

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**LIBERTARIAN PARTY OF OHIO, et al.**  
**Plaintiffs,**

**and**

**Robert Hart, et al.,**  
**Intervenor-Plaintiffs,**

**Case No. 2:13-cv-00953**

**v.**

**JUDGE WATSON**

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

**Defendant,**

**and**

**STATE OF OHIO,**

**Intervenor-Defendant.**

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**THIRD MOTION FOR PRELIMINARY INJUNCTION**  
**FIRST MOTION FOR TEMPORARY RESTRAINING ORDER**  
**ATTACHED MEMORANDUM OF LAW IN SUPPORT**

Plaintiffs pursuant to Federal Rule of Civil Procedure 65 move the Court to enter a preliminary injunction and/or temporary restraining order prohibiting Defendant-Secretary of State from applying O.R.C. § 3501.38(E)(1), as interpreted by Defendant-Secretary of State, to Plaintiff-Libertarian Party of Ohio (LPO), Plaintiff-Earl, and all other LPO candidates running in

Ohio's 2014 primary. In support of this Motion, Plaintiffs (or collectively "LPO") tender to the Court a Seconded Amended Complaint, Motion to Amend the Complaint with accompanying Memorandum, this Motion and included Memorandum, and a Proposed Order (attached as Exhibit 1 to this Motion and Memorandum).

Plaintiffs certify that Defendant-Secretary has previously entered an appearance in this case, has waived service of process, and has supplied an Answer to the First Amended Complaint. Plaintiff further certifies that the Ohio Attorney General's Office, which represents Defendant-Secretary, has been supplied copies of all these documents through the Court's electronic filing system.

Respectfully submitted,

s/Mark R. Brown

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**MEMORANDUM IN SUPPORT OF**  
**THIRD MOTION FOR PRELIMINARY INJUNCTION AND**  
**FIRST MOTION FOR TEMPORARY RESTRAINING ORDER**

**INTRODUCTION**

Because of three 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), Plaintiff, the Libertarian Party of Ohio (hereinafter "Plaintiff-LPO" or "LPO"), has since the 2008 general election remained a ballot-qualified political party in Ohio. Pursuant to three separate federal-court orders, Ohio's Secretary of State (the principal Defendant in this case (hereinafter "Defendant-Husted" or "Secretary"), has issued a series of Directives authorizing Plaintiff-LPO's ballot access. *See, e.g.*, Ohio Secretary of State Directive 2001-01 (Jan. 6, 2011); Ohio Secretary of State Directive 2011-38 (Nov. 1, 2011); Ohio Secretary of State Directive 2013-02 (Jan. 31, 2013).

As part of its court-ordered ballot access, Plaintiff-LPO has participated in Ohio's primaries since 2010. *See* First Amended Complaint (Verified) (Doc. No. 16) (hereinafter "Amended Complaint") at ¶ 2. It has since 2008 ran candidates for local, state-wide, and federal office (including the Presidency in 2008 and 2012) in Ohio's general elections. *See* Amended Complaint at ¶ 3. 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. *See* Amended Complaint at ¶ 21. In all 2010 elections combined, LPO candidates won over one million votes. *Id.* 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.

In June of 2013, Ohio 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). Because Ohio required that nominating petitions for its 2014 primary be submitted on or about February 5, 2014, *see* O.R.C. § 3513.05, Plaintiffs on September 25, 2013 filed their initial Complaint, Doc. No. 1, challenging this new residence requirement under the First Amendment. This Court preliminarily enjoined that measure on November 13, 2013. *See* Doc. No. 18. This enabled Plaintiffs to once again use non-residents and professional paid circulators to collect signatures.

On November 6, 2013, while Plaintiffs' first motion for preliminary relief was pending, Intervenor-Defendant passed legislation, which the Governor immediately signed, voiding the Secretary's previously-issued Directives assuring Plaintiff-LPO ballot access and stripping Plaintiff-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 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. This 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.

By February 5, 2014, Plaintiff-Earl, Plaintiff-Harris and several additional LPO candidates had submitted sufficient numbers of signatures along with their nominating petitions to qualify for Ohio's 2014 primary. See Seconded Amended Complaint at ¶ 64. In employing paid circulators to collect signatures, Plaintiffs and these additional LPO candidates relied on Ohio's established laws for circulators, which does not require that paid circulators disclose their paid status or otherwise disclose the source of their payments. See Second Amended Complaint at ¶ 65. See O.R.C. § 3501.38(E)(1); *In re Protest of Evans*, 2006 WL 2590613 (Ohio App. 2006) (Attached as Exhibit 2); *Rothenberg v. Husted*, 953 N.E.2d 327 (Ohio 2011).

Plaintiff-Earl and other LPO candidates were duly certified by the Defendant as qualified for Ohio's 2014 primary as LPO candidates on or about February 14, 2014.

On Friday, February 21, Plaintiff-Earl, his running mate, and Steven R. Linnabary, the LPO's candidate for Attorney General, were protested by three Ohio voters. See Second Amended Complaint at ¶ 71. Two of these protestors were at no time, and still are not, members of the LPO. *Id.* at ¶ 72. One protestor who challenged Plaintiff-Earl and his running mate is a member of the LPO. *Id.* at ¶ 73. The Defendant-Secretary held an informal hearing on Tuesday, March 4, 2014 to consider these protests. *Id.* at ¶ 74.

On Friday, March 7, 2014, the Defendant-Secretary concluded that Plaintiff-Earl and his running mate were not properly qualified to appear on Ohio's primary ballot. See *id.* at ¶ 75; Exhibit 3 (Hearing Officer Recommendation); Exhibit 4 (Decision of Secretary of State). The

Secretary ruled that although two of Plaintiff-Earl's circulators were independent contractors, and thus not employed by the LPO, Plaintiff-Earl, or anyone else, they were required to disclose the source of their payments under O.R.C. § 3501.38(E)(1). Because they did not, all of the hundreds of otherwise valid signatures they collected had to be excluded under Ohio law, thereby resulting in the invalidation of Plaintiff-Earl's candidacy. *Id.*

As explained below, this interpretation of § 3501.38(E)(1) marked a change in Ohio law, as the accepted practice in Ohio has been that independent contractors need not disclose the source of their funding. *See In re Protest of Evans*, 2006 WL 2590613 (Ohio App. 2006) (Attached as Exhibit 2); *Rothenberg v. Husted*, 953 N.E.2d 327 (Ohio 2011). Further, the conclusion that a failure to comply with § 3501.38(E)(1) must result in the invalidation of otherwise valid voters' signatures also contradicts the accepted practice in Ohio, which is that violations of § 3501.38(E)(1) do not require invalidation of part-petitions. *See, e.g., See, e.g.,* Directive 2006-58 (Issued by Secretary Blackwell in regard to "Initiative Petition --Constitutional Amendment -- Smoke Less", Aug. 21, 2006),<sup>1</sup> 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.") (Exhibit submitted to Hearing Officer on March 3, 2014); Directive 2007-14 (Issued by Secretary Brunner in regard to "Referendum Petition of Sub. S.B. No. 16", Sep. 10, 2007),<sup>2</sup> 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."); *Rothenberg v. Husted*, 953

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<sup>1</sup> <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-58.pdf>.

N.E.2d 327 (Ohio 2011).

Defendant-Secretary's actions now prevent Plaintiff-Earl from running on Ohio's 2014 primary ballot, thereby making it impossible for Plaintiff-Earl to appear as the LPO nominee on Ohio's 2014 general election ballot.

### **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).

#### **I. PLAINTIFFS’ LIKELIHOOD OF SUCCESS ON THE MERITS**

Defendant, 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 under Counts Six through Eight, which have been added by the Second Amended Complaint. *See* ¶¶ 119-28.

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<sup>2</sup> <http://www.sos.state.oh.us/sos/upload/elections/directives/2007/Dir2007-14.pdf>.

**A. Section 3501.38(E)(1) Is Facially Unconstitutional.**

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). Whether interpreted to apply only to employees of actual employers, or to also include independent contractors, § 3501.38(E)(1) is facially unconstitutional under the First Amendment. It is facially unconstitutional because it forces "employers" and other sources of funding to forfeit their First Amendment-secured right to anonymity when engaged in core political speech. *See McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995) (holding that leafletters cannot be constitutionally required to identify themselves).

The Supreme Court in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), 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, then, made 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>3</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

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<sup>3</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).

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 the point is *Citizens in Charge, v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010), where this Court relied on *Buckley* to strike down Ohio's 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* 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), to

use one more example, 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.

It is hard to imagine a substantial reason supporting Ohio's requirement that paid circulators disclose the sources of their income. No reason other than mischievous snooping or tripping up candidates supports demanding this information from paid circulators. *See, e.g., Citizens United v. Federal Election Commission*, 558 U.S. 310, 481 (2010) (Thomas, J., concurring) (noting "recent events' that some *amici* describe 'in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation'" and stating that "[t]he Court properly recognizes these events as 'cause for concern'").

**B. Section 3501.38(E)(1) Is Unconstitutional As-Applied.**

Prior to the Defendant-Secretary's rejection of Plaintiff-Earl's candidacy, Ohio courts (and the Secretary's Office itself) attempted to limit O.R.C. § 3501.38(E)(1)'s reach. As explained below, § 3501.38(E)(1)'s disclosure requirement was limited to actual employees, and even then

Ohio did not require that mistakes be enforced by throwing out all valid signatures. Under these limitations, § 3501.38(E)(1) had a much better chance of surviving the First Amendment's "exacting scrutiny."

But now the Defendant-Secretary has decided that all paid circulators must disclose their sources, and that all mistakes require invalidation of all otherwise valid signatures collected by the mistaken circulators. This interpretation and application of § 3501.38(E)(1) violates the First Amendment even if § 3501.38(E)(1) is facially valid.

Forcing all paid circulators to disclose their sources, on pain of the invalidation of all of their otherwise properly collected signatures, is simply not narrowly tailored to any substantial state interest. It cannot pass "exacting scrutiny." Punishing the circulator is one thing, but punishing the voters and candidates is another. This form of triple punishment cannot survive the First Amendment's most "exacting scrutiny."

**C. The Secretary's Novel Interpretation of § 3501.38(E)(1) Cannot Be Retroactively Applied.**

The Secretary of State has stated in a number of Directives that a circulator's failure to properly identify his or her employer is not a proper reason for invalidating his or her part-petitions. *See, e.g.*, Directive 2006-58 (Issued by Secretary Blackwell in regard to "Initiative Petition --Constitutional Amendment -- Smoke Less", Aug. 21, 2006),<sup>4</sup> 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.") (Exhibit submitted to Hearing Officer on March

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<sup>4</sup> <http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-58.pdf>.

3, 2014); Directive 2007-14 (Issued by Secretary Brunner in regard to "Referendum Petition of Sub. S.B. No. 16", Sep. 10, 2007),<sup>5</sup> at page 3 (same).

Far from constituting election falsification, a failure to properly fill in or fill out an employer information statement pursuant to § 3501.38(E)(1) has consistently in Ohio been treated as a mere technicality. Secretary Blackwell made this clear, as did Secretary Brunner.

These Directives are consistent with O.R.C. § 3513.261's language stating that candidates' part-petitions need only "substantially ... follow[]" the prescribed rules. The Ohio Supreme Court has interpreted the language of § 3513.261 to only require "substantial compliance" by candidates and circulators. "[T]echnical defects in nominating petitions and declarations of candidacy, which even if noticed by the signers would in no way mislead them," should not result in the invalidation of all part-petitions. *State ex rel. Osborn v. Fairfield County Board of Elections*, 602 N.E.2d 636, 638 (Ohio 1992) (citation omitted). The Court explained in *Osborn*:

The public policy which favors free competitive elections, in which the electorate has the opportunity to make a choice between candidates, outweighs the arguments for absolute compliance with each technical requirement in the petition form, where the statute requires only *substantial* compliance, where, in fact, the only omission cannot possibly mislead any petition signor or elector, where there is no claim of fraud or deception, and where there is sufficient substantial compliance to permit the board of elections, based upon the prima facie evidence appearing on the face of the jurat which is a part of the petition paper, to determine the petition to be valid.'

*Id.* (citations omitted).

The Ohio Supreme Court recently demonstrated that Ohio's "substantial compliance" rule specifically applies to § 3501.38(E)(1)'s employer statement. In *Rothenberg v. Husted*, 953 N.E. 2d 327 (2011), the Court addressed the dilemma circulators face with § 3501.38(E)(1)'s employer statement. The problem presented is if they are "employed" they are expected to disclose this fact;

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<sup>5</sup> <http://www.sos.state.oh.us/sos/upload/elections/directives/2007/Dir2007-14.pdf>.

but if they are not--they are, say, independent contractors--they must not disclose.

The Ohio Supreme Court solved this dilemma in *Rothenberg* by ruling that regardless of whether circulators are correct about their employed-or-not status, "[p]art-petitions of compensated circulators are not improperly verified and subject to invalidation simply because the circulators, who might actually be independent contractors, listed the entity or individual engaging or paying them to circulate the petition as 'the person employing' them." *Id.* at 327.

*Rothenberg* proves two things. First, as argued above, it establishes that employer-statement mistakes do not require the invalidation of the signatures on their part-petitions. Second, *Rothenberg* recognizes that § 3501.38(E)(1) draws a distinction between independent contractors and employees.

*In re Protest of Evans*, 2006 WL 2590613 (Ohio App. 2006) (Exhibit 2), addresses the second point. *Evans* ruled that circulators cannot and do not satisfy § 3501.38(E)(1) by disclosing the source of their funding. There, the Secretary had likewise argued -- and the Court of Appeals and Court of Common Pleas both rejected -- that circulators must disclose the source of their funding, as opposed to the identities of their actual employers. Consequently, two courts have now rejected the argument that circulators must disclose who pays them, and another, the Ohio Supreme Court, has found it unnecessary to accept. The argument, moreover, contradicts the formal positions taken by prior Secretaries that employer statements are mere technicalities.

*Evans* is important here because it represents the *only* formal interpretation of § 3501.38(E)(1)'s employer statement requirement. The question in *Evans* was whether a paid circulators' actual employer must be disclosed under § 3501.38(E)(1), or whether the sponsor of the ballot measure who financed the effort must be disclosed. The circulators in that case listed



the financial sponsor, the American Cancer Society (ACS), pursuant to the Secretary's advice. The protestors argued that the employer that was needed to be disclosed under § 3501.38(E)(1) was "the professional petition-circulating company (Arno) that actually employed them." Relying on Ohio's well-recognized distinction between "employers" and "independent contractors," the Court of Appeals concluded that Arno was the answer.

The Candidates, and their circulators, both being engaged in core First Amendment activity, have the right under the Fourteenth Amendment Due Process Clause to rely on the Court of Appeals ruling in *Evans* that § 3501.38(E)(1) is governed by the employer/independent contractor distinction. The Candidates and their circulators have the right to rely on the Secretary's own Directives, such as Directive 2006-58, stating that Boards of Elections must "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."

As this Court made clear in its second preliminary injunction prohibiting S.B. 193's retroactive application, the combination of Directives and prior practices creates legitimate First Amendment reliance interests. Ohio cannot "move the proverbial goalpost in the midst of the game:

The circumstances here included the Secretary's directives which indicated Plaintiffs could qualify for the ballot, Plaintiffs' expenditure of significant time and resources to qualify, and Plaintiffs' legitimate expectation that, having complied with the process that was (and remains) in place, they would have the opportunity to reap the political benefits of participating in the primary. The Ohio Legislature moved the proverbial goalpost in the midst of the game.

*Libertarian Party of Ohio v. Husted*, No. 13-953 (S.D. Ohio, Jan. 7, 2014) (Doc. No, 47), at 16-17.

The Defendant-Secretary's most recent actions fit the Legislature's previous actions hand-in-glove. Plaintiffs and their circulators relied on the Secretary's previous position (formally adopted in Directives) that employer statements, right or wrong, cannot be used to invalidate part-petitions. They relied on the Ohio Court of Appeals decision in *Evans* distinguishing employers from independent contractors. Ruling now that this distinction is incorrect, and that the failure to disclose each and every source of funding requires the invalidation of all part-petitions, marks a significant change in Ohio law. This change cannot be constitutionally applied retroactively. Ohio cannot constitutionally, as it attempted with S.B. 193, "move the proverbial goalpost in the midst of the game."

## **II. IRREPARABLE INJURY**

Plaintiffs 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.").

## **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 Plaintiff-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.

#### **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.

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

Rule 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). As noted by one well-recognized authority, however, "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 under Rule 65(c), 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 Defendant will suffer no harm, economic or otherwise, no security should be required.

#### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully move the Court to issue a preliminary injunction and/or temporary restraining order against Defendant-Husted preventing enforcement of O.R.C. § 3501.38(E)(1) and ordering that Plaintiff-Earl be included on Ohio's 2014 primary ballot.

Respectfully submitted,

s/Mark R. Brown

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**CERTIFICATE OF SERVICE**

I certify that copies of the First Amended Complaint, this Motion and accompanying Memorandum in Support, and the attached Proposed Order, 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