the minimal signature requirements a candidate needs to qualify for the ballot, it is hard to fathom how the Party suffers any disadvantage. A newly formed minor party's statewide candidates need only 50 signatures, and its district-wide candidates need only 5 signatures to qualify for the ballot. Ohio Rev. Code § 3517.012(B)(2)(a)-(b). Yet major party candidates need 1,000 signatures for statewide office and 50 for district-wide office. *Id.* § 3513.05. And once a minor party passes the three-percent threshold, its candidates need only half of the signatures required of major-party candidates to appear on the primary ballot. *Id.*

2. *State Interests.* The Ballot-Access Law's modest requirements ensure that new or minor parties have significant support before they appear on the ballot. Indeed, this Court has already recognized the "important state interest in requiring some preliminary showing of a significant modicum of support—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Forston*, 403 U.S. 431, 442 (1971). And there is an "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." *Id.* at 441. Furthermore, the Sixth Circuit *invalidated* an earlier state law that required minor parties to have primaries, *Libertarian Party*, 462 F.3d at 582-83, 589-90, so it made sense for the State to limit new parties' participation in primary elections.

This is particularly so because, as the district court found, "minor party primaries are typically uncontested" and experience low voter turnout. Order, R. 285, PageID#7520. Indeed, the Libertarian Party's own expert, Richard Winger, testified that he does not believe it is good public policy to require minor parties to participate in primaries. Winger Depo., R. 38-1, PageID#424-426. Even when their primaries are contested, minor-party voters tend to be uninformed about the minor parties' candidates. *Id.*, PageID#425. Winger acknowledged that Ohio's law is not outside the mainstream. He agrees that it is not unusual for a State to decide that newly qualified political parties do not get to participate in a state-run primary, and endorsed that decision as a preferable, logical choice. *Id.*, PageID#424-26. As Winger testified in *Green Party of Tennessee v. Hargett*, 953 F. Supp. 2d 816, 829 (M.D. Tenn. 2013), "'[m]inor parties in the United States almost never have contested primaries, so providing them with their own is wasteful.'"

Ohio's experience with minor-party primary elections bears out Winger's testimony that Ohio's system is a good and rational policy choice. During the 2012 primary, the Libertarian Party had only 337 individuals across the entire state cast a ballot for its senatorial candidate. http://goo.gl/y9h7Kz (last visited August 25, 2016). In 2012, the Libertarian Party fielded one State Senate candidate and only six candidates for the Ohio House. http://goo.gl/TFKOPm (last visited August 25, 2016); http://goo.gl/aG62Oa (last visited August 25, 2016). In 2010, only 5,476 people requested a Libertarian Party primary ballot. *See* http://goo.gl/DEuyF2 at Primary Election: May 4, 2010 ("Voter Turnout by Party" (last visited August 25,

2016)). Such low minor-party turnout and candidate participation shows that it is unnecessary for such parties to have a primary.

These low-turnout primaries came at considerable cost to the counties. At a primary election, every precinct has to have a primary ballot prepared for every party running a candidate statewide. *See* Ohio Rev. Code § 3513.13. The expenditure of such resources in the face of such low turnout substantiates the view of Libertarian Party expert Winger that it is "wasteful" to demand minor-party participation in primary elections. *Green Party*, 953 F. Supp. 2d at 829. The interest of "defray[ing] election costs" has been approved by the courts as "worthy of advancement." *Green v. Mortham*, 989 F. Supp. 1451, 1459 (M.D. Fla. 1998).

3. *Libertarian Party's Cases.* The Party's cases are all far afield. *Reform Party of Allegheny County v. Allegheny County Dept. of Elections*, 174 F.3d 305 (3d Cir. 1999) (en banc), and *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992), have no bearing on the issues presented here. In *Fulani*, the plaintiffs challenged a Florida statute that allowed candidates qualifying for the ballot by petition to avoid paying signature-verification fees by submitting a written oath of inability to pay. The statute, however, provided that minor-party candidates could not provide an oath in lieu of payment of the fees. Applying the applicable *Anderson-Burdick* analysis, the court invalidated the law because Florida did not identify any interest justifying that *facially* discriminatory treatment of certain parties. 973 F.2d at 1544. *Reform Party of Allegheny County* likewise involved a law that denied a benefit to minor parties that was available to others. In that case, state law allowed

major parties to cross nominate candidates for local office, but prohibited minor parties from doing the same. The court found the law "facially discriminatory" and a violation of equal protection. *See* 174 F.3d at 318.

Here, by comparison, the Ballot-Access Law does not deny minor parties such benefits that are provided to others. It creates alternative methods to obtain recognized minor-party status and sets forth the process for minor-party candidates to access the ballot. As *White* recognized, States may constitutionally create procedures that are different for different classes of candidates. 415 U.S. at 781. Access to the ballot through a primary and access to the ballot through a petition are two distinct paths to the ballot, "'neither of which [could] be assumed to be inherently more burdensome than the other.'" *Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012) (quoting *Jenness*, 403 U.S. at 441).

The Party's other cases are equally unhelpful to it. *Green Party of New York State v. New York State Board of Elections*, 389 F.3d 411 (2d Cir. 2004), involved a challenge to a New York registration law under which voters enrolled as party members when registering. New York law does not use the terms "major party" and "minor party." Rather, in New York, a political organization is either a "party" or an "independent body" depending on whether the organization's gubernatorial candidate received at least 50,000 votes during the last election. Those who achieved 50,000 votes were "parties" and those who did not were "independent bodies." *Id.* at 415. Upon registration, New York voters could only enroll as a member of a "party" and not an "independent body." *Id.* at 416. *Baer v. Meyer*, 577

F. Supp. 838, 843 (D. Colo. 1984), involved a challenge to a law providing that voters register party affiliation on voter registration forms that provided boxes only for "Democratic," "Republican," and "Unaffiliated." Voters could only affiliate with other parties on a portion of the form labeled "Remarks" and were frequently misinformed that they could not affiliate with other parties. *Id.* Party membership lists could be generated for Republicans and Democrats from the information provided on the registration forms. *Id.*

Unlike in *Baer* and *Green Party of New York State*, Ohio voters do not declare a party upon registering to vote and they may affiliate with any recognized party at a partisan primary election. As the Sixth Circuit below found, Ohio's statutes "'do not govern party registration or affiliation *in general*,' but rather refer only to 'party affiliation' for a specific purpose: establishing who may vote in a partisan primary." App. Op. 24 (citation omitted). These cases do not support the Libertarian Party's claims, let alone establish that the law is indisputably clear in its favor.

Socialists Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y. 1970), *summarily aff'd*, 400 U.S. 806 (1970), is also inapposite. The Party relies upon the portion of that case invalidating a New York law that called for providing free lists of registered voters to county chairmen of certain political parties but required minor parties to pay for such lists. The Court explained the effect of the provisions "is to deny independent or minority parties . . . an equal opportunity to win the votes of the electorate" and that there was "no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those

parties which have least need therefor." *Id.* at 995. The Party's last case, *Schulz v. Williams*, 44 F.3d 48, 60 (2d Cir. 1994), involved essentially the same law struck down in *Rockefeller*. *Rockefeller* and *Schulz* have no bearing here as the Ballot-Access Law does not deny minor parties any benefit available to major parties and, to the extent it imposes any burden, those burdens are justified by State interests.

The Party has failed to offer any authority demonstrating the "indisputable clarity" of its rights, or even a strong likelihood of success. The Sixth Circuit correctly concluded that the Ballot-Access Law does not severely burden the Party. There is no basis for an emergency injunction on this claim.

B. It Is Not Indisputably Clear that the Ohio Republican Party Was A State Actor That Selectively Enforced An Ohio Statute In Violation Of The Constitution

1. The Libertarian Party also has no "indisputably clear" right to an injunction as to the selective-enforcement claim. That is so for four reasons.

First, the Libertarian Party raises arguments about only a single element of the claim, so even crediting those arguments would not merit overriding the Sixth Circuit's judgment. The Party spends its entire argument on this point discussing whether the Ohio Republican Party was a state actor. Even if the Party were right on this point, it has said nothing about the remaining elements—whether enforcement of the Ohio election law here (1) had a discriminatory effect and (2) was motivated by a discriminatory purpose. *Wayte v. United States,* 470 U.S. 598, 608 (1985). The Party has failed to even argue these elements, let alone satisfy them.

The Party cannot show discriminatory effect because it has not shown that the law was unenforced against "similarly situated individuals." *United States v.*

Armstrong, 517 U.S. 456, 465 (1996). Indeed, the opposite is the case. An Ohio appellate decision describes a *successful* protest based on the same Ohio statute that the Party challenges as selectively enforced. *See In re Protest of Evans*, No. 06AP-539, 2006-Ohio-4690 ¶¶ 4-5 (Ohio Ct. App.); *see also* Order, R.369, PageID#8946 (describing additional instance of enforcement); *see Libertarian Party*, 751 F.3d at 405 (describing Party's challenge to the same statute).

Nor can the Party show that the enforcement here had a discriminatory purpose. "[T]he decisionmaker"—Ohio's Secretary of State—did not enforce the law "'because of[]' . . . its adverse effects upon an identifiable group." *Wayte,* 470 U.S. at 610 (1985) (citation and some quotation marks omitted). The Party *concedes* that the Secretary did not selectively enforce the statute in 2014. *See* App. Op. 14.

The Libertarian Party would thus fail to prevail on its selective-enforcement claim under these required elements. This Court has "taken great pains to explain" that the standard for proving selective enforcement "is a demanding one." *Armstrong,* 517 U.S. at 463. Yet the Libertarian Party is utterly silent about two of the three elements. Silence does not satisfy this "demanding" standard as a de novo matter, let alone when filtered through the "indisputably clear" requirement. *Cf. Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (two layers of deference require reviewing court to resolve doubt against party seeking relief).

Second, the Libertarian Party has bypassed multiple opportunities to seek an injunction to restore its party status in Ohio on this ground. The claimed selective enforcement arose in March 2014. *See Libertarian Party*, 751 F.3d at 407-412.

Since then, the Party has twice sought an injunction in this Court to restore its party status. *See* No. 13A-1089 (May 1, 2014) (denied by Justice Kagan), *on further application*, (May 5, 2014) (denied by Court after referral by Justice Thomas); No. 15A-725 (January 14, 2016) (denied by Justice Kagan). In those Applications, the Party could have argued that the alleged selective enforcement required an injunction putting it on the ballot for the 2014 primary election, the 2014 general election, or the 2016 primary election. Yet it did not. Nor did it appeal in late 2014 after the district court rejected a requested preliminary injunction where the Party argued that it should be placed on the general 2014 ballot because of selective enforcement. The distance between the winter of 2014 and today weakens the claim that this Court should put two candidates on the ballot under the Libertarian banner who (1) are not parties to the case, (2) during the events of 2014, were not even a gleam in the Party's eye, and (3) are now certified as independents. Forgoing these multiple prior opportunities to seek relief on this basis is "inconsistent with the urgency [the Party] now assert[s]." *Brown*, 533 U.S. at 1305 (Rehnquist, C.J., in chambers) (denying injunction pending certiorari).

Third, the Ohio Republican Party is not a state actor in this case. The Ohio Republican party allegedly triggered the protest. *See* App. Op. 7. But even "furnishing" information to authorities about a legal violation does not transform a private actor into a state actor. *See, e.g.*, *Cooper v. Muldoon*, No. 05-4780, 2006 WL 1117870, at *2 (E.D. Pa. Apr. 26, 2006) (collecting cases). The Ohio Republican Party's action here no more makes it a state actor than does a witness reporting a

crime to the police or a whistleblower reporting a violation to authorities. The enforcement here was entirely the product of the Secretary, an actor that the Libertarian Party concedes did not selectively enforce the law. App. Op. 14.

Fourth, the Libertarian Party's request for relief does not match its theory. Rather than argue that the Secretary selectively enforced Ohio election law, it argues that the Ohio Republican Party did so. Appl. 19. But even if that is so, the remedy would lie against the Republican Party, not the Secretary. *Cf. Wyatt v. Cole,* 504 U.S. 158 (1992) (private actor using unconstitutional state statute did not enjoy qualified immunity under § 1983). It is far from "indisputably clear" that a remedy against Ohio and its Secretary is appropriate here, even if the Libertarian Party could show all the elements of selective enforcement.

2. Nothing in the Libertarian Party's application refutes these points. The Party's entire argument on selective enforcement relies on "meaningfully different" cases holding that a political party may be a state actor for *certain purposes*. App. Op. 14. No case that the Party cites holds that a political party is a state actor for reporting an election-law violation. Unlike the Party's cases, the Ohio Republican Party did not "determin[e]" candidate qualification, *Smith v. Allwright*, 321 U.S. 649, 664 (1944), "determine[] who shall . . . govern," *Terry v. Adams*, 345 U.S. 461, 469 (1953), or "appl[y]" a state statute, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 589 n.9 (5th Cir. 2006). Nor is this case anything like *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996)—which interpreted a statute, not the Constitution—*id.* at 195 (Stevens, J., op.), or *Constitution Party of Pa. v.*

Aichele, 757 F.3d 347 (3d Cir.2014)—which involved a question of standing in a facial attack on an election statute. Easily distinguishable cases do not equal indisputably clear rights.

C. The Libertarian Party's Argument That The Sixth Circuit Should Have Considered Sovereign Immunity Before Res Judicata Does Not Show That The Party Is Indisputably Entitled To Relief On Its State-Law Claim

The Libertarian Party lastly seeks an injunction on the ground that this Court should consider whether the Sixth Circuit could resolve its state-law claim on res-judicata grounds before addressing whether the State was entitled to sovereign immunity. For many reasons, this issue provides no basis for an injunction.

First, no matter who is right on this procedural debate—whether courts can sidestep a sovereign-immunity issue when it is clear that a plaintiff's claim fails on the merits—the question is not outcome dispositive. This procedural question thus offers no support for the conclusion that the Libertarian Party has an "'indisputably clear'" right to be on the November ballot based on an alleged violation of Article V, § 7 of the Ohio Constitution. To be entitled to an injunction on that state-law ground, the Libertarian Party would have to show: (1) that the Sixth Circuit indisputably erred in relying on res judicata to find this claim barred; (2) that the district court indisputably erred in relying on sovereign immunity to find this claim barred; and (3) that the state court indisputably erred in finding this claim meritless under the Ohio Constitution's plain text. But the Libertarian Party does not even attempt to make any of these showings.

Second, the Libertarian Party lacks an indisputably clear right to an injunction on the basis of this state-law claim because the Sixth Circuit correctly found the claim barred by res judicata. As the Libertarian Party itself admits, a state court rejected this state-law claim on the merits when it granted summary judgment to the State and dismissed the claim in a final order. *Libertarian Party*, No. 16-cv-554, Slip Op. at 25. "The Full Faith and Credit Act, 28 U.S.C. § 1738, originally enacted in 1790, . . . , requires [a] federal court to 'give the same preclusive effect to a state-court judgment as another court of that State would give.'" *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005) (citation omitted). Under Ohio law, moreover, "[i]t is well-settled that the pendency of an appeal does not prevent the judgment's effect as res judicata in a subsequent action." *Cully v. Lutheran Med. Ctr.*, 523 N.E.2d 531, 532 (Ohio Ct. App. 1987).

Third, the Libertarian Party lacks an indisputably clear right to an injunction on the basis of this state-law claim because the district court correctly held that sovereign immunity barred the claim. Order, R.336, PageID#8700-05. It is black-letter law that sovereign immunity bars plaintiffs from seeking injunctive relief in federal court against a State or its officials on claims arising under *state* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The Libertarian Party's only defense to this argument was that Ohio had somehow waived the sovereign-immunity defense to this state-law claim by intervening to co-defend this litigation before the Libertarian Party had even *raised* this state-law claim in federal court. But the district court rightly noted that this intervention did

not *unequivocally* illustrate Ohio's consent to suit on the state-law claim—the standard that the Party must meet. Order, R.336, PageID#8703-05; *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-83 (1999).

Fourth, the Libertarian Party lacks an indisputably clear right to an injunction on the basis of this state-law claim because the state court correctly held that the Libertarian Party misinterpreted Article V, § 7 of the Ohio Constitution. *Libertarian Party*, No. 16-cv-554, Slip Op. at 7-13. This section provides that "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections *or by petition as provided by law . . . .*" Ohio Const. art. V, § 7 (emphasis added). Nowhere does this language grant any party a constitutional right to a primary election despite state law to the contrary. Instead, it directs political parties to state "law" adopted by the General Assembly. "Manifestly this provision of the constitutional amendment is not self-executing. Legislation in some form is needed." *Fitzgerald v. Cleveland*, 103 N.E. 512, 521 (Ohio 1913) (Wanamaker, J., concurring); *cf. State v. Jackson*, 811 N.E.2d 68, 72-73 (Ohio 2004) (holding that a similar provision of was not self-executing).

Fifth, even if the Libertarian Party's right to relief did hinge on the answer to the procedural question that it has presented, the Libertarian Party has alleged only a circuit split on that question. Appl. 25-26. That allegation dooms its request for an injunction. A right to injunctive relief is not indisputably clear when "lower courts have diverged on" the question on which relief depends. *Hobby Lobby*, 133 S. Ct. at 643 (Sotomayor, J., in chambers). In other words, when "the courts of

appeals appear to be reaching divergent results in [the relevant] area," that conflict disproves (rather than proves) the propriety of an injunction pending further appellate review. *Lux*, 131 S. Ct. at 7 (Roberts, C.J., in chambers).

Sixth, perhaps for all of these reasons, the Libertarian Party did not even assert this claim as a basis for emergency relief in the Sixth Circuit following that court's judgment against it. *See* Mot. to Stay, R. 34, at 2-17 (6th Cir.). By failing to present this argument below, the Party has waived its ability to rely on this ground here. *Cf. Spriestma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

IV. THE BALANCE OF EQUITIES TIP AGAINST THE REQUESTED INJUNCTION

Aside from the usual factors, the Court should decline to issue an injunction because the overall equities support the status quo.

Irreparable Injury. An injunction would irreparably injure Ohio. "'[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) (granting stay) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Suspending Ohio's law is more significant here as "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks omitted). The harm is especially pronounced in this case because any harm to the Libertarian Party is self-inflicted. Rather than litigate and exhaustively appeal failure after failure in the courts since 2014, the Libertarian Party could have directed that extensive energy to gathering the signatures necessary to form a

recognized minor party under Ohio law. The Party's choice to litigate rather than persuade Ohio citizens to support it should foreclose an emergency injunction.

By contrast the Libertarian Party suffers no irreparable harm because it loses only a chance to get enough votes for its candidates *in this election* to qualify as a minor party in Ohio *for future elections*. It has already bypassed the Ohio 2014 gubernatorial election without gaining an injunction from any court, including this one, to put the Party on the ballot. If the Party's arguments turn out to be right (they are not "indisputably clear" now), an injunction can place the Party on any future Ohio ballot. Nothing is irretrievably lost if the Party sits out one more election, especially one where its preferred candidates may very well already be on the ballot as independents anyway.

Mismatch of Remedy and Theory. None of the Libertarian Party's three legal theories—equal protection, selective enforcement, or state-law violations—match their requested relief: to change the current label on the independent candidacy of Johnson and Weld to "Libertarian." It would be odd to award that relief when Johnson and Weld are not even parties to the case. Further, each claim is incongruent with that requested injunction. If Ohio election law disadvantages minor political parties because they do not automatically get to hold primaries, the remedy is a court-ordered primary after certiorari and full-merits review, not a specific injunction about the non-party candidates Johnson and Weld. If the Ohio Republican Party selectively enforced a statute in 2014, the remedy should run against the party, but, at best, would mean access to a primary after certiorari and

full-merits review, not the specific injunction requested here. If the district court should have heard the Party's state-law claim (after sidestepping immunity and excusing the res-judicata bar), the remedy would be, once again, a primary down the road, not an injunction renaming candidates likely already on the ballot.

Timing. The timing of this request cuts against the Libertarian Party as well. This Court has rejected last-minute election changes because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Ohio's deadline to certify the ballot is days away (August 30). If this Court issues an injunction, it will conflict with both lower federal and state courts' refusals to find merit in the Party's arguments and countermand Ohio law, at best, on the eve of that deadline. Johnson and Weld are already on Ohio's ballot, but are there because Ohio citizens signed petitions for "Independent" candidates, not "Libertarian" ones.

In response, the Libertarian party touts the supposed harm to the Johnson-Weld ticket, doubts the harm to Ohio, and speculates that the public will benefit. Appl. 27-29. It is hard to see how the Johnson-Weld ticket will be harmed (or the public benefited) by changing the name of that ticket. (Conversely, it is possible that Johnson-Weld will be *advantaged* at the ballot box in Ohio without the "Libertarian" party label.) The national poll numbers the Party cites have all arisen *despite* the absence of that ticket gaining official status as "Libertarian" in Ohio.

Rather, the public will be harmed by the last minute ballot-label switch-up imposed on Ohioans who signed a petition for "independents," not "libertarians."

* * * *

Unless the Libertarian Party's claims are "indisputably clear," this Court cannot issue an injunction. Even a later success under the Constitution does not merit relief in this brief-in-a-day atmosphere. *Compare Lux*, 131 S. Ct. at 6 (Roberts, C.J., in chambers) (denying injunction to place candidate on ballot by overriding Virginia law), *with Lux v. Judd*, 842 F. Supp. 2d 895, 906 (E.D. Va. 2012) (enjoining same law after full merits review).

CONCLUSION

The Court should deny the application.

Respectfully submitted,

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