

NO. 14-3230

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**LIBERTARIAN PARTY OF OHIO;
KEVIN KNEDLER; AARON HARRIS; CHARLIE EARL,**

Plaintiffs-Appellants,

v.

JON HUSTED, Secretary of State,

Defendant-Appellee,

and

GREGORY FELSOCI,

Intervenor-Defendant-Appellee.

**On Appeal from the United States District Court
For the Southern District of Ohio
Eastern Division**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: 14-3230 Case Name: Libertarian Party of Ohio v. Husted

Name of counsel: Mark R. Brown

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Ohio
Name of Party

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

No.

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No.

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s/Mark R. Brown

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

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants believe that oral argument would be useful to the resolution of this case, but do not wish to delay the Court's decision. Ohio's primary is scheduled for May 6, 2014, just three weeks removed from the close of briefing. Accordingly, Appellants respectfully waive oral argument and request an expedited decision.

STATEMENT OF THE ISSUES

1. Whether O.R.C. § 3501.38(E)(1), which requires that paid circulators disclose their sources of funding, facially violates the First Amendment.
2. Whether punishing candidates for the technical mistakes of circulators under O.R.C. § 3501.38(E)(1) facially violates the First Amendment.
3. Whether punishing candidates for technical mistakes made by circulators under O.R.C. § 3501.38(E)(1) without proper prior notice to the candidates, parties and circulators of the statute's requirements and its risk of punishment violates the First and Fourteenth Amendments.

STATEMENT OF JURISDICTION

Jurisdiction in the District Court was premised on 28 U.S.C. § 1331, the underlying action being founded on 42 U.S.C. § 1983 and the First and Fourteenth Amendments. This appeal was timely taken from the denial of a motion for

preliminary injunction, entered on March 19, 2014. Jurisdiction in this Court is proper under 28 U.S.C. § 1292(a).

STATEMENT OF THE CASE

Because of four successful suits, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 462 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sep. 7, 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012); and *Libertarian Party of Ohio v. Husted*, No. 13-953 (S.D. Ohio, Jan. 7, 2014) (the present litigation), the Libertarian Party of Ohio (hereinafter "LPO"),¹ has since the 2008 general election remained a ballot-qualified political party in Ohio. Pursuant to four federal-court orders, Ohio's Secretary of State (hereinafter "the Secretary"), has been required to recognize the LPO and provide it ballot access.

LPO has participated in Ohio's primaries since 2010. It has had candidates for local, state-wide, and federal office (including President in 2008 and 2012) in Ohio's primary and general elections. In the most recent non-presidential election year

¹ Appellants are collectively referred to in this Brief as "the LPO." Where necessary for clarity, each Appellant is referred to by name. Charles Earl was certified as the LPO's gubernatorial candidate before being removed. Kevin Knedler is the LPO's Chair. Aaron Harris attempted to gain access for statewide office on the LPO ballot but proved unsuccessful.

(2010), the LPO's slate of state-wide candidates won between 2% and 5% of the total votes cast in their respective elections; specifically LPO's candidates won 92,116 votes (2.39% of the total) for Governor, 184,478 votes (4.91%) for State Treasurer, 182,977 votes (4.88%) for Secretary of State, and 182,534 votes (4.87%) for State Auditor. *See* Ohio Secretary of State, Elections & Voting, 2010 Election Results, <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2010results.aspx> (last visited March 29, 2014).

Running in primaries in Ohio requires submitting nominating petitions supported by voters' signatures. *See* O.R.C. § 3513.05; *see, e.g.*, Ohio Secretary of State Directive 2013-02, at page 2 (Jan. 31, 2013).² Signatures required to support nominating petitions must be gathered and witnessed by "circulators." *See* O.R.C. § 3513.05. Because of the LPO's litigation success, the Secretary ruled that state-wide primary candidates for the LPO (and other non-major parties) may qualify with 500 voters' signatures. *See* Directive 2013-02, *supra*, at page 2 (stating that minor candidates must collect half the number of signatures required by major candidates); O.R.C. §3513.05 (stating that major statewide candidates must collect 1000 signatures for primaries).

In June of 2013, Ohio changed its law to once again require that circulators

for candidates be Ohio residents. *See* O.R.C. § 3503.06(C)(1)(a). The Legislature's plan, the LPO believes, was to make it more difficult for minor parties and their candidates to qualify in 2014 by making it harder for them to find circulators.

After all, the change plainly contradicted this Court's ruling in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), which had invalidated on First Amendment grounds Ohio's prior residence requirement. Still, Ohio tried again, only to have the District Court on November 13, 2013 preliminarily enjoin enforcement of the measure. *See* Opinion and Order, RE 18, Page ID # 143. This preliminary injunction was important for LPO candidates because it allowed them to use non-residents and interstate professional signature-collection companies.

On November 6, 2013, while the LPO's first motion for preliminary relief was pending, Ohio's legislature (which had already intervened to defend its new residence restriction) passed legislation, which Governor Kasich immediately signed, stripping LPO of its ballot status and its right to participate in Ohio's 2014 primary. Known as S.B. 193, this legislation necessarily stripped the LPO of its right to participate in Ohio's 2014 general election.

The LPO on November 8, 2013, amended their Complaint (as of right) to challenge S.B. 193's retroactive stripping of its right to participate in Ohio's 2014

² <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2013/Dir2013-02.pdf>.

primary. The District Court on January 7, 2014 preliminarily enjoined S.B. 193's application to Ohio's 2014 primary, once again returning the LPO to Ohio's primary ballot. *See* Opinion and Order, RE 47, Page ID # 811. This Court refused to expedite the Secretary's appeal, and the Secretary consequently dismissed its appeal on February 21, 2014. Order of United States Court of Appeals, Doc. No. 006111971694 (6th Cir., Feb. 21, 2014).

By February 5, 2014, Earl had submitted a sufficient number of signatures along with his nominating papers to qualify for the LPO's 2014 primary. Earl, like many LPO candidates (including Steven Linnabary (LPO's candidate for Attorney General)), employed paid circulators to collect signatures. Both Earl and Linnabary were duly certified by the Secretary as qualified for Ohio's 2014 primary as an LPO candidate for Governor on or about February 14, 2014.

On Friday, February 21, 2014, Earl, his running mate (Sherry Clark), and Linnabary were "protested" by three Ohio voters. One of the protestors, Carl Akers, challenged both Linnabary and LPO's candidate the General Assembly, Chad Monnin. Akers had two different lawyers representing him in the separate protest proceedings before the Secretary (for Linnabary) and the Franklin County Board of

Elections (for Monnin). Akers was not affiliated with the LPO.³

Two additional protestors, Tyler King and Appellee-Intervenor-Defendant-Felsoci, challenged the Earl/Clark gubernatorial ticket. Only one of these protestors, Felsoci, is a registered member of the LPO. King was not a member of the LPO and withdrew his protest.

The Secretary held an informal administrative hearing on Tuesday, March 4, 2014 to consider the protests against Earl and Linnabary. The Secretary ruled not only that both of these remaining protestors had standing, but also that Earl's and Linnabary's common circulator (Oscar Hatchett) had violated Ohio law by not naming his "employer" on the part-petitions he circulated. *See* Motion for Temporary Restraining Order and Preliminary Injunction, RE 57 (Exhibits 3 & 4), Page ID # 1083, 1101; O.R.C. § 3501.38(E)(1). The Secretary accordingly ruled ALL of the plainly legitimate signatures collected by Hatchett were invalid. Without these signatures, the Secretary ruled, neither Earl nor Linnabary had enough

³ Still, the Secretary ruled that Linnabary's unaffiliated protestor (Akers) had standing to challenge Linnabary's candidacy in the primary. This ruling is being challenged by Linnabary in his original mandamus action before the Ohio Supreme Court. *See infra*. The Franklin County Board of Elections, meanwhile, split evenly along party lines (with the Republicans ruling Akers possessed standing) over whether Akers had standing to challenge Monnin. Monnin prevailed on the merits in that proceeding and will run in the LPO primary for the Ohio House.

signatures to qualify. Both were ejected from Ohio's Libertarian Party primary ballot. *See* Motion for Temporary Restraining Order and Preliminary Injunction, RE 57 (Exhibits 3 & 4), Page ID # 1083, 1101.

Linnabary's Challenge Before the Ohio Supreme Court

Linnabary on Monday, March 10, 2014, filed an original action in Ohio's Supreme Court challenging the Secretary's decision. *See* Notice of Related Action, RE 59 (*State ex rel. Linnabary v. Husted*, No. 14-359 (Original Action in Mandamus)), Page ID # 1116. Linnabary's case was fully briefed and ready for disposition by Thursday, March 20, 2014.⁴

Linnabary's case raises two questions under Ohio law. First, whether an unaffiliated voter *has standing* to challenge a party's primary candidate. Second, whether Ohio law requires paid, self-employed circulators who are independent contractors to name the sources of their funding as their "employers" under O.R.C. § 3501.38(E)(1) on Ohio's part-petition forms.

Ohio law is not clear on this latter point, there being an Ohio Court of Appeals decision, *In re Protest of Evans*, 2006-Ohio-4690 (Ohio App. 2006), which

⁴ The Ohio Supreme Court does not schedule oral argument in original election challenges. Earl is not, moreover, a party to the Ohio Supreme Court action. Nor is Linnabary a party to this federal action. Success against the Secretary in either case,

ruled that there is a difference between independent contractors and employees under § 3501.38(E)(1). *See* Motion for Temporary Restraining Order and Preliminary Injunction, RE 57 (Exhibit 1) (*In re Protest of Evans*, 2006-Ohio-4690 (Ohio App. 2006)), Page ID # 1063.

Should the Ohio Supreme Court agree with the Ohio Court of Appeals' ruling in *Evans*, then Linnabary must be returned to the LPO primary ballot. Alternatively, if the Ohio Supreme Court were to agree with Linnabary that § 3501.38(E)(1) is a technicality that does not require strict compliance, then Linnabary's name should also be returned to the ballot. *See* RE 59, Page ID # 1116, *supra*, Exhibit 1.

Because these same state-law questions are implicated in Earl's challenge in this case, their resolution in Linnabary's favor could likely require (through collateral estoppel and otherwise) that Earl, too, be returned to the LPO's Ohio's primary ballot. Earl and Linnabary, after all, were challenged (and excluded) because of the same circulator (Oscar Hatchett). They are similarly situated in regard to the application of § 3501.38(E)(1). An Ohio Supreme Court ruling in favor of Linnabary on the meaning of § 3501.38(E)(1) would necessarily mean that the Secretary incorrectly removed Earl, too. Such an application of § 3501.38(E)(1) to invalidate

however, could have collateral estoppel effect against the Secretary because he is party to both proceedings.

all of Earl's supporters' signatures would not only contradict Ohio law, it would necessarily violate Due Process.⁵

LPO's and Earl's Challenge in Federal Court

The LPO's and Earl's suit in the District Court challenging Ohio's new residence requirement and S.B. 193 was still pending when the Secretary removed Earl from the ballot. For this reason, the LPO and Earl amended their Complaint for a second time (with the District Court's permission) on Friday, March 7, 2014, to challenge the Secretary's action excluding Earl from the ballot. *See* Amended Complaint, RE 56, Page ID # 986.⁶ This Second Amended Complaint was immediately met by the intervention of Felsoci, nominally a member of the LPO, on March 10, 2014. *See* Motion to Intervene, RE 58, Page ID # 1103. The LPO did not oppose Felsoci's intervention and called him as a witness at the evidentiary hearing held on March 13, 2014. *See* Minute Entry, RE 69, Page ID # 1981.

Felsoci testified that although he is a nominal member of the LPO, he had no

⁵ The LPO moved to amend the Second Amended Complaint to assert an Equal Protection challenge and to add the Ohio Republican Party as a defendant on March 16, 2014. *See* Motion for Leave to File Third Amended Complaint, RE 72, Page ID # 1998. The District Court has yet to rule on that motion, and disposition of that motion is not relevant to this appeal.

⁶ The District Court granted this Motion to Amend the Complaint on March 26, 2014. *See* Order, RE 93, Page ID # 2303.

interest in challenging Earl until he discussed the matter with a friend, John Musca, a member of the Ohio Republican Party. Musca asked Felsoci if he would accept a phone call from a lawyer to discuss protesting Earl. Felsoci said he would, and a lawyer from the firm now representing Felsoci quickly contacted him. *See* Transcript of Testimony of Gregory Felsoci, RE 86, Page ID # 2190, 2196-98, 2202-04.

Felsoci had difficulty explaining why he filed the protest and what it was about. Judge Watson described him as a "guileless dupe." *See* Opinion and Order, RE 80, Page ID # 2148. Felsoci testified that he had not and would not pay any of his lawyers -- that he was never asked to -- and that he did not know who was in fact paying them.⁷ Transcript, *supra*, RE 80, Page ID # 2203.⁸

⁷ Counsel for LPO at side-bar and later in-chambers asked to explore through additional witnesses who had retained Felsoci's lawyers for him. If Felsoci's lawyers were retained (and perhaps paid) by state officials, the Republican Party, its agents, or others in coordinated efforts, the LPO believes that the state officials' and/or Republican Party's actions could violate the Constitution of the United States. The District Court, on its own motion, called the chair of Ohio's Republican Party (Matt Borgess), who had been quoted by several news sources (and filmed on YouTube) claiming Republican sponsorship behind Earl's protest. Borgess testified on March 17, 2014, that while he was properly quoted, he was mistaken.

⁸ The LPO has also attempted to uncover whether Felsoci was being paid to protest (and by whom). *See* footnote 7, *supra*. Felsoci inexplicably failed to appear (after being properly noticed one day in advance) at the continuing evidentiary hearing on

The irony between Felsoci's insistence that Earl's circulators disclose their funding sources and Felsoci's own inability to disclose his financial sponsors,⁹ compounded by Felsoci's refusal to clarify the financial arrangements he had surrounding his protest, merits carefully considering Judge Watson's remarks about Felsoci:

Intervenor Gregory Felsoci's role in this case merits a more detailed explanation. Felsoci resides in Akron, Ohio and works as a carpenter. He considers himself a member of the LPO. Felsoci filed one of the successful protests with Secretary Husted that resulted in the removal of Plaintiff Earl and other LPO candidates from the Ohio 2014 primary ballot.

Felsoci testified at the evidentiary hearing before this Court on March 13, 2014. His testimony demonstrates that he lacks even a basic understanding of the nature of the protest he agreed to sign. For example, the guileless dupe

March 17, 2014, when the LPO was prepared to make this inquiry of him. He thereafter refused to sit for a deposition noticed for March 25, 2014 to correct his recalcitrance. Instead of answering the question of whether he was paid, Felsoci immediately filed a Motion for a Protective Order with the District Court. *See* Motion for a Protective Order, RE 91, Page ID # 2237. Based on his refusal to appear at the March 17, 2014 evidentiary hearing, *see Moffitt v. Illinois State Bd. Ed.*, 236 F.3d 868, 873 (7th Cir. 2001) ("One naturally expects the plaintiff to be present and ready to put on her case when the day of trial arrives"); *Knoll v. A T & T*, 176 F.3d 359 (6th Cir. 1999) (same), the LPO responded with a motion to compel Felsoci's deposition. *See* Motion to Compel, RE 92, Page ID # 2237. The District Court has yet to rule on these motions.

⁹ Felsoci at the administrative hearing, in contrast, was strident in his efforts to uncover whether Democrats were funding some of the LPO's circulators. *See, e.g.*, Proffer of Ian James, RE 63-1, Page ID # 1232; Testimony of Emily Baker, RE 63-1, Page ID # 1387, 1392; Testimony of Andrew Goldsmith, RE 63-1, Page ID # 1426.

Felsoci repeatedly referred to the misdeed that motivated him to protest Plaintiff petitions as the LPO's gathering of "votes" without disclosing those who gathered them were being paid to do so. His decision to act as a protestor came about after a Republican friend, John Musca, showed him an unidentified document which Musca claimed to have found at a local coffee shop. Felsoci could not as much as accurately describe the nature of the document Musca showed him and was at an utter loss to explain why he believed the truth of the assertions the document contained. He said he believed it because he read it.

Felsoci's Republican friend Musca then asked Felsoci whether he would be willing to stand by his apparently strong conviction that wrongdoing had occurred and agree to be contacted by someone to discuss pursuing the matter further. Soon thereafter, the Zeiger, Tigges & Little law firm contacted Felsoci, and the protest process at issue was afoot. Felsoci is not paying for the representation of the Zeiger law firm and does not know who is paying for it.

To state the obvious, Felsoci's testimony, as well as other evidence in the record, supports an inference that operatives or supporters of the Ohio Republican Party orchestrated the protest that Felsoci signed.

Id., Page ID # 2147-49.

The Secretary admitted through the testimony of Matthew Damschroder, Deputy Secretary of State and Director of Elections, that § 3501.38(E)(1) has never been applied by the Secretary (or anyone else), before Earl, to exclude any candidate from the ballot. *See* Transcript of Testimony of Matthew Damschroder, RE 79, Page ID # 2073, 2130-31.

Further, Damschroder testified that the Secretary does not, and never has, enforced § 3501.38(E)(1)'s employer-statement requirement in the absence of a

formal protest, *id.*, Page ID # 2082, even when § 3501.38(E)(1) is clearly violated. *Id.* He admitted that the Secretary has on at least two occasions formally instructed his agents and local election boards to ignore violations of § 3501.38(E)(1). *See* Ohio Secretary of State Directive 2006-58 (Instructions for Examining State Issue Petition Papers)(Aug. 21, 2006), at page 3 of 5 ("Do not invalidate a part-petition if the employer information statement ... is blank or incomplete, does not match or correspond with the information provided by the circulator in the compensation statement, or is otherwise improperly filled out."); Directive 2007-14 (Sept. 10, 2007) (Instructions for Examining State Issue Petition Papers), at page 3 of 5 (same).

The only time § 3501.38(E)(1) has ever been enforced against a candidate, Damschroder admitted, is now, with Felsoci's protest against Earl (and Akers' protest against Linnabary). Consequently, identical candidates who use the same circulator will see disparate applications of § 3501.38(E)(1). *Id.*, Page ID # 2084. One who is protested, like Earl, is removed from the ballot; the other is allowed to compete in the election. *Id.*, Page ID # 2084.¹⁰

¹⁰ LPO moved to amend the Second Amended Complaint to include selective prosecution claims under the First and Fourteenth Amendments on March 16, 2014. Motion to File Third Amended Complaint, RE 72, Page ID # 1998. Plaintiffs further moved to join the Ohio Republican Party as a party based on their belief that

The LPO argued below that § 3501.38(E)(1) facially violated the First Amendment, and was also unconstitutional as-applied. It further argued that the Secretary's interpretation of § 3501.38(E)(1), both substantively and in terms of punishment, contradicted Ohio's past practices in violation of both the First Amendment and Due Process.¹¹

SUMMARY OF ARGUMENT

1. Meaningful relief can be awarded before Ohio's primary date, scheduled for May 6, 2014. The Secretary has the authority under Ohio law to order local election boards to include Earl on their ballots. Nothing in UOCAVA prohibits the correction of state and local ballots. Further, because this is a primary, Earl would be the only candidate on LPO's gubernatorial ballot, and Earl will prevail by receiving a single vote, correction can be had quickly and without cost by having electronic ballots include Earl.

it or its agents were involved in Felsoci's protest.. *Id.*, Page ID # 1998. The District Court has not ruled on this motion and it is not relevant to this appeal.

¹¹ The District Court stated in its Opinion that the LPO had "abandoned" its Due Process argument. *See* Opinion and Order, RE 80, Page ID # 2169-70. Judge Watson's reasoning may have been tied to his rejection of the argument that Ohio law distinguishes between independent contractors and employees. Because the LPO fully raised the Due Process argument in its Second Amended Complaint and Third Motion for Preliminary Injunction, *see* Amended Complaint, RE 56, Page ID

2. The LPO's challenge here is a facial one. Challenges of this nature are common because of the preferred nature of First Amendment rights. The LPO therefore can assert not only its and its candidates' interests, but also those of circulators and funding sources who are not before the Court.

3. Forced disclosure destroys anonymity. In the context of core political activity, like circulating for candidates and issues, it necessarily amounts to a severe burden on First Amendment rights. For this reason, forced disclosure must pass "exacting scrutiny." As made clear by the Supreme Court, this Court, and numerous others, forcing the disclosure of sponsors' identities cannot pass exacting scrutiny.

4. Ohio has no substantial reason for requiring disclosure. Fraud is not rampant in Ohio. Nor is it linked to paid circulators. Even if fraud were a problem, forcing circulators to disclose the identities of their financial sponsors bears no relationship to fraud. Less restrictive alternatives exist, such as punishing fraudulent circulators and signers and requiring candidates and parties to report expenditures and contributions.

5. Ohio's employer-statement rule does not clearly require that circulators who are self-employed, independent contractors report their funding sources. Because of

986; Motion for Temporary Restraining Order and Preliminary Injunction, RE 57, Page ID # 1063, the issue is properly preserved. *See infra*.

this ambiguity, applying § 3501.38(E)(1) (passed in 2006) for the first time to Earl violates Due Process. Ohio, moreover, has never before applied § 3501.38(E)(1)'s "death penalty" to a circulator who has failed to properly report an employer. The Secretary has instructed local election boards and his own agents to ignore § 3501.38(E)(1). Disclosure has, until now, been treated as a technicality that carries no punishment. Earl had no notice that this technicality must be complied with on pain of exclusion of signatures and expulsion from the ballot.

ARGUMENT

I. Relief Before May 6, 2014 Will Redress LPO's and Earl's Irreparable Injuries.

Ohio's Secretary of State is charged under Ohio law with enforcing Ohio's ballot-access restrictions, including those found in O.R.C. § 3501.38(E)(1). *See* O.R.C. § 3501(M) (the Secretary has the power to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws"); *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992) (observing that the Secretary "compel[s] compliance with election law requirements by election officials"). The Secretary can therefore correct ballots throughout Ohio and have Earl's name restored should this Court rule in Earl's favor.

The District Court in denying the LPO's Motion to Stay explained that even

after UOCAVA, 42 U.S.C. § 1973ff-1, ballots and state absentee ballots are sent, Plaintiffs can win meaningful relief from the Secretary in this Court:

If the Sixth Circuit ... reverses this Court's decision and orders Plaintiffs' candidates to be included on the May 2014 Ohio primary ballot, then each candidate need only obtain a *single vote* to qualify for the November 2014 Ohio general election ballot The larger cities in Ohio make extensive use of electronic ballots. Hence, the fact Plaintiffs might not be included on paper ballots does not realistically reduce their odds of qualifying for the November 2014 Ohio general election.

Order, RE 85, Page ID # 2188-89.

The Secretary, meanwhile, has conceded that UOCAVA, which requires overseas ballots 45 days before an election, does not apply to Ohio's state election ballots. *See* Ohio Secretary of State Jon Husted's Memorandum Contra Plaintiffs' Motion for an Emergency Injunction and to Expedite this Appeal, No. 14-3230, filed March 21, 2014, at 20 (observing that UOCAVA's waiver provision only applies to federal elections and thereby necessarily conceding that UOCAVA only applies to federal elections). Consequently, nothing in federal law prevents the Secretary, should this Court rule in favor of the LPO and its candidates, from restoring Earl to Ohio's statewide electronic ballots before May 6, 2014.

II. The Standard of Review is Effectively De Novo.

The standard of review for a denial of preliminary relief is "abuse of discretion," with this Court "examining findings of fact for clear error and legal

conclusions *de novo*." *See Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013). With denials of First Amendment claims, however, "the likelihood of success on the merits often will be the determinative factor' in analyzing whether the district court should have issued the preliminary injunction." *Id.* "Since 'likelihood of success' is a legal question that this court reviews *de novo*, the effective standard of review for a denial of a preliminary injunction in this posture is also *de novo*." *Id.* (citing *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012)).

III. Section 3501.38(E)(1) Is Facially Unconstitutional Under the First Amendment.

A. Facial Challenges Are Subject to the Overbreadth Doctrine.

Section 3501.38(E)(1) of the Ohio Revised Code states in full:

On each petition paper, the circulator shall indicate the number of signatures contained on it, and shall sign a statement made under penalty of election falsification that the circulator witnessed the affixing of every signature, that all signers were to the best of the circulator's knowledge and belief qualified to sign, and that every signature is to the best of the circulator's knowledge and belief the signature of the person whose signature it purports to be or of an attorney in fact acting pursuant to section 3501.382. On the circulator's statement for a declaration of candidacy or nominating petition for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition, *the circulator shall identify* the circulator's name, the address of the circulator's permanent residence, and *the name and address of the person employing the circulator to circulate the petition, if any*.

(Emphasis added).¹²

Even should it be interpreted to exclude self-employed, independent contractors,¹³ § 3501.38(E)(1) is facially unconstitutional under the First Amendment. It is facially unconstitutional because it forces circulators and their funding sources to forfeit their First Amendment rights to anonymity when engaged in core political speech. It unconstitutionally forces circulators of all sorts to disclose the identities of their funding sources.

The District Court below noted that facial constitutional challenges are disfavored. While this is true, the Supreme Court and this Court have concluded that First Amendment challenges do not fall into this general rule. In *Citizens For Tax Reform v. Deters*, 518 F.3d 375, 377 (6th Cir. 2008), Judge McKeague wrote for the Court:

the First Amendment is a jealous mistress. It enables the people to exchange ideas (popular and unpopular alike), to assemble with the hope of changing minds, and to alter or preserve how we govern ourselves. But in return, it

¹² The italicized language was added in 2006, ostensibly in response to the "massive fraud" perpetrated by Ralph Nader's paid circulators in 2004. As made clear by this Court in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), however, Nader's candidacy was not infected by "massive fraud." Rather, a handful of paid circulators committed fraud; not even enough to defeat the causation required to support Nader's First Amendment claim in that case. *See infra*.

¹³ This is the state-law question presented to the Ohio Supreme Court in *State ex rel. Linnabary v. Husted*, No. 14-359, discussed *supra*.

demands that sometimes seemingly reasonable measures enacted by our governments give way.

Because the First Amendment is so jealous, the Supreme Court and this Court have consistently recognized that facial attacks under the First Amendment are proper.

In *United States v. Stevens*, 559 U.S. 460, 473 (2010), for example, which invalidated a federal law criminalizing depictions of animal cruelty, the Supreme Court allowed the facial challenge to proceed, stating: "[i]n the First Amendment context, ... this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" (Quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

Consequently, the LPO here can assert not only its and its candidates rights, but also the rights of others, including circulators, who are not 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 ... is a departure from traditional rules of standing, [and] 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.").

The question, then, is whether § 3501.38(E)(1) severely burdens the rights of the LPO, its candidates, its circulators, any other circulators, and/or any potential funding sources. *See Nader v. Blackwell*, 545 F.3d 459, 478-79 (6th Cir. 2008) (Clay, J., concurring) ("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.'").

Allowing the LPO to challenge § 3501.38(E)(1) on its face is doubly necessary, since Ohio here punished the LPO and Earl by removing them from

Ohio's ballot.¹⁴ When the government punishes speakers, as here, those speakers have a constitutional right to be punished under a constitutionally valid law.

Justice Ginsburg recently explained: “[a]n offence created by [an unconstitutional law],’ ... ‘is not a crime’. ‘A conviction under [such a law] is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment’. If a law is invalid as applied to the criminal defendant’s conduct, the defendant is entitled to go free.” *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011) (Ginsburg, J., concurring) (quoting *Ex parte Siebold*, 100 U.S. 371, 376, 376-77 (1880)). See also *Waldon v. McAtee*, 723 F.2d 1348, 1355 (7th Cir. 1983) (Swygert, J., dissenting) (“all citizens have the right to be judged under constitutionally valid statutes”).

B. Circulating Petitions Is Core Political Activity.

In *Meyer v. Grant*, 486 U.S. 414, 420 (1988), the Court stated that circulating petitions “involves core political speech.” As this Court explained in *Deters*, 518 F.3d at 381:

The Court subjected Colorado’s payment ban to “exacting scrutiny.” The

¹⁴ The LPO will be removed from future ballots because Ohio law, S.B. 193 (which remains in force for future elections) only guarantees continuing access to parties whose gubernatorial candidate wins 2% of the vote in the 2014 election. Without Earl, the LPO will have no gubernatorial candidate and will automatically be excluded from future ballots.

Court determined that the ban restricted political expression in two fundamental ways: (1) it "limit[ed] the number of voices who will convey [the petitioner's] message and the hours they can speak and, therefore, limits the size of the audience they can reach"; and (2) "it makes it less likely that [the petitioner] will garner the number of signatures necessary to place the matter on the ballot, thus limiting [the petitioner's] ability to make the matter the focus of the statewide discussion."

(Citation omitted).

The Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), reiterated that collecting signatures is core First Amendment activity.

This Court in *Deters*, 518 F.3d at 381, summarized the outcome in *Buckley*:

the Court looked at three provisions: "(1) the requirement that initiative-petition circulators be registered voters"; "(2) the requirement that they wear an identification badge"; and "(3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator." Using again the "exacting scrutiny" it applied in *Meyer*, the Court struck down all three as too heavy a burden in comparison to the State's purported justifications of deterring fraud and corruption.

(Citations omitted). The Court stated in *Deters*, 518 F.3d at 388, moreover, that the form of "exacting scrutiny" required by *Meyer* and *Buckley* is really akin to strict scrutiny: "the State must justify it with a compelling interest and narrowly tailored means."

C. Section 3501.38(E)(1) Severely Burdens First Amendment Rights.

In *Deters*, 518 F.3d at 381, Ohio argued, as it does here, that its ban on how circulators are paid "imposes, at most, only a moderate burden on CTR's rights. It faults CTR for failing to show, in the State's words, that the ban would cause 'a significant, quantitative decrease in the number of circulators available' or that it 'would decrease the number of issues successfully placed on the ballot.'" Thus, Ohio argued, some form of less-exacting scrutiny was in order. *Id.*

This Court rejected the claim. Even though "CTR [the initiative sponsor] has not pointed to any evidence showing that, outside a relatively small number of professional circulators, there exists a substantial number of people or a demonstrable percentage of Ohio's population who would participate under a per-signature system but not under a per-time-only system," *id.* at 383, the evidence it presented was "limited ... and inconclusive," *id.* at 384, and "there is little in the record to suggest that a substantial number of people in Ohio would be dissuaded from participating in the petition process because of a ban on all payment not based on time worked," *id.* at 385, the Court still concluded: "(1) that Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive; and (2) that professional coordinators and circulators would likely not work under a per-

time-only system." *Id.* "[T]he per-time-only provision adds an element of risk to the petition process which would otherwise be absent." *Id.* at 384.

For this reason, the *Deters* Court ruled: "By making speech more costly, the State is virtually guaranteeing that there will be less of it. Because its ban on all forms of payment to circulators except based on the amount of time worked would create a *significant burden on CTR's and other petitioners' core political speech rights*, the State must justify it with a compelling interest and narrowly tailored means." *Id.* at 388 (emphasis added).

The same is true here, not only because of increased prices caused by paid circulators shying away from minor-party candidates' petitions, but also (and more importantly) because of the chilling effect § 3501.38(E)(1) has on circulators' and their funding sources. In short, requiring disclosure of funding sources makes speech and association risky for those who want to support minor parties and unpopular causes. Section 3501.38(E)(1) adds significantly to the cost-side of the First Amendment ledger because fears of harassment and embarrassment often surround minor parties and their candidates.

Being a Republican or Democrat in America is easy. On either side of this partisan divide, business opportunities exist and political patronage abounds. Supporting Socialists, Libertarians, Greens, and others, in stark contrast, is *hard*.

See Libertarian Party of Ohio v. Blackwell, 462 F.3d 579 (6th Cir. 2006). No perks. No patronage. No jobs. No business opportunities.

The Court in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), which struck Ohio's attempt at forcing the Socialist Workers Party to disclose its funding sources, recognized these risks and fears. There, Ohio argued that the burden imposed by disclosure was trivial; but the Supreme Court disagreed:

appellants seriously understate the threat to First Amendment rights that would result from requiring minor parties to disclose the recipients of campaign disbursements. Expenditures by a political party often consist of reimbursements, advances, or wages paid to party members, campaign workers, and supporters, whose activities lie at the very core of the First Amendment. Disbursements may also go to persons who choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion. Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals as are contributors whose connection with the party is solely financial. Even individuals who receive disbursements for “merely” commercial transactions may be deterred by the public enmity attending publicity, and those seeking to harass may disrupt commercial activities on the basis of expenditure information. Because an individual who enters into a transaction with a minor party purely for commercial reasons lacks any ideological commitment to the party, such an individual may well be deterred from providing services by even a small risk of harassment. Compelled disclosure of the names of such recipients of expenditures could therefore cripple a minor party's ability to operate effectively and thereby reduce “the free circulation of ideas both within and without the political arena.”

Id. at 96-98 (footnotes omitted).

Knowing that their names must be revealed by circulators, their financial

sources, including philanthropists, business owners, and everyday citizens, understandably must think twice before offering support to minor parties and their circulators. "[P]ersons who choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion," *Brown*, 459 U.S. at 97, are chilled by § 3501.38(E)(1). "Should their involvement be publicized, these persons would be as vulnerable to threats, harassment, and reprisals as are contributors whose connection with the party is solely financial." *Id.*

Circulators, moreover, are put in a difficult situation by Ohio's forced disclosure requirement. Paul Frankel, a veteran circulator for minor-parties and -candidates, testified in his declaration:

Paid circulators often affiliate with different candidates and causes, making disclosure of the sources of their funding professionally risky for future business. Paid circulators often seek to preserve the anonymity of their funding sources to insure future business with their funding sources.

Affidavit of Paul Frankel, RE 64, Page ID # 1963 (¶ symbols omitted).

The professional and political risk Frankel describes took center stage at the administrative hearing before the Secretary in this very case. There, the First Amendment was repeatedly invoked by circulators, their employers, and their

lawyers to ward off Felsoci's efforts to uncover the "true" sources of their funding.¹⁵

See Exhibits to Memorandum Contra Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit A, RE 63, Page ID # 123.

Just to cite one example, attorneys for Ian James and his Strategy Network, which had supplied a handful of independent, uncoordinated circulators to assist Earl in his efforts, proffered the following First Amendment defense to questioning by Felsoci's lawyers at the administrative hearing below:

Would being compelled to disclose the identities of persons with whom you communicated ... alter how you communicate in the future? He would answer yes.

Would compelled disclosure of such communications with such persons make you less willing to engage in such communications in the future? He would answer yes.

Would compelled disclosure of the identities of such persons and your communications with them make it less likely that others would ask you to

¹⁵ None of these circulators was retained by the LPO, Earl or anyone else affiliated with the LPO. They circulated nominating petitions for Earl independently. This further demonstrates the danger lurking behind § 3501.38(E)(1). Circulators are not always known to candidates and their parties. Any unaffiliated adult can circulate petitions. They do not need the candidate's permission, and the candidate may know nothing of them before being given their part-petitions. The LPO here, for example, posted the blank petitions for Earl's candidacy on its web page and invited anyone to download them, circulate them, and assist his campaign. Several individuals did just that. Volunteers working for a signature collection firm, a good-government group, or a local business are naturally discouraged by § 3501.38(E)(1) from helping, since they must list not only their own identities, but also those of whomever employs or funds them under § 3501.38(E)(1).

become involved in such activities in the future? He would answer yes.

As part of your work in political campaigns, do you depend on your ability to attract like-minded associates willing to engage with you in such political activities? He would answer yes.

Would compelled disclosure ... affect your ability to attract such associates and form such associations in the future? He would answer yes.

Proffer of Ian James, RE 63-1, Page ID # 1232. *See also* RE 63-1, Page ID # 1387, 1392 (Testimony of Emily Baker) (raising freedom of association objection); RE 63-1, Page ID # 1426 (Testimony of Andrew Goldsmith) (same).

If forced disclosure presents an insignificant burden, why were lawyers for James, Baker and Goldsmith at the administrative hearing so riled by the prospect of having their clients disclose the true source of their funding? Why is Felsoci so intent on avoiding this very question about his funding? *See* page 10 & footnotes 7 & 8, *supra*. The answer is that disclosure can be professionally and politically debilitating. It can be embarrassing.

The testimony of Felsoci's witness, Brandon Lydaugh, who was cited by the District Court, *see* Opinion and Order, RE 80, Page ID # 2165-66, must accordingly be taken with a large grain of salt. Lydaugh devoted his circulation efforts to mainstream, Republican-leaning, efforts. He admitted that he had never collected signatures for minor-party candidates. He could have no idea about the burdens and

risks placed on minor candidates, their circulators, and those who would like to offer them financial assistance. That falls outside his anecdotal experience. It may be that the mainstream circulation world has little concern over disclosing funding sources, but the reality for minor parties and their candidates is quite different. Those who support unpopular candidates often experience harassment and hostility. *See Brown*, 459 U.S. at 96-98.

D. Numerous Courts Have Found Severe Burdens And Invalidated Disclosure Requirements Like Ohio's.

Forced disclosure -- the government's destruction of anonymity -- constitutes a severe burden as a matter of law. The Supreme Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995), made this clear:

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

(Citation and footnotes omitted). The Court continued:

The freedom to publish anonymously extends beyond the literary realm. In *Talley [v. California]*, 362 U.S. 60 (1960), the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. Writing for the Court, Justice Black noted that “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.” Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the *Federalist Papers* were published under fictitious names. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where “the identity of the speaker is an important component of many attempts to persuade,” the most effective advocates have sometimes opted for anonymity.

514 U.S. at 342-43 (citations omitted).

Ohio's law (O.R.C. § 3599.09(A)), deemed invalid in *McIntyre*, is not unlike § 3501.38(E)(1). It provided that “[e]very written document covered by the statute must contain 'the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.’” 514 U.S. at 345. Thus, those who championed a particular candidate or idea were required to disclose the identity of the organization responsible for the speech. *Id.* The Court ruled that McIntyre's speech was “core” political speech that demanded “exact[ing] scrutiny.”

Notably, the Court did not stop to inquire of whether McIntyre might have readily complied with the disclosure requirement. It did not pause to ask whether the disclosure of her and others' identities was a severe burden. It simply recognized that disclosure is a severe burden in the context of grass-roots speech.¹⁶

The reported cases that have invalidated disclosure requirements placed on circulators and their funding sources likewise make abundantly clear that forced disclosure constitutes a severe burden. The Supreme Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), applied *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), to invalidate under the First Amendment not only a Colorado measure that forced circulators to wear badges with their names prominently displayed, 525 U.S. at 198, but also a Colorado law requiring ballot-initiative proponents who paid circulators to file monthly and final

¹⁶ Compelled speech generally constitutes a severe burden regardless of how easy it is to comply. School children, for example, cannot be forced to stand and recite the Pledge of Allegiance, *see West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), notwithstanding that they easily might. Newspapers cannot be forced to carry replies even though they often do and easily can. *See Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974). Of course, a child who wants to stand, like a newspaper that chooses to run replies, is not burdened and does not have Article III standing to complain. But those who resist are necessarily being severely burdened, even if they can easily comply. So long as one has Article III standing, a facial challenge under the First Amendment is proper.

reports listing the names and addresses of each paid circulator and the total amount paid to each.

The Court observed that "[l]isting paid circulators and their income from circulation 'forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts" *Id.* at 204. It is "no more than tenuously related to the substantial interests disclosure serves," and thus "Colorado's reporting requirements, to the extent that they target paid circulators, 'fai[l] exacting scrutiny." *Id.* (citation and footnote omitted).

While noting that simple identification requirements (requiring the name and address of the circulator) that are applied to both volunteers and paid circulators alike are valid, *id.* at 204 n. 24, it refused to "assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.* at 203-04. Requiring more of paid circulators than volunteers makes no sense.

In the absence of a compelling justification, *Buckley* prohibits a state from requiring more disclosure from paid circulators than volunteers. Paid circulators, after all, have the same First Amendment rights that volunteers possess. *See Meyer*

v. Grant, 486 U.S. 414 (1988) (holding that paid circulators are protected by the First Amendment just as volunteers are protected). Paid circulators cannot be treated differently simply because they are paid. Disparate treatment of paid circulators must pass the most "exacting scrutiny" under the First Amendment. *See Buckley*, 525 U.S. at 204.¹⁷

Proving this point in the specific context of Ohio and its alleged problems with election-fraud is *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where Ohio claimed that problems with fraud in Ohio justified its disclosure requirement. The Supreme Court disagreed. It rejected Ohio's claim that fraud justified requiring disclosure:

As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the

¹⁷ No one questions that both paid and volunteer circulators can be required to disclose their identities. But paid circulators cannot be required to tell voters more without a very good reason. *See WIN v. Rippie*, 213 F.3d 1132, 1134 (9th Cir. 2000) ("The Supreme Court invalidated Colorado's compelled disclosure requirement not because it was redundant to the affidavit requirement, but because '[l]isting paid circulators and their income from circulation forces paid circulators to surrender the anonymity enjoyed by their volunteer counterparts' without advancing the asserted state interests.").

opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code. Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection.

Id. at 351-52 (footnotes omitted).

The Court in *Deters*, 518 F.3d at 387, more specifically noted the lack of evidence of fraud perpetrated by paid circulators: "there is no evidence in the record that most, many, or even more than a de minimis number of circulators who were paid by signature engaged in fraud in the past."

As here, Ohio in *Deters* pointed "primarily to the 2004 presidential election, when circulators trying to get Ralph Nader on the ballot engaged in fraud. The circulators were paid on a per-signature basis." *Id.* "While this is evidence that circulators who were paid per-signature engaged in fraud, it does not prove that the per-signature feature actually caused or significantly contributed to the circulators' fraudulent acts. At most, the evidence of fraud associated with the Nader election effort and other elections is evidence of correlation, not causation." *Id.*

The *Deters* Court further observed that "even though payment 'creates an economic incentive to engage in fraud by padding signatures (whether by forgery,

false certification or false pretense),' '[t]hat is not to say ... that someone faced with the incentive to pad signatures will actually act upon it.'" *Id.* (quoting *Meyer v. Grant*, 486 U.S. at 426). "As explained in *Meyer*," the Court continued, "courts should not be 'prepared to assume that a professional circulator -- whose qualifications for similar future assignments may well depend on a reputation for competence and integrity -- is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.'" *Id.* at 387-88 (citation omitted).

Citizens in Charge v. Brunner, 689 F. Supp. 2d 992 (S.D. Ohio 2010), provides another Ohio example. There, Judge Sargus relied on *Buckley* to strike down an Ohio law requiring that ballot committees report the names and addresses of paid circulators. The Court stated that "petition circulation is 'core political speech' for which First Amendment protection is 'at its zenith.'" *Id.* at 993 (citations omitted). "Because 'Exacting scrutiny' is necessary when compelled disclosure of campaign-related payments is at issue,' such regulations must be 'substantially related to important governmental interests.'" *Id.* (citations omitted).

In finding that Ohio's disclosure requirement failed this "exacting scrutiny," the Court in *Citizens in Charge* observed that "*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.* Perhaps most importantly, the Court ruled that "the State's interest in reaching election law violations does not save § 3517.12(B); such interest is sufficiently served by the separate requirement that each circulator, paid and unpaid, disclose his or her name and address." *Id.* (citing *Buckley*, 525 U.S. at 196).

Consequently, *Citizens in Charge* found that to the extent Ohio is targeting fraud or attempting to reach election law violations, its interests are "sufficiently served by the separate requirement that each circulator, paid and unpaid, disclose his or her name and address." Requiring that paid circulators do more serves no substantial end.

WIN v. Rippie, 213 F.3d 1132 (9th Cir. 2000), provides an example from Washington (state). There, the Ninth Circuit, relying on *Buckley*, invalidated a 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." *Id.* at 1134. The same was not demanded of volunteers. The Ninth Circuit stated: "We conclude these requirements chill political speech protected by the First Amendment, and do not significantly advance any substantial state interest." *Id.*

In finding that Washington's law failed exacting scrutiny, the Ninth Circuit stated that "the Supreme Court has expressly rejected the notion that 'occasional fraud ... involving paid circulators' justifies targeting paid petitioners for special enforcement." *Id.* at 1139. It further observed that "[t]he State's interest in educating voters through campaign finance disclosure is more adequately served by a panoply of the State's other requirements that have not been challenged." Thus, "the State's asserted interests in fraud detection and in educating voters through campaign finance disclosure do not justify the required disclosure of the names and addresses of paid circulators." *Id.* at 1140.

In *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), the Ninth Circuit invalidated 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. Quoting *Talley v. California*, 362 U.S. 60, 64-65 (1960), the Ninth Circuit first observed:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

378 F.3d at 981. It concluded by observing that "[a]s a content-based limitation on core political speech, the Nevada Statute must receive the most 'exacting scrutiny' under the First Amendment." *Id.* at 992.

Heller demonstrates the dual concerns of paid circulators in both avoiding being subjected to more disclosure, and also protecting the identities of those who pay them. In *Heller* the Ninth Circuit turned to the latter concern to invalidate Nevada's law. In short, financial sponsors (be they "an individual, a group of individuals, or an informal 'business or social organization,'" *id.* at 989, have strong First Amendment interests in remaining anonymous. The Ninth Circuit explained:

the fact that *individuals* in a group, or an individual cooperating with a group, have shared their political thoughts with the members of the group does not mean that they have *no* privacy interest in concealing from the general public their endorsement of those beliefs. This observation has particular force when the group is small enough that readers will associate individual members with the thoughts conveyed. Exposing the identity of the group publishing its views, or of an individual publishing the views of a group, thus infringes to some degree on the privacy interests of the individuals affiliated with the group.

Id. at 990.

The Ninth Circuit distinguished campaign finance laws from disclosure requirements placed on speakers. The former can withstand constitutional scrutiny. The latter are nefarious because they add little to what campaign finance disclosure

requirements already provide. In regard to Nevada's interests in requiring disclosure, the Court rejected all three: "We perceive no relevant distinction between *McIntyre* and this case that would support the constitutionality of the Nevada Statute on the ground that the Statute, as the state claims, 'foster[s] an informed electorate.' In fact, the impact of the Statute may be quite the opposite. The premise of *McIntyre* is that if anonymous speech is banned, some useful speech will go unsaid." *Id.* at 994. "Nor does Nevada's interest in combating "sham advocacy " justify [its law]." *Id.* at 995. Lastly, the Court rejected the claim that the law served the state's campaign finance disclosure end. After all, the state's laws already required campaign finance disclosure.

The District Court in *Hatchett v. Barland*, 816 F. Supp. 2d 583, 598 (E.D. Wis. 2011), most recently reached this same conclusion 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.*

The best that the Secretary and 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),¹⁸ which sustained an Oregon law requiring that paid circulators register their identities with the state.¹⁹ The requirements in these two cases are far cries from what O.R.C. § 3501.38(E)(1) demands and the punishments it inflicts.

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

¹⁸ 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.

¹⁹ They also cite the unreported opinion in *In re Protest of Evans*, see Doc. No. 57 (Plaintiffs' Motion for Emergency Preliminary Relief), Exhibit 2, Page ID # 1063, rejecting a First Amendment challenge to § 3501.38(E)(1). *Evans*, however, did not involve 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 its First Amendment rights. It did not argue, as is argued here, that forcing any disclosure of the source of funds facially violated the First Amendment.

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.

The LPO has never claimed 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). Neither the LPO nor Earl would have any complaint with a clear law that required paid circulators to simply 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 innocent candidates off ballots. This, as explained below, violates the First Amendment.

E. Section 3501.38(E)(1) Cannot Pass Exacting Scrutiny.

The District Court concluded that Ohio's interest in combating fraud justifies § 3501.38(E)(1). As explained above, Ohio simply has not experienced the kind of fraud with paid circulators that its disclosure laws are designed to uncover or prevent.

Still, the District Court pointed to Ohio's specific experience with Ralph

Moreover, *Evans* was handed down before Judge Sargus's decision in *Citizens in Charge v. Brunner*.

Nader in 2004 to support its conclusion that Ohio's fraud problem justified disclosure. The District Court's factual conclusion that 1,956 of Nader's 2756 invalidated signatures were invalidated because of fraud, *see* Opinion and Order, RE 80, Page ID # 2165, however, is clearly erroneous. In fact, according to the Quinn Report, which was carefully explored by this Court in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), only seven circulators, who collected approximately 855 signatures, engaged in fraud of any sort in connection with Nader's candidacy. The rest of Nader's legitimate signatures were thrown out because of lack of residence or improper voter registration on the part of the circulators, both unconstitutional requirements under the First Amendment.

The Court in *Nader* made much of this fact, since if 2,756 had been invalidated because of fraud, Nader could have been properly excluded from the ballot and could not have maintained his First Amendment challenge:

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.

Id. at 478 n.1.

The fact is that there never was massive fraud on the part of paid circulators in Ohio. There have been occasional frauds, as illustrated by *Nader*. But widespread circulator fraud in Ohio does not exist. The Supreme Court in *Meyer v. Grant*, 486 U.S. at 427-28, explained why this is so: "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." This is doubly true with unopposed primaries, like that here.

Even assuming that fraud were a problem with paid circulators in Ohio, forcing them to disclose their funding sources bears no relation to the problem. The Court in *Deters* observed:

Ohio already has criminalized election fraud, specifically with regard to false signatures. See O.R.C. § 3599.28 (making false signatures on election-related documents a felony of the fifth degree). This and other criminal provisions of Ohio election law are the types of protections that the Supreme Court has found 'adequate' to deter improper conduct with regard to petition circulation, "especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting."

518 F.3d at 388 (quoting *Meyer*, 486 U.S. at 427)).

Further, invalidating all signatures collected by circulators who fail to disclose their funding sources is not substantially related to concerns over fraud. The signatures being invalidated, after all, have all been checked and checked again for accuracy. They are valid. If Ohio were concerned about ferreting out fraud, it would target not the innocent signers and their candidates but the circulators for

punishment.

Perhaps most telling is the fact that if § 3501.38(E)(1) were really needed, if it substantially served Ohio's end in deterring and preventing fraud among paid circulators, the Secretary would enforce it. Not only when a protestor complained, but whenever it was apparent that the circulator failed to properly report. The Secretary's expert, Damschroder, testified that the Secretary instructs its staff and local election boards not to enforce § 3501.38(E)(1), even when § 3501.38(E)(1) has been plainly and obviously violated. *See* Testimony of Matthew Damschroder, RE 79, Page ID # 2082. Only a formal protest can bring § 3501.38(E)(1) into play. *Id.* One wonders why an absolutely necessary disclosure requirement would need to be enforced only occasionally. If it helps deter or uncover fraud it should be enforced all the time; especially when nondisclosure or partial disclosure is obviously incorrect. The reality, of course, is that § 3501.38(E)(1) has little to do with deterring or uncovering fraud.

Last but not least, even assuming that forced disclosure under these circumstances were permissible, less-restrictive means exist for achieving it. Ohio's strict, vicarious punishment of candidates and voters for the sins of circulators is far too much medicine. As made clear by the Court in *Deters*, 518 F.3d at 388, "Ohio already has criminalized election fraud, specifically with regard to false signatures.

... This and other criminal provisions of Ohio election law are the types of protections that the Supreme Court has found 'adequate' to deter improper conduct with regard to petition circulation" Campaign-finance reporting mistakes, to use another example, do not result in a candidate's being kicked off the ballot or removed from office. Small fines are the norm. And even serious transgressions are dealt with by subsequent punishments. Ohio's approach, invalidating otherwise valid signatures and removing candidates from ballots smacks more of an impermissible prior restraint. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 733 (1931) ("every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint").

IV. Narrowly Tailored Campaign-Finance Reporting Requirements Are Not At Issue.

A red herring introduced by the Secretary and Felsoci involves campaign-finance reporting requirements. They point to *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, which have sustained financial reporting requirements for parties, candidates and some independent sources.

The LPO and Earl have no quibble with contribution/expenditure reporting requirements that are applied to candidates, parties and their supporters. They have, for their parts, fully complied with Ohio's campaign finance laws and will continue

to do so in the future. Section 3501.38(E)(1), however, has nothing to do with candidates' and parties' reporting contributions and expenditures. Moreover, it goes far beyond the independent expenditure reporting requirement sustained in *Buckley v. Valeo*.²⁰

Section 3501.38(E)(1) requires that *all circulators* report *all* their sources of funding. This source of funding might be a candidate or party, either of which would at some point have to report the expenditure under Ohio's or the federal government's campaign-finance laws. But the funding source could also be independent and uncoordinated; one that is not otherwise required to report anything. An independent funding source, for instance, might not meet expenditure thresholds,²¹ or be engaged in the type of communication targeted by campaign-

²⁰ The Court in *Buckley v. Valeo*, "[t]o insure that the reach of [the expenditure reporting requirement] is not impermissibly broad," 424 U.S. at 80, "construe[d] 'expenditure' ... to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* (footnote omitted). "This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* Ohio law is substantially similar, stating that an "independent expenditure" "means an expenditure by a person advocating the election or defeat of an identified candidate or candidates." O.R.C. § 3517.01(C)(17). *See* Ohio Secretary of State, Campaign Finance Handbook, 1-7, (<http://www.sos.state.oh.us/SOS/publications.aspx#Campfin>) (last visited, March 27, 2014).

²¹ Ohio's campaign-finance law, for instance, provides that political action committees and political contributing entities (like labor unions) with fewer than ten

finance laws.²² She might not even be "expressly advocat[ing] the election or defeat of a clearly identified candidate" within the meaning of *Buckley v. Valeo*, 424 U.S. at 80, and Ohio law. *See* footnote 20, *supra*.

Section 3501.38(E)(1) reaches far beyond candidates and parties as financial sources. It requires reporting by circulators of *all* sources, even those that are independent of candidates and parties. It reaches sources that have no duty to

members that are engaged in "public political advertising" must report their independent expenditures to the Secretary, and include disclosures on their advertising, only if they spend more than \$100 for local candidates, \$250 for General Assembly candidates, and \$500 for statewide candidates. *See* O.R.C. § 3517.105(B)(1). *See* Ohio Secretary of State, Campaign Finance Handbook, 1-9, <http://www.sos.state.oh.us/SOS/publications.aspx#Campfin> (last visited, March 27, 2014).

²² For example, under BCRA reporting requirements, which were sustained in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 366 (2010), independent expenditures spent on federal candidates need only be reported if they exceed \$10,000 in a calendar year. Further, BCRA's disclosure requirement, providing that an independent advertisement for a candidate must state that "_____ is responsible for the content of this advertising," only applies to "televised electioneering communications." *Id.* The Supreme Court has repeatedly recognized a First Amendment distinction between broadcast and other forms of communication. *See, e.g., Red Lion Broadcasting Corp. v. Federal Communications Commission*, 395 U.S. 367 (1969) (upholding fairness doctrine for radio and television requiring that they carry messages they would otherwise choose not to); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that print media cannot be required to carry messages). Federal reporting and disclosure laws, therefore, do not require that a funding source's independent efforts to assist a federal primary candidate (by, say, paying circulators) be reported until

report anything under campaign-finance laws. Section 3501.38(E)(1), in short, is not a narrowly tailored campaign-finance law.

The Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995), invalidated Ohio's disclosure law, O.R.C. § 3599.09(A), for this very reason: "It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources." *Id.* at 351. Section 3599.09(A) was therefore overbroad; it could not be sustained as a campaign-finance reporting measure.

Section 3501.38(E)(1) suffers this same flaw. The Secretary's expert, Damschroder, was asked about a father who wanted to pay his son \$20 to circulate petitions for a candidate. Would the son have to report him (even though it might cause domestic angst)? *See* Transcript of Testimony of Matthew Damschroder, RE 79, Page ID # 2132-33. Mr. Damschroder's answer was, "he should." *Id.*, RE 79, Page ID # 2132. The same is necessarily true of a devout Catholic who, unbeknownst to a candidate or anyone else, wants to fund a circulation effort because she (the candidate) is pro-ObamaCare. Must the circulators disclose their independent, uncoordinated source to the entire community? Under § 3501.38(E)(1)

they eclipse a \$10,000 floor in a calendar year. Requiring more reporting would, under the logic of *Citizens United*, violate the First Amendment.

they must, and then it will become a public record in Ohio.²³ *See Doe v. Reed*, 561 U.S. 186 (2010) (holding that states may constitutionally make public records of initiative-petitions including all signatures).²⁴

These are just simple illustrations of the broader problem posed by § 3501.38(E)(1). The problem is that anyone who wants to independently support a candidate's circulation efforts will have to suffer disclosure. For some, like Brandon Lynaugh, this is not problematic. It is good for business. But for those involved with minor parties and unpopular causes it is a huge problem. Consider a philanthropist who wants to challenge the two-party system but who does not want his name splashed across the airwaves. Or an average citizen who wants to support minor

²³ Independent circulators and financial sponsors are a reality in today's Internet world. The LPO, for example, posted Earl's nominating papers on-line and invited anyone to download them, circulate them, and deliver them to the LPO for inclusion in the papers Earl submitted to the Secretary. See footnote 15, *supra*.

²⁴ The result in *Doe v. Reed*, 561 U.S. 186 (2010), has no bearing on the constitutionality of § 3501.38(E)(1). The Court in *Doe* ruled that the disclosure of signers' names and signatures placed on petitions does not facially violate the First Amendment. Those signers, after all, have voluntarily signed the petitions, and therefore have chosen not to remain anonymous. (Even then, the Court noted, disclosure could violate the First Amendment privacy rights of those who could establish a risk of harassment.) The question in the present case is antecedent; whether a speaker or signer can be forced to sign or reveal himself in the first instance. Assuming he does, his signature can become public record should the state so choose. The LPO does not contest that. Forcing the speaker, funding source

parties' circulation efforts but fears harassment, embarrassment and ostracism at the hands of major-party neighbors. The point is that § 3501.38(E)(1) does not require that a financial source be coordinated with a candidate. Even independent sources must be reported.

The District Court distinguished between laws targeting initiative-circulators and those targeting candidate-circulators. *See* Order and Opinion, RE 80, Page ID # 2160-61. But § 3501.38(E)(1) does not distinguish the two. It applies to both. Even assuming the distinction is relevant, § 3501.38(E)(1) is therefore still overbroad and facially unconstitutional.

Granted, some courts have relied on an initiative-versus-candidate distinction to award more protection to the former while distinguishing campaign-finance reporting requirements for candidates. Section 3501.38(E)(1), however, is not a campaign-finance law. And not all courts have drawn this distinction. *See, e.g., American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004). This Court, in particular, has refused to distinguish candidate-circulators from initiative-circulators. In *Nader v. Blackwell*, 545 F.3d 459, 475-76 (6th Cir. 2008), the Court stated:

or signer to reveal himself so that his name can be made a public record is the problem presented here. It was not presented in *Doe*.

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 paid circulators of candidate-petitions disclose the sources of their funding must be subject to precisely the same constitutional scrutiny given circulators of initiative-petitions. In either situation, Ohio must pass "exacting scrutiny."

In the end, § 3501.38(E)(1) does not distinguish between candidates²⁵ and issues. All sources must be reported for both. Because this sort of indiscriminate reporting requirement is overbroad and facially unconstitutional as applied to

²⁵ Interestingly, § 3501.38(E)(1) does not apply to candidates for local offices, including those running for the United States House. If fraud were a real problem, one would think that it would be just as much of a problem in these federal elections and local elections. That § 3501.38(E)(1) has no application to these district-wide elections demonstrates that it is under-inclusive, too. It is not narrowly tailored to preventing, deterring, or uncovering fraud or election law violations.

initiative-circulators, under the overbreadth doctrine it cannot be applied to candidate-circulators.

V. Section 3501.38(E)(1) Cannot Be Applied to Earl.

Assuming that Linnabary prevails in his parallel proceeding before the Ohio Supreme Court in *State ex rel. Linnabary v. Husted*, No. 14-359, discussed *supra*, the Secretary's application of § 3501.38(E)(1) to Earl cannot be constitutionally sustained. After all, if the Secretary was wrong about § 3501.38(E)(1) not distinguishing between independent contractors and employees, or if the Secretary incorrectly demanded complete compliance with § 3501.38(E)(1), then Earl could not have been placed on proper notice of what was expected.

Even assuming that the Ohio Supreme Court rules that independent contractors are subject to § 3501.38(E)(1), neither Earl, his circulator, nor the LPO was placed on proper, prior notice of this requirement. Ohio law on the point has been hopelessly ambiguous since 2006 when § 3501.38(E)(1)'s employer-statement rule was put in place. So vague, in fact, that § 3501.38(E)(1)'s employer-statement rule has never before been enforced against a candidate in Ohio. *See* Transcript of Testimony of Matthew Damschroder, RE 79, Page ID # 2073, 2130-31 & 2082.

Further, the Secretary has on at least two occasions formally instructed his

agents and local election boards to ignore violations of § 3501.38(E)(1). *See, e.g.*, Ohio Secretary of State Directive 2006-58 (Aug. 21, 2006),²⁶ at page 3 ("Do not invalidate a part-petition if the employer information statement ... is blank or incomplete, does not match or correspond with the information provided by the circulator in the compensation statement, or is otherwise improperly filled out."); Directive 2007-14 (Sept. 10, 2007),²⁷ at page 3 (same).

Damschroder, the Secretary's expert, testified that the Secretary's policy at the time Earl was removed from the ballot was exactly the same; violations of § 3501.38(E)(1) are ignored. Transcript of Testimony of Matthew Damschroder, RE 79, Page ID # 2081-83, 2086-87. The only exception, Damschroder stated, was when there was a protest. *Id.* But no protest of this nature had ever occurred before. *Id.*, Page ID # 2082-84. And the Secretary has nowhere stated, so that a circulator or candidate could know, that a distinction exists between those who are protested and those who are not.

Neither Earl nor his circulator could have known that § 3501.38(E)(1) might be applied, with a vengeance, if he were protested.

²⁶ <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-58.pdf>.

²⁷ <http://www.sos.state.oh.us/sos/upload/elections/directives/2007/Dir2007-14.pdf>.

The Supreme Court in *Federal Communications Commission v. Fox Television Stations*, 132 S. Ct. 2307 (2012), reiterated the First Amendment's strong aversion to the application of vague rules and novel interpretations. *Fox* involved a new FCC policy punishing even fleeting expletives on the airwaves. The FCC's prior policy had tolerated occasional vulgarity, even though it was technically prohibited. Notwithstanding that its new policy was announced after these fleeting vulgarities, the FCC chose to punish two television stations.

The Supreme Court ruled that the FCC could not apply its new zero-tolerance rule to the television stations:

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.*

Id. at 2317 (emphasis added). The Court added:

The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation ... “fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.” This would be true with respect to a regulatory change this abrupt on any subject, *but it is surely the case when applied to the regulations in question, regulations that touch upon “sensitive areas of basic First Amendment freedoms.”*

Id. at 2318 (citations omitted and emphasis added).

Section 3501.38(E)(1) certainly "touch[es] upon sensitive areas of basic First Amendment freedoms." The combination of § 3501.38(E)(1) and Ohio's newly-enforced strict compliance requirement, which mandates the invalidation of every valid signature collected, results in wholly innocent candidates being removed from ballots just because their circulators made technical mistakes. Earl and his circulator, having read Directives 2006-58 and 2007-14, having studied Ohio's law on independent contractors, and even having talked to Damschroder, could not have reasonably known that a failure to fully comply with § 3501.38(E)(1) risked the invalidation of Earl's candidacy.

Moreover, a subsequent judicial construction broadening § 3501.38(E)(1)'s reach to clearly include independent contractors, or to clearly require strict compliance, cannot fix this Due Process problem. The Court in *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), where the South Carolina Supreme Court broadened the state's definition of criminal trespass, ruled that "[w]hen a statute on its face is narrow and precise, ... it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."

Here Earl was more than "lulled into a false sense of security" by §

3501.38(E)(1)'s literal requirement of "employment," he was assured by the Secretary's Directives that § 3501.38(E)(1) would not be enforced. Even should the Ohio Supreme Court agree with the Secretary's current construction, Due Process prohibits Earl's punishment.

VI. The LPO and Earl Risk Irreparable Injury.

Earl is threatened with irreparable injury because he has been removed from Ohio's primary ballot and the primary election is less than six weeks away. If Earl does not run in the primary he cannot run as an LPO candidate in the 2014 general election.

The LPO, if Earl is excluded from the primary, will have no gubernatorial candidate. Without a gubernatorial candidate, it cannot win the needed votes necessary under Ohio law (S.B. 193) to remain ballot-qualified. It will therefore cease to exist as a political party in Ohio after the November 2014 general election. Any impediment to the assertion of First Amendment rights, even for brief periods, causes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

VII. Ohio Will Suffer No Harm By Including Earl on the LPO Primary Ballot.

Ohio will suffer no injury should the Court enjoin the enforcement of § 3501.38(E)(1) and order that Earl be restored to the LPO primary ballot. The Secretary, after all, had previously certified Earl to the ballot, and Ohio has for the past several election cycles held primaries including the LPO and other minor parties. No one knows for certain what Felsoci's injuries include. There is no evidence of any injury to Ohio's voters or anyone else.

VIII. The Public Will Benefit.

Placing Earl on the LPO primary ballot will benefit the public because it will insure that Ohio's primary election complies with the First Amendment and that voters enjoy once again the choices they had in 2008, 2010, and 2012. It will facilitate this Court's holding in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), which chastised Ohio for its horrible history of denying minor parties ballot access.

CONCLUSION

For the foregoing reasons, the LPO and Earl respectfully ask the Court to **REVERSE** the District Court's denial of preliminary relief and restore Charles Earl and his running mate, Sherry Clark, to the LPO's primary ballot in time for the May 6, 2014 primary election.

Respectfully submitted,

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s/ Mark R. Brown
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Dated: March 30, 2014

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I certify that a copy of this Brief was filed using the Court's electronic filing system and will thereby be electronically delivered to all parties through their counsel of record.

s/Mark R. Brown

Mark R. Brown