

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

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

**Appellants-Plaintiffs,**

**v.**

**No. 14-3230**

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

**Appellee-Defendant,**

**and**

**GREGORY FELSOCI,**

**Appellee-Intervenor-Defendant.**

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**APPELLANTS' MOTION FOR EMERGENCY INJUNCTION  
AND EXPEDITED APPEAL  
WITH ATTACHED MEMORANDUM OF LAW**

Appellants respectfully move this Court for an emergency injunction pending appeal, pursuant to Fed. R. App. P. 8(a), directing Appellee, Ohio's Secretary of State, Jon Husted (hereinafter "Secretary"), (1) to place the name of Appellant-Charles Earl on Ohio's 2014 Libertarian Party of Ohio primary ballot to be held on May 6, 2014; (2) to restrain the Secretary from printing Libertarian Party of Ohio primary ballots until this Court can resolve this motion; and (3) to order the Secretary to seek a waiver from federal authorities under UOCAVA and

MOVE, which would otherwise require that overseas ballots be mailed on Saturday, March 22, 2014.

Appellants also respectfully move to expedite this appeal.

In support of these emergency motions, Appellants respectfully state:

1. By Opinion and Order issued on March 19, 2014, the District Court denied Plaintiffs' request for a temporary restraining order and/or preliminary injunction placing Appellant-Charles Earl's name on the Libertarian Party of Ohio's primary ballot in Ohio. Doc. No. 80 (Opinion and Order).<sup>1</sup>
2. Plaintiffs/Appellants that same day filed a motion with the District Court to stay its Opinion and Order under Federal Rule of Civil Procedure 62(c), and further moved the District Court to restrain the Secretary-Appellee's printing of Ohio's Libertarian Party primary ballots until this Court of Appeals has had time to consider this Motion. Doc No. 81 (Motion to Stay).
3. Plaintiffs/Appellants further in that same Motion to Stay moved the District Court to order the Secretary to seek a waiver from federal authorities under UOCAVA/MOVE. Doc No. 81(Motion to Stay).

Having fully requested the relief being sought here from the District Court below, Appellants respectfully move this Court under Federal Rule of Appellate Procedure 8(a) for this same relief, specifically: (1) Appellants respectfully move the Court to issue an emergency injunction placing the name of Charles Earl on the Libertarian Party of Ohio's May 6, 2014 primary ballot. (2) Appellants respectfully move the Court to issue an emergency injunction

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<sup>1</sup>References in the form "Doc. No. \_\_, [description of document]" are to documents listed on the district court's CM/ECF docket sheet.

restraining the Secretary from printing Libertarian Party of Ohio primary ballots until this Court has had the opportunity to consider the merits of this emergency motion. (3) Appellants respectfully move the Court to issue an emergency injunction ordering the Secretary of State to seek a waiver from federal authorities under UOCAVA and MOVE, which otherwise might require printing ballots by Saturday, March 22, 2014.

Appellants timely filed a notice of appeal on March 19, 2014, *see* Doc. No. 82 (Notice of Appeal), the same day the District Court issued its Opinion and Order and the same day Plaintiffs/Appellants moved the District Court to stay its Opinion and Order. *See* Doc. No. 82 (Notice of Appeal).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF**  
**MOTION FOR EMERGENCY INJUNCTION AND**  
**EXPEDITED APPEAL**

**INTRODUCTION**

Because of four prior 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'"), has since the 2008 general election remained a ballot-qualified political party in Ohio. Pursuant to four separate federal-court orders, Ohio's Secretary of State (the principal Defendant-Appellee in this case (hereinafter "Secretary")), has been required to recognize that the LPO remains ballot-qualified in Ohio.

As part of its court-ordered ballot access, LPO has participated in Ohio's primaries since 2010. It has since 2008 run candidates for local, state-wide, and federal office (including the Presidency in 2008 and 2012) in Ohio's general elections. In the most recent non-presidential election year, 2010, LPO's slate of state-wide candidates won nearly 5% of the total votes cast in their respective elections; specifically LPO's candidates won 184,478 votes (4.91% of the total) for State Treasurer in 2010, 182,977 votes (4.88% of the total) for Secretary of State in 2010, 182,534 votes (4.87% of the total) for State Auditor in 2010. In all 2010 elections combined, LPO candidates won over one million votes. The LPO expects even greater percentages and

more votes in the next non-presidential election, 2014.

Running in party primaries in Ohio requires submitting a nominating petition 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). Signatures required by Ohio law to support nominating petitions, *see* O.R.C. § 3513.05, must be gathered and witnessed by "circulators." *See* O.R.C. § 3513.05. State-wide primary candidates for LPO and other non-major parties must gather 500 valid signatures.

Because of its anxiety over Governor John Kasich's re-election, the Republican legislature in Ohio in June of 2013 changed its law to once again require that circulators for candidates in Ohio be residents of Ohio. *See* O.R.C. § 3503.06(C)(1)(a). The General Assembly's plan 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.

This Court in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), had invalidated on First Amendment grounds Ohio's prior residence requirement. Still, Ohio tried again, only to have the District Court below on November 13, 2013 preliminarily enjoin enforcement of the measure. *See* Doc. No. 18 (Opinion and Order). This preliminary injunction was important for LPO candidates and the LPO because now they could use non-residents and interstate professional signature-collection companies to qualify for Ohio's primary and general election ballots.

On November 6, 2013, while Plaintiffs/Appellants' first motion for preliminary relief was pending, the Ohio General Assembly (which had intervened below to defend its new residence restriction) passed legislation, which Governor Kasich immediately signed, voiding LPO's ballot-qualified status and stripping LPO of its right to participate in Ohio's 2014 primary. Known as

S.B. 193, this legislation also stripped Plaintiff-LPO of its derivative right (as a qualified party participating in the 2014 primary) to participate in Ohio's 2014 general election.

Plaintiffs/Appellants on November 8, 2013, amended their Complaint to challenge S.B. 193's stripping the LPO of its right to participate in Ohio's 2014 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. This Court refused to expedite the Secretary's appeal, and the Secretary dismissed its appeal on February 24, 2014. Doc. No. 52 (Order of USCA).

By February 5, 2014, Plaintiff-Appellant-Earl, and several additional LPO candidates, submitted sufficient numbers of signatures along with their nominating petitions to qualify for Ohio's 2014 primary. Earl, like many candidates, employed paid circulators to collect signatures. Earl, and several other LPO candidates, were duly certified by the Secretary as qualified for Ohio's 2014 primary as LPO candidates on or about February 14, 2014.

On Friday, February 21, 2014, Earl, his running mate (Sherry Clark), and Steven R. Linnabary, the LPO's candidate for Attorney General, were "protested" by three Ohio voters. One of the protestors, Carl Akers, protested both Linnabary and another LPO candidate (running for the Ohio House), Chad Monnin. Two additional protestors, Tyler King and Appellee-Intervenor-Defendant-Felsoci, challenged Earl. Only one of these protestors, Felsoci, is a member of the LPO. Akers and King are unaffiliated. Still, the Secretary ruled that Linnabary's unaffiliated protestor (Akers) had standing to challenge Linnabary's candidacy in the primary.<sup>1</sup>

The Secretary held an informal hearing on Tuesday, March 4, 2014 to consider the

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<sup>1</sup> The Franklin County Board of Elections, split along party lines, divided evenly over whether Akers had standing to challenge Chad Monnin. Monnin ultimately prevailed on the merits and will run in the LPO primary for local office.

protests against Earl and Linnabary. The Secretary ruled not only that both 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* O.R.C. § 3501.38(E)(1). The Secretary accordingly ruled ALL of the otherwise valid signatures collected by Hatchett to be invalid. Without these signatures, neither Earl nor Linnabary had enough to qualify. Both were ejected from Ohio's Libertarian Party primary ballot.

Linnabary on Monday, March 10, 2014, the first possible day after the Secretary's almost-5:00 PM-decision removing him from the ballot, filed an original action in Ohio's Supreme Court challenging the Secretary's decision. *See State ex rel. Linnabary v. Husted*, No. 14-359 (Original Action in Mandamus); Doc. No. 59 (Notice of Related Action). Linnabary's case will on Thursday, March 20, 2014, have been fully briefed and ready for disposition.<sup>2</sup>

Linnabary's original action in the Ohio Supreme Court raises two questions under Ohio law. First, whether an unaffiliated elector can have standing to challenge a primary candidate. Second, whether Ohio law requires that paid circulators who are also self-employed, independent contractors name the source of their funding as their "employers" under O.R.C. § 3501.38(E)(1) on Ohio's part-petition forms. Because the latter question is implicated in Earl's challenge in this case, its resolution in Linnabary's favor would very likely require (through collateral estoppel and otherwise) that Earl, too, be included on the Libertarian Party of Ohio's primary ballot.

As explained in greater detail below, the argument raised in *State ex rel. Linnabary v. Husted*, No. 14-359, *see* Doc. No. 59 (Notice of Related Case), is whether Ohio's employer-

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<sup>2</sup> Earl is not a party to this state court action. Nor is Linnabary a party to this federal action. Success against the Secretary in either case, however, could have collateral estoppel effect against the Secretary because he is party to both proceedings.

statement statute, § 3501.38(E)(1), requires that independent contractors name "employers." Ohio law is not clear on this point, as an Ohio Court of Appeals decision in 2006 ruled that there is a difference between independent contractors and employees under § 3501.38(E)(1). *See In re Protest of Evans*, 2006-Ohio-4690 (Ohio App. 2006) (Attached as Exhibit to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Doc. No. 57. Should the Ohio Supreme Court agree with the Court of Appeals' ruling in *Evans*, then Linnabary must be returned to the 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 will be returned to the ballot.

Because Earl and Linnabary were excluded because of the same circulator (Hatchett), they are precisely similarly situated in regard to the application of § 3501.38(E)(1). An Ohio Supreme Court ruling in favor of Linnabary would necessarily mean that the Secretary incorrectly removed Earl, also. The Secretary's application of § 3501.38(E)(1) to invalidate all of Earl's supporters' signatures would not only contradict Ohio law, its application would necessarily violate Due Process and Equal Protection.<sup>3</sup>

Earl's suit in the District Court below challenging Ohio's residence requirement and S.B. 193 was still pending when the Secretary excluded him from the ballot. For this reason, he amended his Complaint on Friday, March 7, 2014, to challenge the Secretary's action here excluding him from the ballot as well as the Secretary's previous actions under S.B. 193. His

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<sup>3</sup> For these factual reasons alone, Appellants believe that the Secretary should be restrained from printing ballots involving Earl until the Ohio Supreme Court has ruled and this Court has had time to consider the legal merits of this Motion.

amended Complaint was met by the intervention of Felsoci, who is nominally a member of the LPO.

At the evidentiary hearing below, *see* Doc. No. 69 (Minute Entry), Felsoci testified that while he is a member of the LPO, he had no interest in challenging Earl until he was solicited by the lawyers' representing him to file a protest. Felsoci had great difficulty explaining why he filed the protest and what it was really about, so much so that Judge Watson admonished him to pay more attention to what he signs in the future. Felsoci also testified that he had not and would not pay any of his lawyers -- that he was never expected to -- and that he did not know who was paying his lawyers.<sup>4</sup>

Further, the Secretary admitted through the testimony of Matthew Damschroder that § 3501.38(E)(1) has never been applied by the Secretary or anyone else to exclude any candidate in Ohio before being applied to Earl. *See* Doc. No.79 (Transcript of Testimony of Matthew Damschroder) at 16, 58-59. Further, Mr. 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.* at 10. And the only time this has ever happened is with Felsoci's protest against Earl. Consequently, two otherwise identical candidates who use the same protestor could see disparate results under § 3501.38(E)(1). *Id.* at 12. One who is protested, like Earl, would be removed from the ballot; while another who is not protested will be allowed to compete in the election. *Id.*

Because of this testimony, Plaintiffs moved to amend their complaint to include selective

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<sup>4</sup> Counsel for Appellants sought to call Felsoci's lawyers in an effort to discover who had retained and paid them. If they were retained by the Republican Party, its agents, or others in coordinated efforts, Appellants believe that their actions could be illegal and unconstitutional. The District Court has not ruled on the question of whether the lawyers, like the circulators here, can be forced to disclose their source of funding.

prosecution claims under the First and Fourteenth Amendments against the Secretary on March 16, 2014. Doc. No. 72 (Motion to File Third Amended Complaint). Plaintiffs further moved to join the Ohio Republican Party as a party based on their belief that the Ohio Republican Party or its agents were involved in Felsoci's protest of Earl.

In the District Court, Earl and the LPO argued that O.R.C. § 3501.38(E)(1) was facially unconstitutional under the First Amendment. They also argued that the Secretary's interpretation of § 3501.38(E)(1), both substantively and its remedial aspect (requiring invalidation of all otherwise valid signatures and exclusion of innocent candidates) contradicted Ohio's past law and practices. As such, its application to Earl violated not only the First Amendment, but also Due Process and Equal Protection.<sup>5</sup>

### **ARGUMENT**

“When a district court is asked to issue a preliminary injunction, it ... balances four factors ...: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.” *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995).

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<sup>5</sup> The District Court ruled in its Opinion and Order that Appellants "abandoned" their Due Process argument, notwithstanding that was fully raised and presented in Plaintiff's Amended Complaint and their Motion for Preliminary Injunction. *See* Docs. No. 56 & 57. The District Court reasoned that the Plaintiffs/Appellants did not again raise the issue in their Reply to the Defendants' Responses. *See* Doc. No. 80 (Opinion and Order) at 24-25. Appellants are aware of no precedent or rule requiring that an issue once raised and fully briefed be argued in a Reply to be properly preserved. The District Court's ruling on this point constitutes clear error.

These same four factors are balanced by this Court in motions for emergency injunctions.

## **I. APPELLANTS' LIKELIHOOD OF SUCCESS ON THE MERITS**

Ohio's Secretary of State is charged by Ohio law with enforcing Ohio's ballot-access restrictions, including those found in O.R.C. § 3503.06(C)(1)(a), the statute being challenged here. *See* O.R.C. § 3501(M) (stating that Secretary of State has 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 Secretary of State "compel[s] compliance with election law requirements by election officials"). Defendant is therefore a proper party-defendant.

### **A. Section 3501.38(E)(1) Is Facially Unconstitutional Under the First Amendment.**

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).<sup>6</sup>

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<sup>6</sup> 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 enough to defeat Nader's First Amendment claim in that case.

Whether interpreted to apply only to employees, or to include independent contractors,<sup>7</sup> O.R.C. § 3501.38(E)(1) is facially unconstitutional under the First Amendment. It is facially unconstitutional because it forces "employers" and other funding sources to forfeit their First Amendment-ensured right to anonymity when engaged in core political speech. It unconstitutionally forces circulators of all sorts to disclose the identity of who is funding them. Ohio has no substantial reason for forcing circulators to disclose this information at the grass-roots circulation stage. *See McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995) (holding that leafletters cannot be constitutionally required to identify themselves). This is particularly true in the context of minor political parties, which have historically suffered harassment at the hands of state officials and major-party members alike. *See, e.g., Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (striking down Ohio disclosure law requiring that candidates of minor party disclose their funding sources and their expenditures).

Further, and even more importantly, invalidating all signatures collected by circulators who fail to disclose their funding sources -- and thereby kicking innocent candidates off ballots -- is not substantially related to any significant state interest. Other means exist for deterring non-disclosure. Other means exist for uncovering fraud. Ohio's strict, vicarious punishment of candidates for the sins of their circulators is far too much medicine for the ends (disclosure, fraud detection, prevention) it seeks to achieve. If § 3501.38(E)(1) substantially served Ohio's end in deterring and preventing fraud, after all, the Secretary would enforce it all the time, not just when

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<sup>7</sup> This is the question presented to the Ohio Supreme Court in *State ex rel. Linnabary v. Husted*, No. 14-359, discussed above.

someone files a protest. Matthew Damschroder testified that the Secretary instructs its staff and local election board not to enforce § 3501.38(E)(1), even when § 3501.38(E)(1) has been plainly and obviously violated. *See* Doc. No. 79 (Testimony of Matthew Damschroder) at 8.

The Supreme Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), made this clear. There, the Supreme Court applied *McIntyre* 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 reports listing the names and addresses of each paid circulator and the total amount paid to each.

The Supreme 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, 'fail[] exacting scrutiny.' *Id.* (citation and footnote omitted). While noting that simple affidavit 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.

Simply put, *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).<sup>8</sup> Paid circulators cannot be treated differently simply because they are paid. In short, a state's disparate treatment of paid circulators must pass the most "exacting scrutiny" under the First Amendment. *See Buckley*, 525 U.S. at 204.

Of course, both paid and volunteer circulators can be required to disclose their identities. No one questions that fact. But paid circulators cannot be required to tell voters more. They cannot be required to tell voters they are "paid" or "employed" and the identity of their payor or employer. *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."). *Buckley* makes clear that kind of disclosure violates the First Amendment. And § 3501.38(E)(1) does just that by requiring that circulators disclose "the name and address of the person employing" them. It is therefore facially unconstitutional.

Proving this point in the specific context of Ohio and its problems with fraud is *Citizens in Charge v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010). There, the District Court relied on *Buckley* to strike down an Ohio law requiring that ballot committees report the names and

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<sup>8</sup> Nor can Ohio law prohibit, or limit the amount of, payments to circulators by candidates, political parties, businesses, professional collection companies, or anyone else. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008) (striking down Ohio law prohibiting circulators from being paid based on the number of signatures collected).

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* establishes that to the extent Ohio is targeting fraud or otherwise 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. It violates the "exacting scrutiny" required by the First Amendment.

*WIN v. Rippie*, 213 F.3d 1132, 1134 (9th Cir. 2000), provides another example. There, the Ninth Circuit, relying on *Buckley*, invalidated a Washington (state) 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." 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.

*WINN* is important for many reasons, but mostly because it 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 *WINN* 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 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),<sup>9</sup> which sustained an Oregon law requiring that paid circulators register their identities with the state.

The requirements in these two cases are far cries from what O.R.C. § 3501.38(E)(1) demands. Nebraska's law did not require that circulators properly guess at, and disclose, the correct source of their funding. It did not place circulators and candidates at risk of losing sheet after sheet of otherwise valid signatures if the circulator's guess proved wrong. It did not require disclosure of the source of funding. Nor did Oregon's law require the disclosure of the source of funding. It did not even require that circulators disclose to the public the fact that they were paid. It simply required that they register their names and addresses and supply that information to state officials when asked.

Appellants here have never claimed that paid circulators cannot be required to provide

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<sup>9</sup> In *Walker v. Oregon*, 2010 WL 1224235 (D. Ore. 2010), the law required only that "paid circulators ... provide identifying information to the state — information that is already available by public records request." Plaintiffs do not claim that circulators, paid or volunteer, cannot be required to provide identifying information to the state. They surely can.

identifying information to state officials. They surely can. *See, e.g., Walker v. Oregon*, 2010 WL 1224235 (D. Ore. 2010). Appellants would have no 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 an innocent candidate off the ballot. And this is what violates the First Amendment.

While it is true that some, though not all, *see, e.g., American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), of the cases relied upon by Appellants involved circulators of initiative-petitions rather than candidate-petitions, the distinction is not critical in this Circuit. This Court in 2008 refused to recognize any distinction between circulators of initiative petitions and circulators of candidate petitions. In *Nader v. Blackwell*, 545 F.3d 459, 475-76 (6th Cir. 2008), which invalidated Ohio's residence requirement for circulators of candidate-petitions, the Court stated:

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

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

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

Weighed against this severe infringement on the First Amendment, the District Court below concluded that Ohio's interest in combating fraud justified its disclosure requirement. The District Court pointed to Ohio's experience with Ralph Nader in 2004 to support its conclusion. The District Court's factual conclusion that 1,956 of Nader's 2756 invalidated signatures were invalidated because of fraud is clearly erroneous. Doc. No. 80 (Opinion and Order) at 20. In fact, according 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. The rest of the signatures were thrown out because of lack of residence or proper registration, and both of these requirements the Court went on to say violate the First Amendment.

This 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 great bulk of signatures invalidated by the Secretary in that case were thrown out because of technical violations, like not being a resident. There simply was no massive fraud in

*Nader*. Ohio has no more reason to require disclosure than Colorado, Nevada, Washington, or Wisconsin. The District Court's factual conclusion to the contrary is clearly erroneous.

\* \* \*

The District Court's conclusion that circulators and the candidates they work for suffer no severe chill at the hands of disclosure laws, *see* Doc. No. 80 (Opinion and Order) at 20-21, cannot be reconciled with this long list of cases. Forcing circulators to disclose the source of their funding is necessarily, as a matter of law, a significant burden on First Amendment rights. This is particularly true of circulators for minor-party candidates.

Further, the District Court made a factual mistake in concluding that Nader's candidacy, the factual predicate for § 3501.38(E)(1), was infected with massive fraud. This Court in *Nader* previously found that it was not.

The District Court's conclusion that § 3501.38(E)(1) is substantially related to ferreting out fraud, moreover, cannot be squared with the Secretary's decision, and his instructions to local elections boards, not to enforce it. These instructions also apply to obvious violations of § 3501.38(E)(1). If § 3501.38(E)(1) substantially served the detection and prevention of fraud, one assumes that it would at least be enforced in situations where violations are obvious.

For all of these reasons, Appellants are substantially likely to prevail on the merits of their First Amendment claim.

**B. The Secretary's Incorrect Interpretation of § 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 above, the Secretary's application of § 3501.38(E)(1) to Earl cannot be constitutionally sustained. After all, if the

Secretary was wrong about Ohio law, Earl could not have been placed on proper notice of what was expected.

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 new rules and interpretations to past conduct. *Fox* involved a new FCC policy punishing even fleeting expletives on the airwaves. The FCC's prior policy had tolerated occasional vulgarity, such as that which occurred on three Fox and ABC programs at issue in the case. Notwithstanding that its new policy was announced after these fleeting vulgarities, the FCC chose to punish the two television stations. The Supreme Court ruled the FCC could not retroactively punish the television stations:

A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. ... It requires the invalidation of laws that are impermissibly vague. ... 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), and especially its risk to political candidates, certainly "touch upon sensitive areas of basic First Amendment freedoms." The combination of § 3501.38(E)(1) and

Ohio's 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. If this was not in fact the law in Ohio when Earl submitted his nominating petition, it cannot be applied to him now to exclude him from the ballot. Such an application violates the First and Fourteenth Amendments.

**C. The Secretary's Printing of Ballots Should Be Suspended.**

In order to give the Ohio Supreme Court (and this Court) time to resolve the important questions of Ohio and federal constitutional law raised in these two cases, the Secretary should be enjoined from finalizing ballots until the litigation is complete.

Appellants on Sunday, March 16, 2014, formally requested that the Secretary seek a waiver from federal authorities of its obligations under UOCAVA and MOVE because of pending litigation in this case and that before the Ohio Supreme Court. Even though the Secretary is fully aware of the problem and the exemption provided by UOCAVA and MOVE, he has neither responded nor sought a waiver. He is attempting to moot this controversy through inaction.

"UOCAVA, as amended by the MOVE Act, requires states to provide absentee ballots to absent military and overseas voters at least 45 days prior to an election." *Obama for America v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012). UOCAVA, as amended by MOVE, however, provides a "hardship exemption" in 42 U.S.C. § 1973ff-1(g)(1):

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

Section 1973ff-1(g)(2)(B) describes three relevant hardships, one of which being that

"[t]he State has suffered a delay in generating ballots due to a legal contest." In this instance, the State is to seek a written waiver from federal authorities "as soon as practicable." 42 U.S.C. § 1973ff-1(g)(3)(B). "The Presidential designee shall approve or deny the waiver request not later than 5 business days after the date on which the request is received." *Id.*

In the present case, the Secretary can lawfully delay printing ballots by applying for a written waiver from federal officials. The pendency of this litigation and that before the Ohio Supreme Court creates a hardship which justifies delaying the printing of Ohio's ballots.

Appellants therefore respectfully request that this Court enjoin the Secretary from printing ballots until the Ohio Supreme Court rules in *Linnabary* and/or this Court resolves the merits of this Emergency Motion.

## **II. IRREPARABLE INJURY**

Appellants are threatened with irreparable injury because they have been removed from Ohio's primary ballot and time is short before those ballots must be printed. Any impediment on 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."). Without Earl on the ballot, the LPO will not be able to sustain its ballot access. Ohio law, S.B. 193 (which remains in effect for future elections) only guarantees continuing access to parties that receive 2% of the vote for governor.

## **III. DEFENDANT WILL SUFFER NO INJURY**

Defendant will suffer no injury should the Court enjoin the enforcement of § 3501.38(E)(1). The Secretary, after all, had previously certified Earl for the ballot, and Ohio has

for the past several election cycles held primaries including the minor parties. There is no evidence of any injury to voters or anyone else. Temporarily suspending the printing of ballots, moreover, is authorized by UOCAVA and MOVE in the face of pending litigation.

#### **IV. THE PUBLIC WILL BENEFIT**

Preliminary relief 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.

#### **V. NO SECURITY IS REQUIRED**

As noted by one well-recognized authority, "the court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant." C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2954. The Sixth Circuit has observed that security is not mandatory and can be dispensed with in the discretion of the court. *See Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6<sup>th</sup> Cir. 1995). Because Appellees will suffer no harm, economic or otherwise, no security should be required.

#### **CONCLUSION**

For the foregoing reasons, Appellants respectfully move the Court to issue an emergency injunction against the Secretary preventing enforcement of O.R.C. § 3501.38(E)(1) and ordering that Earl be included on Ohio's 2014 primary ballot. In addition, Appellants respectfully move the Court to restrain the printing of ballots until this litigation and that before the Ohio Supreme Court resolve the legality of excluding Earl and Linnabary from the ballot. Appellants also

respectfully move the Court to order the Secretary to immediately seek a waiver under UOCAVA and MOVE. Lastly, Appellants move to expedite this appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that copies of this Motion and Memorandum in Support were 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