

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

and

ROBERT HART, et al.,

Intervenor-Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON

JON HUSTED,  
in his Official Capacity as Secretary of State,

Defendant,

THE STATE OF OHIO,

TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION REQUESTED

Intervenor-Defendant,

and

GREGORY A. FELSOCI,

Intervenor-Defendant.

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PLAINTIFFS' REPLY TO DEFENDANT-SECRETARY'S AND  
INTERVENOR-DEFENDANT-FELSOCI'S RESPONSES TO PLAINTIFFS' MOTION  
FOR TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

**I. Plaintiffs' and Circulators' First Amendment Rights Are Severely Burdened.**

The present challenge to § 3501.38(E)(1) is both facial and as-applied. As a facial challenge, it is subject to the overbreadth doctrine, which allows challengers to assert the rights of those who are burdened but not necessarily parties. *See Board of Trustees v. Fox*, 492 U.S.

469, 484 (1989) ("The First Amendment doctrine of overbreadth was designed as a 'departure from traditional rules of standing, to enable persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court,'""); *Alexander v. United States*, 509 U.S. 544, 555 (1993) ("The overbreadth doctrine, which is a departure from traditional rules of standing, permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute."); *Nader v. Blackwell*, 545 F.3d 459, 478-79 (6th Cir. 2008) (Clay, J., concurring to make a majority) ("regardless of whether or not Nader has 'directly' challenged the constitutionality of § 3503.06 [Ohio's residence requirement for circulators], Nader does raise a First Amendment challenge, and First Amendment challenges are governed by the overbreadth doctrine. Under that doctrine, a First Amendment plaintiff 'may prevail on a facial attack by demonstrating there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'").

Because of this, Plaintiffs can assert not only their own rights, but also those of paid circulators, including those it actually paid and others.

Numerous courts, including the Supreme Court and this Court, have recognized that forced disclosures by circulators and financial sponsors severely and significantly burden the First Amendment rights of those paid circulators and their supporters. "Exacting scrutiny" is therefore required. The Supreme Court so stated in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182,192 (1999): "as in *Meyer*, the restrictions in question [requiring disclosure] significantly inhibit communication with voters about proposed political change."

This Court in *Citizens in Charge v. Brunner*, 689 F. Supp.2d 992, 993 (S.D. Ohio 2010), necessarily found that Ohio's reporting demand that ballot initiative sponsors provide "the name and address of each paid circulator of its initiative or referendum petition together with the amount paid, or to be paid, to each circulator," constituted a severe burden and thereby violated the First Amendment.<sup>1</sup>

Similarly, the Ninth Circuit stated the same in *WIN v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000), that the Washington disclosure law at issue (described in Plaintiffs' initial Motion) "imposes a significant burden on the right of political speech protected by the First Amendment."

In addition, the Court in *Hatchett v. Barland*, 816 F. Supp. 2d 583, 598 (E.D. Wis. 2011), recently stated the same in the context of a Wisconsin law requiring that election communications (including leaflets, handbills, post cards and pamphlets) disclose the identity of the person or entity who paid for them: "When anonymity is prohibited, the state inevitably chills freedom of speech, and the law must pass exacting scrutiny." And as in *Buckley* and *Rippie*, the Court concluded: "That burden cannot be met here." *Id.*

Consequently, when a facial challenge is made under the First Amendment, as a matter of law disclosure requirements severely burden First Amendment rights. The chilling effect on First Amendment freedoms is sufficient to beg the constitutional question. It may or may not be that the First Amendment is violated, but as a matter of law the burden is severe and significant.

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<sup>1</sup> Intervenor-Defendant-Felsoci has moved to strike Plaintiffs' declaratory evidence. *See* Doc. No. 66. Courts, including this Court in this case, routinely rely on affidavits and declarations to support and deny motions for preliminary relief. The motion should be denied.

Even if the burden is not apparent as a matter of law, Plaintiffs have submitted the affidavit of an experienced circulator who swears that forcing disclosure severely burdens efforts to gather and collect signatures. *See* Doc. No. 64.

The facts surrounding the hearings before Professor Smith further demonstrate that severe burdens on First Amendment freedoms are at stake. That funding sources and their recipients have significant interests in anonymity is poignantly proved there by the many invocations of First Amendment privileges by witnesses called by Intervenor-Defendant-Felsoci.<sup>2</sup> Regardless of whether these privileges were properly invoked, the fact that these witnesses wished to avoid disclosure proves that it can significantly interfere with First Amendment rights. No court to Plaintiffs' knowledge has ever ruled that forced disclosures simply cannot burden associational interests and speech-related activities. The great weight of authority is to the contrary.

Plaintiffs, moreover, have experienced their own severe burdens. The most obvious case is Charlie Earl. He was qualified for Ohio's 2014 primary ballot until the Secretary invoked his novel interpretation of § 3501.38(E)(1) to throw out sheet after sheet of Earl's otherwise valid signatures. Application of § 3501.38(E)(1) severely burdens Earl's First Amendment right, as previously recognized by this Court in its first two preliminary injunctions, to participate in Ohio's political process. He testified that he was severely burdened.

The LPO, too, has been severely burdened. Without a candidate for governor, which it now will not have since Earl was the only qualified candidate to run in its primary, it cannot

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<sup>2</sup> None of these witnesses who invoked First Amendment privilege was affiliated with or called by the LPO. The LPO and its circulators fully cooperated at all levels of the hearing process.

meet Ohio's vote-test for remaining on the ballot. S.B. 193, which will take effect for future elections, requires that parties win at least 2% of the vote for governor in order to remain on the ballot. Without its candidate for governor, the LPO cannot meet that test. Plaintiff-Earl cannot run as a write-in candidate, because he was initially certified as a ballot-qualified primary candidate. Plaintiff-Knedler testified to this at the evidentiary hearing.

Voters, moreover, are drawn to top-of-the-ticket candidates. Without Plaintiff-Earl, the LPO will have no gubernatorial candidate for its primary. The LPO will therefore draw fewer voters to its primary. Because Ohio registers voters' affiliations through primaries, the LPO will have fewer registered members after the 2014 primary. Fewer members means the LPO will have a harder time rebuilding the party after 2014.

What removal of Plaintiff-Earl from the ballot does, then, is destroy the LPO. It will be no longer ballot-qualified after 2014 and will have a much harder time with fewer members in its attempt to rebuild the party in 2016 by gathering tens of thousands of signatures. This is clearly a severe burden, as testified to by Plaintiff-Knedler.

## **II. Section 3501.38(E)(1) Cannot Survive Exacting Scrutiny.**

Plaintiffs in their Motion point to several cases striking down disclosure laws like Ohio's. To this list can be added *Hatchett v. Barland*, 816 F. Supp. 2d 583, 598 (E.D. Wis. 2011), which is discussed above.

For their parts, Defendant-Secretary and Intervenor-Defendant-Felsoci, can point to only one case, *In re Protest of Evans* (attached as Exhibit 2 to Plaintiffs' Motion for Emergency Preliminary Relief), rejecting a First Amendment challenge to a law requiring that a paid circulator disclose the source of his funding. *Evans*, however, was not a facial First Amendment

challenge. Rather, the initiative sponsor there (ACS) argued only that, as applied to the unique facts of that case, § 3501.38(E)(1) violated the First Amendment. Specifically, the sponsor (ACS) claimed that forcing it to disclose Arno (the actual employer) as opposed to itself (the source of the funds) violated the First Amendment. It did not argue, as is argued here, that forcing any disclosure of the source of funds violated the First Amendment. Moreover, *Evans* was handed down before this Court's decision in *Citizens in Charge*. *Evans* is certainly at odds with *Citizens in Charge*.

The best that the Secretary and Defendant-Intervenor-Felsoci can do is point to *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916 (D. Neb. 2011), which sustained a Nebraska law requiring that paid circulators include on their petitions a stamped, red, "Paid" label, and *Walker v. Oregon*, 2010 WL 1224235 (D. Ore. 2010),<sup>3</sup> which sustained an Oregon law requiring that paid circulators register their identities with the state.

The requirements in these two cases are far cries from that challenged here. Nebraska's law did not require that circulators properly guess at, and disclose, the correct source of their funding. It did not place circulators and candidates at risk of losing sheet after sheet of otherwise valid signatures if the circulator's guess proved wrong. It did not require disclosure of the source of funding. Nor did Oregon's law require the disclosure of the source of funding. It did not even require that circulators disclose to the public the fact that they were paid. It simply required that they register their names and addresses and supply that information to state officials when asked.

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<sup>3</sup> In *Walker v. Oregon*, 2010 WL 1224235 (D. Ore. 2010), the law required only that "paid circulators ... provide identifying information to the state — information that is already available by public records request." Plaintiffs do not claim that circulators, paid or volunteer, cannot be required to provide identifying information to the state. They surely can.

Plaintiffs here do not claim that paid circulators cannot be required to provide identifying information to state officials. They surely can. *See, e.g., Walker v. Oregon*, 2010 WL 1224235 (D. Ore. 2010). Plaintiffs, moreover, would not complain if paid circulators simply had to identify themselves as being paid. *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916 (D. Neb. 2011). But Ohio's law goes much farther, requiring the identity of the source; identity of the source on pain of throwing an innocent candidate off the ballot. And this is what violates the First Amendment.

Telling here is the fact that neither the Secretary nor Defendant-Intervenor-Felsoci points to a single case from another state that sustains a funding source disclosure requirement.<sup>4</sup> Plaintiffs have cited several cases originating in other states and Ohio, from the Supreme Court, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (striking down Colorado's disclosure law), this Court, *Citizens in Charge, v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010) (striking down Ohio's law requiring that ballot committees report the names and addresses of paid circulators), the Ninth Circuit, *WIN v. Rippie*, 213 F.3d 1132, 1134 (9th Cir. 2000) (striking down a Washington law that "require[d] the disclosure of the names and addresses of persons paid to collect signatures on initiative petitions ... and the amounts paid to them"); *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004)

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<sup>4</sup> *Montana Public Interest Research Group v. Johnson*, 361 F. Supp. 2d 1222, 1231 (D. Mont. 2005), is not to the contrary. The Court there ordered an evidentiary hearing over whether Montana's disclosure requirement " statutes requiring proponents of a proposed initiative to disclose the names and addresses of paid signature gatherers have a chilling effect on the First Amendment activities of circulators and therefore are unconstitutional." *Id.* at 1231. The outcome of that hearing is not available either in the official reports or on PACER. The Montana law, however, was much like the Ohio law struck down by this Court in *Citizens in Charge, v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010) (striking down Ohio's law requiring that ballot committees report the names and addresses of paid circulators).

(striking down a Nevada statute requiring that groups or entities who publish material relating to an election candidate or ballot question reveal on the publication the names and addresses of the publication's financial sponsors), and the Eastern District of Wisconsin, *Hatchett v. Barland*, 816 F. Supp. 2d 583, 598 (E.D. Wis. 2011) (striking down a Wisconsin law requiring that election communications disclose the identity of source of funding), that have invalidated disclosure measures.

While it is true that some, though not all, *see, e.g., American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), of these cases involved circulators of initiative-petitions rather than candidate-petitions, the distinction is no longer critical. The Sixth Circuit in 2008 refused to recognize any distinction between circulators of initiative petitions and circulators of candidate petitions. In *Nader v. Blackwell*, 545 F.3d 459, 475-76 (6th Cir. 2008), which invalidated Ohio's residence requirement for circulators of candidate-petitions, the Court stated:

We must decide the extent to which the principles that *Buckley* established regarding initiative-petition circulators and registration requirements may be extended. There appears to be little reason to limit *Buckley*'s holding to initiative-petition circulators. As the Supreme Court noted: "Initiative-petition circulators also resemble candidate-petition signature gatherers ... for both seek ballot access." Indeed, common sense suggests that, in the course of convincing voters to sign their petitions, candidate-petition circulators engage in at least as much "interactive political speech"—if not more such speech—than initiative-petition circulators. Some of our sister circuits have concluded the same and have applied *Buckley* to invalidate state laws requiring that candidate-petition circulators be registered voters. We agree with these courts that we should not categorically exclude candidate-petition circulators from *Buckley*'s analysis of registration requirements. Thus, we hold that Blackwell's enforcement of the registration requirements against Nader's circulators violated Nader's First Amendment rights.

Consequently, Ohio's requirement that the paid circulators of candidate-petitions disclose the sources of their funding is subject to precisely the same analysis applied to circulators of



initiative-petitions. The State must pass "exacting scrutiny," which requires at bare minimum that the State prove that its disclosure requirement is substantially related to an important interest.

### **III. Ohio Has Not Experienced "Massive Fraud" With Paid Circulators.**

The premier argument made by states to overcome exacting scrutiny, and that made here, is fraud. Intervenor-Defendant-Felsoci has pointed to the 2004 events surrounding Ralph Nader's candidacy as evidence of "massive fraud" in Ohio. The claim, however, is an urban legend. There was no massive fraud in Nader's case. The Sixth Circuit's opinion in *Nader v. Blackwell*, 545 F.3d 459, 478 n.1 (6th Cir. 2008), makes this clear:

The hearing officer excluded some signatures based on an explicit finding of fraud. However, as the lead opinion explains, even when these signatures were excluded, Nader had enough signatures to qualify for the ballot. Nader's removal from the ballot resulted from the exclusion of signatures gathered by four circulators based on findings that these circulators were not Ohio residents or properly registered voters.

Proponents of the massive fraud myth often, deliberately or inadvertently, misreport what happened in *Nader*. They erroneously equate the invalidation of a circulator's signatures because of the circulator's non-residence or lack of proper registration with fraud.<sup>5</sup> As Nader makes clear, this equation does not hold up. That a circulator's signatures are deemed invalid does not mean he or she engaged in fraud. And the vast majority of signatures thrown out in *Nader* were thrown out on technical grounds, like a circulator's non-residence. The instances of fraud in

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<sup>5</sup> Intervenor-Defendant-Felsoci's expert at the evidentiary hearing likely made this same mistake. He assumed that invalidation-rates of paid circulators' part-petitions implies fraud. That could be true, but it is certainly not necessarily true. It is just as likely that invalidation-rates are tied to the many technical requirements in Ohio law. As illustrated by *Nader*, the reality is that circulators' part-petitions are more often thrown out because of technical mistakes than fraud.

Nader amounted to only a handful of circulators -- and these were easily uncovered and stipulated to by the Nader campaign.

This case is a *Nader* redux. Ohio, through a lone protestor, seeks to exclude Plaintiff-Earl because one of his circulators was wrong about his employment status.<sup>6</sup> The circulator did not defraud anyone. He said nothing that was untruthful. He did not lie. Nor did any LPO official. But because he was wrong about his employment status (according to the Secretary) -- just like Nader's circulators were wrong about their residence -- all of the otherwise valid signatures he collected are to be sacrificed. The Sixth Circuit in *Nader* ruled this violated the First Amendment. The same is true here.

This Court in *Citizens in Charge v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010), moreover, has already ruled that the few instances of fraud uncovered in the 2004 election in Ohio are insufficient to justify disclosure laws. "*Buckley* cannot be distinguished based on evidence of past petition fraud in Ohio. The record in *Buckley* also contained evidence of fraud involving paid circulators, but the Court held that 'it does not follow ... that paid circulators are more likely to commit fraud and gather false signatures than other circulators.'" *Id.*

Even assuming there was massive fraud in Ohio, invalidating all signatures collected by a circulator who improperly fills out a form is far too much medicine to satisfy exacting scrutiny. Ohio has numerous less-restrictive ways to achieve its end. For instance, it might simply choose to punish a circulator. It might, and already does, require that funding sources themselves disclose monies donated to candidates. The list goes on. What the Secretary cannot do is punish

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<sup>6</sup> Hatchett is really the only relevant circulator. Hart did not gather enough signatures to warrant Plaintiff-Earl's exclusion.

a candidate, like Earl, who has not paid for anything and has done nothing wrong. Vicarious, strict liability is not substantially related to any important state interest.

Further, there is simply no connection between an employer-statement and uncovering or deterring fraud. Ohio already has the circulator's name and address. Signatures collected are twice screened by Ohio authorities for accuracy, and in the case of professional signature-collecting companies are screened before being deposited with boards of elections. Mistakes and frauds are uncovered at these stages. Having a funding source's name adds nothing to uncovering fraud or deterring it. Paid circulators who receive compensation based on valid signatures already are discouraged from supplying fraudulent signatures. Requiring disclosure of funding sources is nothing more than an additional technicality that can be used to trip up circulators and candidates. *See* Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harv. J. Leg. 167, 167 (1991) ("One factor in this sustained dominance is state ballot-access legislation that is designed to present obstacles to third parties.").

#### **IV. Abstention Is Not Required.**

Shortly after the Motion for Emergency Relief was filed in this case, Steven A. Linnabary, who was also removed from Ohio's ballot on the same day as Plaintiff-Earl, filed an original action in the Ohio Supreme Court challenging the Defendant-Secretary's action. Linnabary argues that the protestor who challenged him, who is not a member of the LPO, has

no standing to bring the challenge. He also argues that § 3501.38(E)(1) does not apply to circulators who are self-employed, independent contractors.<sup>7</sup>

Should Linnabary win on his second claim, it would appear that Plaintiff-Earl too must be restored to Ohio's ballot under Ohio law. Assuming the Defendant-Secretary is prepared to abide by such a ruling and restore Plaintiff-Earl to the ballot, it would appear that informal abstention here is the best course. Plaintiffs respectfully submit that it may be wise to await the outcome in the Ohio Supreme Court.

Once the Ohio Supreme Court opinion is timely rendered, abstention of any sort should prove unnecessary. *Younger* abstention does not apply to federal judicial review of executive action, even when a parallel proceeding appears in state court. *See Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 918-19 (S.D. Ohio 2004) (rejecting *Younger* abstention in *Nader* case). *Pullman* abstention would not seem warranted in this case either, as Plaintiffs are making a facial First Amendment challenge that will exist regardless of how the Ohio Supreme Court interprets § 3501.38(E)(1). *See Hunter v. Hamilton County Board of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) ("Abstention under [Pullman] is appropriate only where state law is unclear *and* a clarification of that law would preclude the need to adjudicate the federal question."); *Kansas Judicial Review Board v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008) ("Courts have been particularly reluctant to abstain in cases involving facial challenges on First Amendment grounds, *see City of Houston v. Hill*, 482 U.S. 451, 467 (1987), in part because the delay caused by declining to adjudicate the issues could prolong the chilling effect on speech.").

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<sup>7</sup> He does not make federal claims before the Ohio Supreme Court.

In any case, Plaintiffs agree that the Ohio Supreme Court's decision is relevant to these proceedings. Assuming it is timely rendered, and assuming the Secretary agrees to delay printing ballots, *see infra*, Plaintiffs believe the best course is to wait for the *Linnabary* decision.

**V. UOCAVA and MOVE Do Not Require Printing Ballots By Saturday or Before.**

"UOCAVA, as amended by the MOVE Act, requires states to provide absentee ballots to absent military and overseas voters at least 45 days prior to an election." *Obama for America v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012). *See generally* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. J. 113, 143 (2010); Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L. J. 1168, 1218 (2012).

UOCAVA, as amended by MOVE, however, provides a "hardship exemption" in 42 U.S.C. § 1973ff-1(g)(1):

If the chief State election official determines that the State is unable to meet the requirement under subsection (a)(8)(A) with respect to an election for Federal office due to an undue hardship described in paragraph (2)(B), the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection.

Section 1973ff-1(g)(2)(B) describes three relevant hardships, one of which being that "[t]he State has suffered a delay in generating ballots due to a legal contest." In this instance, the State is to seek a written waiver from federal authorities "as soon as practicable." 42 U.S.C. §

1973ff-1(g)(3)(B). "The Presidential designee shall approve or deny the waiver request not later than 5 business days after the date on which the request is received." *Id.*<sup>8</sup>

Consequently, in the present case, the Defendant-Secretary can if need be delay printing ballots by applying for a written waiver from federal officials. The pendency of this litigation creates a hardship which justifies delaying the printing of Ohio's ballots.

Plaintiffs on Sunday, March 16, 2014, formally asked the Secretary, through counsel, to seek, in writing, a waiver from the appropriate federal authority seeking to delay printing Ohio's ballots until this litigation is complete.

**VI. Plaintiffs Had No Reason to Challenge § 3501.38(E)(1) Before its Application and Would Not Have Had Standing.**

Defendant-Secretary argues that Plaintiffs should have challenged § 3501.38(E)(1) eight years ago when it was first passed. Plaintiffs, however, had no reason to challenge the law then because it was not being, and has never been, enforced. Moreover, Plaintiffs likely would not have had standing to challenge the law at that time. The Supreme Court in *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1147 (2013), made clear that even facial First Amendment

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<sup>8</sup> States in this instance have sometimes used "special write-in absentee ballots" (SWABs) for overseas voters when final ballots cannot be printed. Several states authorize SWABs. Pennsylvania, for example, did this in 2012. *See Pileggi v. Aichele*, 843 F. Supp.2d 584, 587 (E.D. Pa. 2012) (describing Pennsylvania's procedure for sending overseas ballots and stating "[n]o later than forty-five days before the day of the primary, the county board is to commence delivering official absentee ballots or special write-in absentee ballots when official absentee ballots have not yet been printed."). Several states authorize SWABs. *See, e.g.*, Mo. Rev. Code § 115.292.5 (providing that military personnel can request "special write-in ballots" and that "[t]he special write-in absentee ballot provided for in this section shall be used instead of the federal write-in absentee ballot in general, special, and primary elections for federal office as authorized in Title 42, U.S.C. Section 1973ff-2(e), as amended."); N.D. Code § 16.1-07-08.1 (providing that military personnel may use "special write-in absentee ballots").

challenges must be predicated on "concrete, particularized, and actual or imminent" harm. Plaintiffs were not harmed by § 3501.38(E)(1) until now.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs' Motion should be GRANTED.

Respectfully submitted,

s/Mark R. Brown

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### **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed using the Court's electronic filing system and that copies of this First Amended Complaint will be automatically served on all parties of record through the Court's electronic filing system.

s/Mark R. Brown  
Mark R. Brown