

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

makes the following disclosure:

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 OF THE CASE

"Curiouser and curiouser!," exclaimed Alice.¹ See LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).

Ohio might not yet be Wonderland, but it does not take an Alice to wonder (and worry) about its curious political playground.

Take the "guileless dupe Felsoci." He has no idea what this case is about, does not know who retained his lawyers, has no clue whether they are being paid, and refuses to answer questions about whether anyone is paying him.

¹ Another curious event is Felsoci's filing a Motion to Dismiss this Appeal coupled with an Appendix, both complaining that Appellants had improperly filed the record on appeal. See, e.g., Intervenor-Defendant-Appellee-Felsoci's (hereinafter "Felsoci") Appendix. Everything in Felsoci's Appendix appears to be in the Electronic Record. Secretary Husted, for instance, filed the entire state administrative record (without objection from Appellants or Felsoci), see RE 63, all of which is repeated in Felsoci's Appendix. Appellants cannot locate anything in the Appendix that is not already part of the Electronic Record. Sixth Circuit Rule 30(a) states: "An appendix is required only in the following cases, unless the court directs otherwise. *In other cases, an appendix is unnecessary and must not be filed.* The court will have the district court electronic record available." (Emphasis added). None of the exceptional situations described by Sixth Circuit Rule 30 (requiring an additional or supplemental appendix) applies here. Appellants accordingly moved to strike the Appendix under Sixth Circuit Rule 30(a). Given that Felsoci has also moved to dismiss based on Appellants' alleged "failure" to file a complete transcript (which Appellants obviously had no obligation to do), Appellants can only conclude that Felsoci (and not the Secretary) has incorrectly conflated "the electronic record" with "testimony taken at the evidentiary hearing." The two are not identical, of course, especially in the context of an interlocutory appeal from the denial of a motion for preliminary injunction.

Matt Borges, Ohio's Republican Party Chair, is the next curious character. News outlets described his comments at a press conference in the aftermath of Felsoci's filing of his protest against Earl: "If they didn't circulate their petitions properly and aren't actually able qualify, then we should take a look at that. And we're going to. ... We're the ones who filed that complaint" Chrissie Thompson, Libertarians denied spots on Ohio governor's and attorney general's ballot, CINCINNATI ENQUIRER, March 7, 2014.²

Upon learning this, Judge Watson on his own motion ordered Borges to appear and explain himself. Borges did so by stating simply, under oath, that he was "mistaken." His "mistake" was so far-fetched that Judge Watson drew a specific inference that Republican operatives were in fact behind Felsoci's protest.

Last but not least is the Secretary himself. Before Judge Watson, he claimed that he relies on protestors to police § 3501.38(E)(1). He does not enforce it absent a protest. He made this argument, of course, to explain his eight years' worth of non-enforcement. Indeed, he had to make this argument to explain prior Directives expressly stating that § 3501.38(E)(1) must not be enforced. He had to make this argument to corroborate his claim that his current policy is the same as the policies

²<http://www.cincinnati.com/story/news/politics/ohio%20government/2014/03/07/husted-earl-governor-election-ohio/6180677/>.

stated in these prior Directives. He had to make this argument to demonstrate that he did not have different rules for different candidates in different elections.

The problem with the Secretary's explanation, apparently, is that it is not true. At least not according to the Secretary in *State ex rel. Linnabary v. Husted*, __ N.E.3d __, 2014 WL 1317512 (Ohio, April 3, 2014). Just days after he explained to Judge Watson his official position on why he had never enforced § 3501.38(E)(1), the Secretary in *Linnabary* argued the opposite. "Curiouser and curiouser!" He unilaterally enforces § 3501.38(E)(1) after all.

The Ohio Supreme Court (understandably given its deference to the Secretary)³ accepted the Secretary's position: "we agree with Husted that he had the authority under R.C. 3501.39 to investigate noncompliance by a petition circulator once he learned of it and to reject petitions for noncompliance. Therefore, we find that we need not decide whether Akers had standing to file the protest against Linnabary." *Id.* at ¶ 19.⁴

³ Appellants are not critical of the Ohio Supreme Court's conclusion in *Linnabary*. The Ohio Supreme Court routinely defers to the Secretary on matters of Ohio election law. Appellants do, however, criticize the Secretary for adopting different policies for different elections, and (the LPO believes) for different candidates.

⁴ The Ohio Supreme Court then again deferred to the Secretary's interpretation of § 3501.38(E)(1), that is, that it broadly requires the disclosure of all funding sources,

So which is it? Is the Secretary's position that he must unilaterally enforce § 3501.38(E)(1) the law of Ohio? Or is it that, as Damschroder testified in the present case, that the Secretary only enforces § 3501.38(E)(1) when a proper protestor presents the challenge?

The LPO questioned in its principal Brief whether Damschroder's rationalization of § 3501.38(E)(1) made sense; after all, if § 3501.38(E)(1) were so important to combating fraud it would be enforced all the time. *See* Appellants' Brief at 45. Now that the Secretary has conceded that it enforces § 3501.38(E)(1) whenever evidence of its violation comes to light, *see Linnabary*, what initially appeared to be curious makes more sense.

As Damschroder testified, (1) the Secretary has never before enforced § 3501.38(E)(1), (2) has published Directives stating that § 3501.38(E)(1) should not be enforced, and (3) up until this election cycle has abided by this policy. Sometime during the 2014 election cycle, the Secretary changed his mind. Section 3501.38(E)(1) must be enforced after all, either when a protestor files an administrative complaint, as here, or when the Secretary has evidence of a violation, as in *Linnabary*. Section 3501.38(E)(1) is necessary after all. And this

not just employers. *Id.* at ¶¶ 22 -24. This portion of the opinion is discussed at pages 13-14 & 24 , *infra*.

proves that the Secretary's enforcement policy is new, one that took the LPO, Linnabary, Earl, Damschroder, and everyone else (except perhaps the Secretary and Felsoci) by complete surprise.

ARGUMENT

I. Facial Challenges Are Preferred In Election Matters.

The Secretary argues that "there is no evidence that LPO's or any third parties' rights are severely burdened by Ohio's disclosure requirement." Brief of Appellee-Defendant Secretary of State, Doc. No. 31 (hereinafter "Secretary's Brief"), at 36; *see also id.* at 28.⁵ No one was injured; the LPO and Earl just made

⁵ The Secretary asserts that "LPO cannot rely on Paul Frankel's affidavit to establish a burden on third parties, in part because it was never admitted into evidence. LPO never even moved to admit it. ... Frankel's affidavit was not part of the record before the district court and cannot be considered here." Secretary's Brief at 35. This point might be credible if this were an appeal from a jury verdict and the question included sufficiency of the evidence; but this is an interlocutory appeal from a denial of preliminary injunctive relief. Courts have *always* relied on affidavits, as well as live testimony, when considering motions for preliminary injunctions. *See* C. A. WRIGHT, ET AL., 11A FEDERAL PRACTICE AND PROCEDURE CIVIL § 2949 (2013) ("Affidavits are appropriate on a preliminary-injunction motion and typically will be offered by both parties."); *Welch v. Brown*, 2014 WL 25641 (6th Cir., Jan. 3, 2014); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996). Indeed, the Secretary here routinely relies on record evidence presented outside the evidentiary hearing. *See, e.g.*, Secretary's Brief at 32 (quoting Hatchett's testimony before the Hearing Officer (RE 63-1, Page ID # 1327-28)). And so does Felsoci. *See, e.g.*, Brief of Intervenor-Defendant-Appellee-Felsoci (hereinafter "Felsoci's Brief") at 27 (citing RE 63-2, Page ID # 1543, 1550). Contrary to the

a stupid mistake. *Id.* at 32. 'It was a self-inflicted wound.' *See* Felsoci's Brief at 50.

Aside from the fact that this is not a proper factual description of what occurred, the legal difficulty with this argument is that it ignores the overbreadth doctrine and this Court's and the Supreme Court's stated preferences for facial challenges in the context of time-sensitive elections.

Under the overbreadth doctrine, "a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978). This is especially true when persons are being *punished* for speech. Even when a

Secretary's singular misstatement here, of course, Felsoci systemically conflates the testimony and exhibits submitted at the evidentiary hearing with the electronic record. He repeatedly complains that Appellants did not file a "full record" on appeal, somehow prejudicing his case. *See, e.g.*, Intervenor-Defendant-Appellee-Felsoci's Appendix at 4; Brief for Intervenor-Defendant-Appellee-Felsoci, Doc. No. 28 (hereinafter "Felsoci's Brief") at vi, 8, 17, 18, 29, 32 & 49. Appellants can only reply that they ordered copies of the parts of the transcript they deemed necessary for, and relevant to, this appeal, in accordance with the Federal Rules of Appellate Procedure and this Court's practice. Frankel's affidavit, meanwhile, was made part of the record before the evidentiary hearing, as was Appellants' verified Second Amended Complaint. *See* Affidavit of Paul Frankel, RE 64, Page ID # 1963. All of this is entitled to whatever weight the District Court and this Court choose to give it.

criminal defendant's speech is reprehensible, unprotected, and deserving of punishment, he is entitled to make a facial challenge under the First Amendment. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537 (2012) (sustaining a facial challenge to the federal "Stolen Valor Act" even though the defendant might have been successfully prosecuted under a more narrow law).

Facial challenges are therefore common under the First Amendment. In *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1056 (7th Cir. 2004), for example, the Seventh Circuit stated:

Most often in this context, plaintiffs launch First Amendment challenges pursuant to the overbreadth doctrine. The overbreadth doctrine allows an attack on the facial validity of a statute even though the conduct of the person attacking the statute could be regulated by a statute drawn with the requisite narrow specificity. The theory behind the doctrine is that a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." In short, "[t]he First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges."

(Citations omitted).

A preference for facial challenges remains true even when speakers could succeed under more limited as-applied challenges. In *Hodgkins*, the Seventh Circuit observed that even though the speakers might have as-applied claims, "Nevertheless, the plaintiffs may launch a facial attack on their own behalf if the

statute creates an unacceptable risk of suppression of ideas. The distinction in this context is merely an academic one, for in either case the plaintiffs may seek to strike down the ordinance on its face." *Id.* at 1056-57 (citations omitted).

On top of the legal reality that facial challenges are common in the First Amendment context is the fact that facial challenges are even more preferred with time-sensitive elections.

In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the challengers made an as-applied challenge to federal campaign finance laws prohibiting corporations from independently spending in support of, or against, candidates. Regardless of whether the complaint was framed as "as-applied" or "facial," the Supreme Court expressly ruled it would treat the matter as a facial challenge:

throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."

Id. at 330-31 (citations omitted).

It continued: "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."

Id. at 333 (citing Richard H. Fallon, *As-Applied and Facial Challenges and Third-*

Party Standing, 113 HARV. L. REV. 1321, 1339 (2000) (“[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly ‘as-applied’ cases”)).

This is especially true, the Supreme Court ruled, with elections, where rules are not always immediately clear and "substantial time would be required to bring clarity to the application of the statutory provision on these points in order to avoid any chilling effect caused by some improper interpretation." *Id.* at 333-34. It continued:

It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is “capable of repetition, yet evading review.”

Id. at 334.

Further supporting facial challenges in the political arena, the Court observed, "is the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled." *Id.* at 334. It added:

[G]iven the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.

Id.

The Supreme Court thus concluded that rather than await a series of as-applied challenges, a facial challenge was the better approach: "The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." *Id.*

Citizens United fits the present controversy completely. Candidates can only obtain ballot access through the Secretary. The Secretary's decisions are given deference by Ohio's courts. *See State ex rel. Linnabary v. Husted*, __ N.E.3d __, 2014 WL 1317512 (Ohio, April 3, 2014). Candidates must "ask governmental agencies for prior permission" to appear on the ballot. Candidates who want to avoid punishment (through exclusion from the ballot) must either curry favor with the Secretary -- a difficult task for minor-party candidates -- or invest exaggerated efforts to avoid the landmines planted by their major-party rivals.

In the District Court, the LPO and Earl argued both that § 3501.38(E)(1) violated the First Amendment "as-applied" and "on its face." Because time is short, the election will soon be over,⁶ and neither the LPO nor Earl have the immediate resources or time to whittle away at § 3501.38(E)(1) through as-applied challenges, they have focused their interlocutory strategy here on a facial challenge.⁷ Simply put, their speech is being punished under a facially unconstitutional law. They have the right to be judged under a constitutional law. They need not necessarily prove that Ohio's law is unconstitutional only as-applied to them.⁸

⁶ As Judge Watson observed below, and as Appellants argued in their principal Brief, most counties in Ohio have the ability to quickly correct the ballots on their voting machines. *See* Appellants' Brief at 16-17. Because Earl's primary is uncontested, he needs only one vote to represent the LPO in the general election. Hence, the fact that some paper ballots and absentee ballots may have been printed without his name is irrelevant to whether this Court can timely afford him relief.

⁷ Should this Court conclude an as-applied challenge is the better vehicle for resolving this dispute, it has the discretion to so choose, since the LPO and Earl raised and argued as-applied challenges below. In *Jacobs Florida Bar*, 50 F.3d 901, 905 n.17 (11th Cir. 1995), for example, the Eleventh Circuit recharacterized a challenge based on the facts before it where the appellants were unable to carry a broader facial attack on rules restricting attorney advertising:

We recognize that Appellants characterized their claim as a facial challenge. We are not, however, bound by Appellants' designation of their claims, as the complaint sets forth a cause of action for an as-applied challenge to the rules.

⁸ *See* Henry Paul Monaghan, *Overbreadth*, 1981 S. CT. REV. 1, 3 ("a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law."); Richard H. Fallon, *Fact and Fiction About Facial Challenges*, 99 CAL. L.

II. The Supreme Court Has Made Clear That Electoral Speech Is Prized Under the First Amendment.

In *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, __ (2014),⁹ the Supreme Court stated:

There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.

Making abundantly clear how powerful the First Amendment is in the context of elections, the Supreme Court in *McCutcheon* invalidated aggregate *contribution* limits on federal elections. It did not inquire of whether the challenger, McCutcheon, was specifically burdened. It did not ask whether, as-applied, the law burdened him. It simply ruled that aggregate contribution limits violate the First Amendment.

The *McCutcheon* Court's holding must be doubly true for limits on independent expenditures. *McCutcheon* demonstrates that the First Amendment offers even more protection to those who independently spend on elections than it

REV. 915, 919 (2011) ("contrary to the conventional wisdom, the Supreme Court does not routinely insist on ruling on as-applied challenges before deciding whether to hold a statute invalid on its face, nor should it almost always do so").

⁹ Pagination is not yet available for this case (which was handed down on April 2, 2014).

did at the time of *Buckley v. Valeo*, 424 U.S. 1 (1976), *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). Section 3501.38(E)(1)'s requirements, which extend well beyond coordinated expenditures, not only violate the holdings of *McIntyre* and the two *Buckley* opinions, they violate the soul of the First Amendment.

III. No Other State Requires that Circulators Disclose The Identities Of Their Financial Sources.

The Secretary observes that "[t]he LPO has cited no case from any jurisdiction striking down a requirement that circulators of candidate petitions disclose who has funded their effort." Secretary's Brief at 17. Further, "[n]o court has held that a state is constitutionally prohibited from requiring paid circulators of candidate petitions to disclose the source of their payments before petitions are submitted." *Id.* at 19.

All of this is true. The reason is simple: no state other than Ohio requires that all circulators disclose all their funding sources. Ohio is unique. And that says a lot, given Ohio's unique Wonderland history.

The Ohio Supreme Court's decision in *Linnabary* demonstrates how far Ohio has strayed. Deferring to the Secretary's interpretation of § 3501.38(E)(1), the Court concluded that (although the matter was not without some doubt

beforehand), § 3501.38(E)(1) applies to independent contractors as well as actual employees.¹⁰ No state other than Ohio has such a requirement.

Of course, this is not to say that less-restrictive laws survive First Amendment scrutiny. The LPO and Earl have cited numerous cases striking down state laws that interfere with circulators' and funding sources' rights to anonymity.

The list grows. In *Montana Public Interest Research Group v. Johnson*, 361 F. Supp. 2d 1222, 1231 (D. Mont. 2005), for example, the trial court ordered an evidentiary hearing over whether Montana's statutory requirement that proponents of initiatives disclose the names and addresses of their paid circulators had a "chilling effect on the First Amendment activities of circulators and therefore are unconstitutional." *Id.* at 1231.¹¹ At the conclusion of the proceedings, the District Court entered judgment declaring that "requir[ing] disclosure of the name and

¹⁰ Linnabary informed the Ohio Supreme Court of his federal constitutional concerns and argued that § 3501.38(E)(1) should be construed narrowly. Specifically, Linnabary reserved his federal constitutional claims to a later challenge in federal court by making an express reservation under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). This Court has found that prior reservations of federal claims in this fashion are proper. *See, e.g., DLX, Inc. v. Kentucky*, 381 U.S. 511 (6th Cir. 2004). In any event, the Ohio Supreme Court did not decide the federal constitutional issues. It only used Judge Watson's decision to support its broad construction of § 3501.38(E)(1).

¹¹ The Montana law was much like Ohio's law requiring that ballot committees report the names and addresses of paid circulators, which was struck down in *Citizens in Charge, v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010).

address of individual paid signature gatherers," as opposed to simply demanding "disclosure of the amount paid," violated the First Amendment. *See Montana Public Interest Research Group v. Brown*, No. CV-03-183-M-DWM (D. Mont., Aug. 31, 2005) (copy attached). Anonymity, the District Court concluded, trumps the state's interest in disclosure.

Even campaign-finance laws, as opposed to the ballot-access restrictions at issue here, have been found to require a large measure of respect for anonymity. In *Delaware Strong Families v. Biden*, __ F. Supp. 2d __, 2014 WL 1292325 (D. Del., March 31, 2014),¹² for example, the District Court preliminarily enjoined a Delaware law that required "[a]ny person ... who makes an expenditure for any third-party advertisement that causes the aggregate amount of expenditures for third-party advertisements made by such person to exceed \$500 during an election period" to file a "report with the Commissioner."

This report, according to Delaware's law, was to include "the names and addresses of each person who has made contributions to the 'person' in excess of \$100 during the election period." "Third-party advertisement" was defined to mean "an independent expenditure or an electioneering communication." "Electioneering communication," meanwhile, meant "a communication by any individual or other

¹² Pagination for this case, decided on March 31, 2014, has yet to be provided.

person (other than a candidate committee or a political party) that: (1) Refers to a clearly identified candidate; and (2) Is publicly distributed within 30 days before a primary election or special election, or 60 days before a general election to an audience that includes members of the electorate for the office sought by such candidate.”

Even though the Delaware law had financial thresholds of \$500 for speakers and \$100 for contributors, it was still preliminarily enjoined under the First Amendment. Section 3501.38(E)(1), by contrast, has no financial thresholds. All circulators must disclose, regardless of how much they are paid. Regardless of who pays them. They all must report, lest their candidates risk removal from ballots. Regardless of the amount they are paid. Section 3501.38(E)(1) is far more restrictive than any law sustained throughout the United States.

IV. Circulators Are Not Required to Divulge Their Financial Sources Under Ohio's Campaign-Finance Laws.

The Secretary states that “[a]ny person who receives compensation, or compensates a person for supervising, managing or otherwise organizing the circulating of nominating petitions is required to disclose that fact to the Secretary.” Secretary's Brief at 27 (footnotes omitted).

The Secretary cites O.R.C. § 3501.381(A)(1) & (2) for this proposition. Subsection (A)(1) of that statute requires that any person who will “receive

compensation for supervising, managing, or otherwise organizing any effort to obtain signatures for a declaration of candidacy, nominating petition, or declaration of intent to be a write-in candidate for a person seeking to become a statewide candidate or for a statewide initiative petition or a statewide referendum petition shall file a statement to that effect with the office of the secretary of state"

Subsection (A)(2) provides that "[a]ny person who will compensate a person for supervising, managing, or otherwise organizing any effort to obtain signatures for a declaration of candidacy, nominating petition, or declaration of intent to be a write-in candidate for a person seeking to become a statewide candidate or for a statewide initiative or a statewide referendum petition shall file a statement to that effect with the office of the secretary of state"

The Secretary's argument, apparently, is that forcing funding sources and circulators to disclose by § 3501.38(E)(1) is harmless because they must already disclose under § 3501.381(A)(1) & (2); § 3501.38(E)(1) does nothing more to harm circulators and their funding sources.

The Secretary's interpretation of § 3501.381 is mistaken. The Ohio Supreme Court in *Rothenberg v. Husted*, 953 N.E.2d 327, 328 (Ohio 2011), ruled (under Ohio law) that "paid petition circulators who are not directing the signature-gathering efforts of others" are not "required to file a compensation statement 'for

supervising, managing, or otherwise organizing any effort to obtain signatures' for a statewide petition." (Citing O.R.C. 3501.381(A)).¹³

Ohio's Attorney General, for his part, has concluded that "[p]aid campaign staff of a candidate for statewide office are not persons who 'receive compensation for supervising, managing, or otherwise organizing any effort to obtain signatures for a declaration of candidacy,' [and] are not subject to the filing requirements of R.C. 3501.381(A)(1)." Neither is the "campaign committee of a candidate for statewide office" a "person" for purposes of R.C. 3501.381(A)(2). *See* 2006 Ohio Op. Atty. Gen. 2-36, Opinion No. 2006-04, 2006 WL 466490. Contrary to the Secretary's claim, § 3501.381(A)'s reach is much more limited than that of § 3501.38(E)(1).¹⁴

¹³ The Secretary observes that Ian James disclosed his circulation efforts on Form 14s filed with the Secretary. *See* Secretary's Brief at 34. As this description of Ohio law makes clear, Form 14s are not required of those who simply pay circulators.

¹⁴ This is not to say that § 3501.381(A) itself does not violate the First Amendment. It might. The Ohio Attorney General, after all, has observed that "R.C. 3501.381 works hand-in-hand with R.C. 3599.111." *Id.* The latter of these, O.R.C. § 3599.111 (prohibiting payment-per-signature), was invalidated by this Court in *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008). A related provision, O.R.C. § 3517.12(B), requiring that ballot committees report the names and addresses of paid circulators to the Secretary, was declared unconstitutional in *Citizens in Charge v. Brunner*, 689 F. Supp.2d 992, 993 (S.D. Ohio 2010).

The Secretary cites *National Organization for Marriage v. McKee*, 666 F. Supp.2d 193 (D. Me. 2009),¹⁵ for the proposition that states may force disclosure of the identities of circulators' financial sources. See Secretary's Brief at 20. The law in Maine, however, did not require that all circulators disclose all their financial sources. It only required that political entities that met a financial threshold -- \$5000 -- disclose contributors who also passed a financial threshold -- \$100. There is no indication, moreover, that initiatives or candidates in that case suffered expulsion from ballots because of violations.

Felsoci cites *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). See Felsoci's Brief at 43. The Tenth Circuit there, however, ruled invalid a Colorado law requiring campaign committees receiving less than \$1000 to report contributions and expenditures:

the burden on Plaintiffs' right to association imposed by Colorado's registration and reporting requirements cannot be justified by a public interest in disclosure. *The burdens are substantial*. The average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado's constitution, the Campaign Act, and the Secretary of State's Rules Concerning Campaign and Political Finance."

Id. at 1259-60 (emphasis added).

¹⁵ The Secretary also relies on *Voting for America, Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). See Secretary's Brief at 20. That case, however, merely sustained a Texas law that restricted payments to circulators, in obvious contradiction to this Court's holding in *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008).

All told, no court outside of Ohio has sustained a law like § 3501.38(E)(1). The reason is simple. No state has a law like § 3501.38(E)(1). Many courts in many states, in contrast, have invalidated laws that are far less intrusive than § 3501.38(E)(1). Indeed, federal courts in Ohio, including this Court, have invalidated Ohio laws that are nowhere near as repressive as 3501.38(E)(1). Section 3501.38(E)(1) falls far outside the landscape of acceptable disclosure requirements. It stands alone across the United States.¹⁶

V. Section 3501.38(E)(1) Could Not Be Challenged Before It Was Enforced.

The Secretary faults the LPO for not challenging § 3501.38(E)(1) sooner: "[It] did not challenge this statutory provision earlier, though it has been part of Ohio law since 2005 and the Libertarian Party of Ohio filed several different lawsuits concerning Ohio's ballot access requirements." *See* Secretary's Brief at 6.

¹⁶ The Secretary argues that forcing circulators to disclose is a "modest" burden because the circulator can add the identity after circulating his petitions and need not inform anyone other than the Secretary. *See* Secretary's Brief at 29. As explained by Damschroder in his response to questions posed by Judge Watson, part-petitions are public records as soon as they are filed: "And once things are filed with us, everyone makes public records requests for everybody's petitions" Transcript of Testimony of Matthew Damschroder, RE 79, Page ID # 2109. Consequently, the funding source's identity travels well beyond the halls of the Secretary's office.

The reasons the LPO has not previously litigated the validity of § 3501.38(E)(1) are simple.

First and foremost is the fact that § 3501.38(E)(1) has never been enforced. In the absence of a credible threat of enforcement, the LPO has no Article III standing to file a federal challenge. *See Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013) (holding that First Amendment challenge must be predicated on "imminent" threat of enforcement).

The Secretary knows this, as he made this precise argument before the United States Supreme Court in *Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 895 (2014). *See* Brief for State Respondents [including Secretary Husted], *Susan B. Anthony List and Coalition Opposed to Additional Spending and Taxes v. Driehaus*, No. 13-193 (U.S.), at 23, 25 (arguing that a "threat 'implied by the existence of law'" is not enough to support standing and that "if an injury cannot occur until plaintiffs act in a manner that might trigger it, they cannot allege they will 'someday' do so.").¹⁷

¹⁷ *See also State ex rel. Linnabary v. Husted*, __ N.E.3d __, 2014 WL 1317512, at ¶ 16 (Ohio, April 3, 2014) (rejecting Secretary's argument that § 3501.38(E)(1) "has been on the books since 2005, so Linnabary had nearly a decade in which to seek a declaratory judgment or extraordinary writ. But Linnabary did not have a claim to assert until Husted removed his name from the ballot.").

Second, Ohio has kept the LPO busy enough trying to maintain its ballot access and vindicate its First Amendment rights. The LPO does not have the time or resources to peruse every Ohio law, to search for every potential landmine that the Secretary or major-party operatives might explode, for First Amendment compliance.

Third, the LPO and its circulator, Hatchett, understood § 3501.38(E)(1) to apply only to true "employers." Because it has no employees, using only independent contractors and volunteers to circulate its candidates' nominating petitions, the LPO never imagined that § 3501.38(E)(1) would be material to its ballot-access efforts. The LPO did not somehow plan to circumvent or violate Ohio law.¹⁸

Regarding this last point, the LPO would be remiss if it did not raise a factual error in the Secretary's argument. The Secretary claims that Earl's circulator, Oscar Hatchett, did not fill in the employer-statement box required by §

¹⁸ The LPO, Earl, and all of their agents have completely cooperated with the Secretary (and Felsoci) throughout these proceedings. The LPO admitted that it paid circulators and offered to stipulate that fact. The LPO admitted that Hatchett did not fill in the employer-statement boxes on his part-petitions and offered to stipulate to that fact. Unlike Felsoci, the LPO did not object to any of the documents or evidence submitted by the Secretary or Felsoci in the District Court before, during, or after the evidentiary hearing. There is, and never has been, any indication of secrecy, let alone fraud, on the part of any of the Appellants. Unlike Felsoci, who refuses to answer whether he is being paid, they have been fully transparent.

3501.38(E)(1) "because [Robert] Bridges did not think Hatchett was required to do so." Secretary's Brief at 32. Meanwhile, Hatchett, the Secretary argues, was always willing and eager to fill in the box. *Id.*

This mischaracterizes the testimony of Bridges and Hatchett at the administrative proceeding. Bridges testified that he had no conversation with Hatchett regarding filling in (or not) the employer-statement box. *See* Testimony of Robert Bridges, RE 63-1, Page ID # 1293. Bridges specifically testified that he did not tell Hatchett what to do, or not do, with the employer-statement box. *Id.* Hatchett, meanwhile, testified that told Bridges he was an independent contractor who was not required to fill in the box: "you guys aren't my employer, so I didn't fill it out." Testimony of Oscar Hatchett, RE 63-1, Page ID # 1326. Hatchett made clear in his testimony that Bridges did not tell him what to do with the employer-statement box. *Id.* at Page ID # 1327.

Hatchett testified, moreover, that he had circulated thousands of part-petitions in Ohio since 2004, collecting tens of thousands of signatures over the course of that period, had never filled out an employer-statement box, and had never had a problem under § 3501.38(E)(1). *Id.* at Page ID # 1330.

An accurate portrayal of his testimony is that Hatchett did not fill in the box because he had never been required, or asked, to do so in the past. It was not that Bridges, the LPO, or anyone else made a mistake. It was not a 'self-inflicted

wound.' Hatchett simply and reasonably relied on his experience as a professional circulator. Disclosure had never before been required. So why would he change his practice?

Hatchett's reliance on Ohio law was certainly reasonable. The Secretary had issued Directives prohibiting enforcement of § 3501.38(E)(1). The Secretary's policy, until now apparently, has been one of non-enforcement. The Secretary admits that § 3501.38(E)(1) has never before been applied to independent contractors, or anyone else, for that matter. The Secretary has never published a statement rescinding its policy of non-enforcement. Hatchett reasonably believed that § 3501.38(E)(1) was meaningless.

VI. The Ohio Supreme Court's Interpretation of § 3501.38(E)(1) Cannot Be Applied Retroactively.

The Ohio Supreme Court's clarification in *Linnabary* cannot cure the lack of notice provided to Hatchett, Earl and the LPO. The Supreme Court observed in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that a subsequent judicial construction broadening the reach of a punitive state law, like § 3501.38(E)(1), cannot be applied to speakers who are lulled into a false sense of security. The Ohio Supreme Court's acquiescence in the Secretary's interpretation of § 3501.38(E)(1), as well as his new decision to enforce it, cannot be applied

retroactively to actions by the LPO, Earl and their circulators in reliance on previous Directives, pronouncements, and positions taken by the Secretary.

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,

s/Mark R. Brown

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Attorney for Appellants

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I certify that a copy of this Reply 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

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE 63-1, Exhibits to Memorandum Contra Plaintiffs Motion, Page ID # 1293, 1326-28, 1330.

RE 63-2, Exhibits to Memorandum Contra Plaintiffs Motion, Page ID # 1543, 1550.

RE 79, Transcript of Testimony of Matthew Damschroder, Page ID # 2109.