

IN THE SUPREME COURT
OF THE UNITED STATES

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

Petitioners,

v.

Case No. A

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

On Petition for Writ of Certiorari to
United States Court of Appeals
for the Sixth Circuit¹

Respondent,

and

GREGORY FELSOCI,

Intervenor-Respondent.

_____/

APPLICATION FOR STAY
AND EMERGENCY INJUNCTION
ADDRESSED TO JUSTICE KAGAN

Pursuant to Supreme Court Rules 21, 22 and 23, Petitioners apply for a stay of the United States Court of Appeals for the Sixth Circuit's decision in *Libertarian Party of Ohio v. Husted*, No. 14-3230 (6th Cir., May 1, 2014) (hereinafter "Sixth Circuit

¹ Petitioners respectfully request that the Court take up the decision of Sixth Circuit under Supreme Court Rule 11. Given the impending election scheduled for May 6, 2014, it is unlikely that the case can be fully briefed beforehand. For this reason, as well as those stated below, Petitioners request this stay and emergency relief. The Ohio Supreme Court ruled in *State ex rel. Scott v. Franklin County Board of Elections*, No. 2014-Ohio-1685, at ¶ 13 (April 21, 2014), that any relief awarded before the day of the election, May 6, 2014, will be timely under Ohio law.

Decision”) (Attachment 1) and ask for an emergency order directing Respondent-Secretary to restore Petitioner-Earl's name (and that of his running mate) to Petitioner-Libertarian Party of Ohio's May 6, 2014 primary ballot. Alternatively, because Petitioner-Earl seeks to run in an uncontested primary in order to qualify for the general election ballot, Petitioners respectfully ask for an emergency order restoring Petitioner-Earl's name (and his running mate's) to Ohio's ballot as Libertarian Party of Ohio candidates in time for the November 2014 general election.

Petitioners applied to the United States District Court for the Southern District of Ohio for this same relief, which was twice denied. *See* District Court Docket No. 80 (Opinion and Order) (Attachment 2) and District Court Docket No. 85 (Order). Petitioners thereafter sought this same emergency relief from the Sixth Circuit, *see* Sixth Circuit Doc. No.4, which was denied in the Order expediting the appeal, *see* Sixth Circuit Docket No. 23, and again when the Sixth Circuit Decision was handed down on May 1, 2014. *See* Attachment 1. Petitioners thereafter immediately moved the Sixth Circuit, on May 1, 2014, to stay its Decision and award Petitioners the same emergency relief the previously requested, or alternatively to stay its decision pending disposition of Petitioners' Application to this Court. *See* Sixth Circuit Doc. No. 60. The Sixth Circuit has yet to rule on this motion. Because of the closely approaching May 6, 2014 primary election, Petitioners have immediately filed this Application while awaiting the Sixth Circuit's disposition of their last motion to stay. The relief being sought here is otherwise not available from any other court. *See* Supreme Court Rule 23.3.

STATEMENT OF JURISDICTION

Jurisdiction in the United States District Court for the Southern District of Ohio was proper under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Jurisdiction over the interlocutory decision of the District Court denying preliminary injunctive relief was proper in the Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1292. Jurisdiction in this Court is proper under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

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

LPO has participated in Ohio's primaries since 2010. It has had candidates for local, state-wide, and federal office (including President in 2008 and 2012) in Ohio's primary and general elections. In the most recent non-presidential election year (2010), the LPO's slate of state-wide candidates won between 2% and 5% of the total votes cast in their respective elections; specifically LPO's candidates won 92,116 votes (2.39% of the total) for Governor, 184,478 votes (4.91%) for State Treasurer, 182,977 votes

(4.88%) for Secretary of State, and 182,534 votes (4.87%) for State Auditor. *See* Ohio Secretary of State, Elections & Voting, 2010 Election Results.²

Running in primaries in Ohio requires submitting nominating petitions supported by voters' signatures. *See* O.R.C. § 3513.05. Signatures required to support nominating petitions must be gathered and witnessed by "circulators." *Id.*

On November 6, 2013, Ohio's legislature passed legislation, which Governor Kasich immediately signed, stripping LPO of its ballot status and its right to participate in Ohio's 2014 primary. Known as S.B. 193, this legislation also stripped the LPO of its right to participate in Ohio's 2014 general election.

The LPO on November 8, 2013 challenged S.B. 193's retroactive stripping 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. *See* District Court Doc. No. 47, (Opinion and Order).

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

On Friday, February 21, 2014, Earl and his running mate (Sherry Clark) were "protested" by Intervenor-Respondent-Felsoci. The Secretary held an informal administrative hearing on Tuesday, March 4, 2014 to consider the protest, and ruled that

² <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2010results.aspx> (last visited March 29, 2014).

two of Earl's circulators (Oscar Hatchett and Sara Hart) had violated Ohio law, O.R.C. § 3501.38(E)(1), by not disclosing their "employers" on the part-petitions they had circulated. The Secretary accordingly ruled that ALL of the plainly legitimate signatures they collected were invalid. This was so even though there was never any claim that the circulators, signers, Petitioners, or anyone else connected with Petitioner-LPO had committed fraud of any sort. Still, all the signatures were excluded and Earl (and his running mate) were removed from Ohio's ballot.

Section 3501-38(E)(1) of Ohio's Revised Code (passed in 2005), states, in relevant part:

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).³ In sum, § 3501.38(E)(1)'s "employer-statement" rule requires that all paid circulators for state-wide candidates, initiatives, and referenda in Ohio identify anyone and everyone who has paid them. *See State ex rel. Linnabary v. Husted*, ___ N.E.3d ___, 2014 WL 1317512 (Ohio, April 3, 2014). This is true for independent contractors, actual employees, friends and family members.

At an evidentiary hearing held by the District Court, the Secretary admitted through the testimony of Matthew Damschroder, Deputy Secretary of State and Director

³ The relevant language was added in 2005, ostensibly in response to the "massive fraud" perpetrated by Ralph Nader's paid circulators in 2004. As made clear by the Sixth Circuit in *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), however, Nader's candidacy was not infected by "massive fraud." Rather, seven paid circulators committed fraud; not even enough to defeat the causation required to support Nader's First Amendment claim in that case.

of Elections, that § 3501.38(E)(1) has never been applied by the Secretary (or anyone else), before Earl, to exclude any candidate from the ballot. *See* District Court Doc. No. 79, at Page ID # 2073, 2130-31 (Transcript of Testimony of Matthew Damschroder).

Further, Damschroder testified that the Secretary does not, and never has, enforced § 3501.38(E)(1)'s employer-statement requirement in the absence of a formal protest, *id.*, Page ID # 2082, even when § 3501.38(E)(1) is clearly violated. *Id.* He admitted that the Secretary has on at least two occasions formally instructed his agents and local election boards to ignore violations of § 3501.38(E)(1). *See* Ohio Secretary of State Directive 2006-58 (Instructions for Examining State Issue Petition Papers)(Aug. 21, 2006), at page 3 of 5 ("Do not invalidate a part-petition if the employer information statement ... is blank or incomplete, does not match or correspond with the information provided by the circulator in the compensation statement, or is otherwise improperly filled out."); Directive 2007-14 (Sept. 10, 2007) (Instructions for Examining State Issue Petition Papers), at page 3 of 5 (same).

The only time § 3501.38(E)(1) has ever been enforced against a candidate,⁴ Damschroder admitted, is now, with the proceedings against Earl. Consequently, Damschroder conceded, identical candidates who use the same circulator will see

⁴ Section 3501.38(E)(1) was enforced against an initiative on one occasion following its enactment, *see In re Protest of Evans*, 2006-Ohio-4690 (Ohio App. 2006), but the enforcement by the trial court in *Evans* preceded the Secretary's announcement in Directive 2006-58 (Aug. 21, 2006), that § 3501.38(E)(1) was not to be enforced, and the Ohio Court of Appeals' ruling affirming that decision preceded Directive 2007-14 (Sept. 10, 2007), which likewise stated that § 3501.38(E)(1) would not be enforced. In *Rothenberg v. Husted*, 953 N.E.2d 327 (Ohio 2011), a protestor attempted to apply § 3501.38(E)(1) to a popular measure after these Directives, but the Secretary refused the challenge and the Ohio Supreme Court affirmed. Hence, § 3501.38(E)(1) has not been applied to candidates or popular measures since the Secretary adopted its policy of non-enforcement -- at least not until now.

disparate applications of § 3501.38(E)(1). *See* District Court Doc. No. 79, Page ID # 2084. One who is protested, like Earl, will be removed from the ballot; the other will be allowed to compete in the election. *Id.*

Petitioners argued before the District Court that § 3501.38(E)(1) facially violated the First Amendment. They also argued that the Secretary's interpretation of § 3501.38(E)(1), which had not before the Ohio Supreme Court's decision in *Linnabary* (which was handed down on April 3, 2104 after Earl had been removed) been embraced by any court, could not be retroactively applied to the LPO and Earl. Lastly, they argued that the Secretary's policy of non-enforcement could not be changed following Earl's qualification and retroactively applied to Earl's and the LPO's political activities.

Petitioners took an immediate appeal to the United States Court of Appeals for the Sixth Circuit. Although it denied emergency relief, the Sixth Circuit expedited the appeal. On May 1, 2014, the Sixth Circuit affirmed the District Court's judgment. In doing so, it refused to properly consider Petitioners' facial First Amendment challenge to § 3501.38(E)(1). Rather than address whether Petitioners' had proper Article III standing to press their First Amendment defense, the Sixth Circuit (like the District Court) demanded that Petitioners demonstrate personal, "serious" burdens under the First Amendment. *See, e.g.*, Sixth Circuit Opinion at 20 (Attachment 1) ("The burden is thus insufficiently serious to require strict scrutiny of the statutory provision."). The Sixth Circuit compounded its error by refusing to address § 3501.38(E)(1)'s burdens on others, such as circulators of initiative petitions, *see, e.g.*, Sixth Circuit Opinion at 22, minor political parties, minor-party candidates, and (in particular) potential funding sources.

In sum, the Sixth Circuit's improper application of this Court's overbreadth jurisprudence resulted in a "super-standing" requirement for the victims of laws that facially violate the First Amendment. These victims, who are being punished under a facially unconstitutional law, must demonstrate that their non-compliance somehow caused additional, "serious" and "severe," injury. Such a "super-standing" requirement contradicts this Court's overbreadth precedents.⁵

LEGAL ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits.

A. Injury Beyond Punishment Is Not Required for Facial First Amendment Defenses.

The present case is not unlike *Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013), *cert. granted*, 134 S. Ct. 895 (2014), which was argued on April 22, 2014 before this Court. There, the Court addressed whether plaintiffs threatened with prosecution under Ohio's 'false political claims' statute possessed Article III standing to challenge Ohio's law. The Sixth Circuit ruled that they did not have standing.

Here, the Sixth Circuit has taken a similar, restrictive approach to the vindication of First Amendment rights. It has ruled that Petitioners, who are actively being punished under § 3501.38(E)(1), do not have full 'First Amendment standing' to make a facial defense to the substantive charge against them. Instead, because Petitioners presented "scant" evidence that their circulators were "seriously" injured by § 3501.38(E)(1), their facial defense to the punishment being directed at them, according to the Sixth Circuit, failed.

⁵ The Sixth Circuit also erroneously rejected Petitioners' claim that application of § 3501.38(E)(1)'s new interpretation and the Secretary's new enforcement violated Due Process. Petitioners' address that error in detail below.

The Sixth Circuit's logic contradicts a wide breadth of precedents, the most recent being this Court's decisions in *United States v. Stevens*, 559 U.S. 460, 473 (2010), and *United States v. Alvarez*, 132 S. Ct. 2537 (2012). In *Stevens*, this Court ruled that a purveyor of "crush videos" properly raised a facial First Amendment defense to a federal law criminalizing videos depicting animal cruelty. In *Alvarez*, the Court ruled that a defendant who fraudulently held himself out as having won the Congressional Medal of Honor properly asserted a facial First Amendment defense to the federal Stolen Valor Act. Neither defendant was required to show that he personally, beyond the imposition of punishment, suffered additional "serious" burdens. Indeed, both defendants in those two cases likely could have been punished under more narrowly drawn statutes. Their speech was perhaps not even protected.

Stevens and *Alvarez* demonstrate that speakers, even those whose speech is not protected, have the right to raise facial First Amendment challenges to defend themselves from punishment. Whether they are personally "seriously" burdened is irrelevant. The punishment itself is a severe burden. The only question is whether the law supporting the punishment is facially constitutional under the First Amendment.

The Sixth Circuit's logic has troubling implications. Must a child who is punished for not standing and reciting the Pledge of Allegiance demonstrate some sort of additional, serious burden -- like perhaps not being able to stand or speak clearly? See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Must a newspaper that is required to print replies demonstrate that one in particular is especially offensive to the newspaper? See *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *National Labor Relations Board v. Midland Daily News*, 151 F.3d 472, 475

(6th Cir. 1998) (holding that newspaper did not have to disclose identity of advertiser because of the "the chilling effect on the ability of every newspaper").

Under the overbreadth doctrine, of course, "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 criminal defendant's speech is reprehensible, unprotected, and deserving of punishment, he is entitled to make a facial challenge under the First Amendment.

Facial challenges are therefore common defenses under the First Amendment. Indeed, this Court has even ruled that facial challenges are preferred pre-enforcement in the context of 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 almost 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.

Because time is short, the election will soon be over,⁶ and Petitioners do not have the immediate resources or time to whittle away at § 3501.38(E)(1) through as-applied pre-enforcement challenges, they offer here their facial First Amendment defense. Simply put, their speech is being punished under a facially unconstitutional law. They have the right to be judged under a constitutional law. They cannot be removed from Ohio's ballot -- punished -- under § 3501.38(E)(1) because it is facially unconstitutional.

⁶ Most counties in Ohio have the ability to quickly correct the ballots on their voting machines. 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.

They do not have to separately show that they personally, and additionally, are being "seriously" injured. Their punishment proves that.⁷

B. Mandatory Disclosure of Funding Sources Violates the First Amendment.

Under the overbreadth doctrine, Petitioners can assert not only their rights, but also the rights of others, including circulators of candidates' petitions, circulators of initiatives, and all potential funding sources. *See Alexander v. United States*, 509 U.S. 544, 555 (1993) ("The overbreadth doctrine ... is a departure from traditional rules of standing, [and] permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute.").

The question is simply whether § 3501.38(E)(1) severely burdens First Amendment rights. The answer is obvious; § 3501.38(E)(1) punishes candidates, circulators and parties who do not properly disclose funding sources. It has no financial thresholds. It applies to candidates and initiatives alike. It attacks core political activities at the grass-roots level. It is facially unconstitutional.

In *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1440-41 (2014), the Court stated:

⁷ *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. 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").

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 extends First Amendment protections found in *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. This has been proven again and again in this Court's holdings.

In *Meyer v. Grant*, 486 U.S. 414, 420 (1988), the Court stated that circulating petitions "involves core political speech." In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court reiterated that collecting signatures is core First Amendment activity, striking down requirements that (1) initiative-petition circulators be registered voters, (2) they wear identification badges, and (3) their "proponents" disclose the names and addresses of all paid circulators.

The Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995), invalidated Ohio's disclosure law, O.R.C. § 3599.09(A), for this very reason: "It applies

not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources." *Id.* at 351. Section 3599.09(A) was therefore overbroad; it could not be sustained as a campaign-finance reporting measure.

Section 3501.38(E)(1) suffers this same flaw. The Secretary's expert, Damschroder, was asked about a father who wanted to pay his son \$20 to circulate petitions for a candidate. Would the son have to report him (even though it might cause domestic angst)? *See* District Court Doc. No. 79, Page ID # 2132-33. Mr. Damschroder's answer was, "he should." *Id.*, Page ID # 2132. The same is necessarily true of a devout Catholic who, unbeknownst to a candidate or anyone else, wants to fund a circulation effort because she (the candidate) is pro-ObamaCare. Must the circulators disclose their independent, uncoordinated source to the entire community? Under § 3501.38(E)(1) they must, and then it will become a public record in Ohio. *See Doe v. Reed*, 561 U.S. 186 (2010) (holding that states may constitutionally make public records of initiative-petitions including all signatures).⁸

If there is any question that forced disclosure raises serious concerns for minor parties, the Court in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87

⁸ The result in *Doe v. Reed*, 561 U.S. 186 (2010), has no direct bearing on the constitutionality of § 3501.38(E)(1). The Court in *Doe* ruled that the disclosure of signers' names and signatures placed on petitions does not facially violate the First Amendment. Those signers, after all, have voluntarily signed the petitions, and therefore have chosen not to remain anonymous. (Even then, the Court noted, disclosure could violate the First Amendment privacy rights of those who could establish a risk of harassment.) The question in the present case is antecedent; whether a speaker or signer can be forced to sign or reveal himself in the first instance. Assuming he does, his signature can become public record should the state so choose. Petitioners do not contest that. Forcing the speaker, funding source or signer to reveal himself so that his name can be made a public record is the problem presented here. It was not presented in *Doe*.

(1982), laid it to rest. There, the Court struck Ohio's attempt at forcing the Socialist Workers Party to disclose its funding sources, recognized these risks and fears. Ohio argued that the burden imposed by disclosure was trivial. This Court disagreed:

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

Id. at 96-98 (footnotes omitted).

Knowing that their names must be revealed by circulators, their financial sources, including philanthropists, business owners, and everyday citizens, understandably must think twice before offering support to minor parties and their circulators.

Reported cases from this Court and several lower courts demonstrate that forced disclosure -- the government's destruction of anonymity -- constitutes a severe burden as a matter of law. The Court in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995), made this clear:

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of

art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

(Citation and footnotes omitted). The Court continued:

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

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

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

the speech. *Id.* The Court ruled that McIntyre's speech was "core" political speech that demanded "exacting scrutiny."

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

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), applied *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995), to invalidate under the First Amendment not only a Colorado measure that forced circulators to wear badges with their names prominently displayed, 525 U.S. at 198, but also a Colorado law requiring ballot-initiative proponents who paid circulators to file monthly and final reports listing the names and addresses of each paid circulator and the total amount paid to each.

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

A state's general claim to fraud-prevention cannot suffice. Proving this point in the specific context of Ohio and its alleged problems with election-fraud is *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where Ohio claimed that problems

with fraud in Ohio justified its disclosure requirement. The Court disagreed. It rejected Ohio's claim that fraud justified requiring disclosure:

As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code. Nor has the State explained why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection.

Id. at 351-52 (footnotes omitted).

WIN v. Rippie, 213 F.3d 1132 (9th Cir. 2000), provides an example from Washington (state). There, the Ninth Circuit, relying on *Buckley*, invalidated a law that "require[d] the disclosure of the names and addresses of persons paid to collect signatures on initiative petitions ... and the amounts paid to them." *Id.* at 1134. The same was not demanded of volunteers. The Ninth Circuit stated: "We conclude these requirements chill political speech protected by the First Amendment, and do not significantly advance any substantial state interest." *Id.*

In finding that Washington's law failed exacting scrutiny, the Ninth Circuit stated that "the Supreme Court has expressly rejected the notion that 'occasional fraud ... involving paid circulators' justifies targeting paid petitioners for special enforcement." *Id.* at 1139. It further observed that "[t]he State's interest in educating voters through campaign finance disclosure is more adequately served by a panoply of the State's other

requirements that have not been challenged." Thus, "the State's asserted interests in fraud detection and in educating voters through campaign finance disclosure do not justify the required disclosure of the names and addresses of paid circulators." *Id.* at 1140.

In *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004), the Ninth Circuit invalidated a Nevada statute requiring that groups or entities who publish material relating to an election candidate or ballot question reveal on the publication the names and addresses of the publication's financial sponsors. Quoting *Talley v. California*, 362 U.S. 60, 64-65 (1960), the Ninth Circuit first observed:

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

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

The Tenth Circuit in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), reached a similar result, ruling invalid a Colorado law requiring campaign committees receiving less than \$1000 to report the identities of those making 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).

More recently, the District Court in *Hatchett v. Barland*, 816 F. Supp. 2d 583, 598 (E.D. Wis. 2011), invalidated 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.*

Similarly, in *Montana Public Interest Research Group v. Johnson*, 361 F. Supp. 2d 1222, 1231 (D. Mont. 2005), the court worried that Montana's law requiring that proponents of initiatives disclose the names and addresses of their paid circulators might have a "chilling effect on the First Amendment activities of circulators" *Id.* at 1231.⁹ At the conclusion of the proceedings, the District Court entered judgment declaring that "requir[ing] disclosure of the name and 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).

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),¹⁰ for example, the District Court preliminarily enjoined a Delaware law that required "[a]ny person ... who makes an expenditure for any third-party advertisement

⁹ 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).

¹⁰ Pagination for this case, decided on March 31, 2014, has yet to be provided.

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 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.

Even assuming that fraud were a problem with paid circulators in Ohio, forcing them to disclose their funding sources bears no relation to the problem. As observed in *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008) (which invalidated an Ohio law prohibiting per-signature payment of circulators):

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

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

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

Perhaps most telling is the fact that if § 3501.38(E)(1) were really needed, if it substantially served Ohio's end in deterring and preventing fraud among paid circulators, the Secretary would enforce it. Not only when a protestor complained, but whenever it was apparent that the circulator failed to properly report. The Secretary's expert, Damschroder, testified that the Secretary instructs its staff and local election boards not to enforce § 3501.38(E)(1), even when § 3501.38(E)(1) has been plainly and obviously violated. *See* District Court Doc. No. 79, Page ID # 2082.

Last but not least, even assuming that forced disclosure under these circumstances were permissible, less-restrictive means exist for achieving it. Ohio's strict, vicarious punishment of candidates and voters for the sins of circulators is far too much medicine.

C. Section 3501.38(E)(1)'s New Interpretation Cannot Be Retroactively Enforced.

The Ohio Supreme Court did not rule until April 3, 2014 that Ohio's employer-statement requirement, § 3501.38(E)(1), applied to independent contractors. *See State ex*

rel. Linnabary v. Husted, __ N.E.3d __, 2014 WL 1317512 (Ohio, April 3, 2014). Petitioners could not have reasonably known that Ohio's law would be extended in this fashion.

This Court has ruled that a subsequent judicial construction broadening the reach of a state law punishing speech cannot cure a Due Process violation. The Court in *Bowie v. City of Columbia*, 378 U.S. 347, 352 (1964), where the South Carolina Supreme Court broadened the state's definition of criminal trespass, stated that "[w]hen a statute on its face is narrow and precise, ... it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."

Here Petitioner-Earl was more than "lulled into a false sense of security" by § 3501.38(E)(1)'s literal requirement of "employment," he was assured by the Secretary's Directives that § 3501.38(E)(1) would not be enforced. The Secretary on at least two occasions formally instructed his agents and local election boards to ignore violations of § 3501.38(E)(1). *See, e.g.*, Ohio Secretary of State Directive 2006-58 (Aug. 21, 2006), at page 3 ("Do not invalidate a part-petition if the employer information statement ... is blank or incomplete, does not match or correspond with the information provided by the circulator in the compensation statement, or is otherwise improperly filled out."); Directive 2007-14 (Sept. 10, 2007), at page 3 (same). These Directives were both published and remain to this day on the Secretary's web page. *See, e.g.*, Directive 2006-58 (<http://www.sos.state.oh.us/SOS/Upload/elections/directives/2006/Dir2006-58.pdf>) (last visited May 1, 2014).

The Secretary, moreover, never publicly announced that it was prepared to begin enforcing § 3501.38(E)(1). Neither Earl nor his circulator could have known that § 3501.38(E)(1) would be applied.

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

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

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

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

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

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

* * *

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 requires that all circulators, both for candidates and popular measures, disclose all their financial sources, regardless of whether they desire anonymity. It punishes the candidates whose circulators run afoul of this disclosure law by removing them (the candidates) from ballots. Section 3501.38(E)(1) stands alone in the United States. No other state has such a measure. No law of its kind has ever before been sustained.

Regardless of whether Petitioners here can demonstrate an additional, serious burden, their punishment gives them the right to press a facial First Amendment defense. And it is clear that Ohio's employer-statement statute, § 3501.38(E)(1) cannot survive a facial challenge.

II. The LPO and Earl Risk Irreparable Injury.

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

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

III. Ohio Will Suffer No Harm.

Ohio will suffer no injury should the Court enjoin the enforcement of § 3501.38(E)(1) and order that Earl be restored to the LPO primary ballot. The Secretary, after all, had previously certified Earl to the ballot, and the Ohio Supreme Court recently ruled in *State ex rel. Scott v. Franklin County Board of Elections*, No. 2014-Ohio-1685, at ¶ 13 (April 21, 2014), that candidates may be restored to Ohio's primary ballot anytime before the May 6, 2014 election is complete.

IV. The Public Will Benefit.

Placing Earl on the LPO primary ballot will vindicate the most precious of First Amendment rights; "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1440-41 (2014).

CONCLUSION

For the foregoing reasons, Petitioners' Application should be granted.

Respectfully submitted,

/s/ Mark R. Brown

Mark R. Brown
303 East Broad Street
Columbus, OH 43215
(614) 236-6590
(614) 236-6956 (fax)
mbrown@law.capital.edu
Counsel of Record

Mark G. Kafantaris
625 City Park Avenue
Columbus, OH 43206
(614) 223-1444
(614) 300-5123(fax)
mark@kafantaris.com

CERTIFICATE OF SERVICE

I hereby certify that copies of this Application were mailed, with first-class postage affixed, and e-mailed to Bridget C. Coontz, Ohio Attorney General's Office, 30 East Broad Street, 16th Floor, Columbus, OH 43215, bridget.coontz@ohioattorneygeneral.gov, counsel for the Secretary, and to John Zeiger, 3500 Huntington Center, 41 S. High Street, Columbus, OH 43215, zeiger@litohio.com, counsel for Intervenor, this 1st day of May, 2014.

*/s/ Mark R. Brown*_____

Mark R. Brown

ATTACHMENT 1

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0091p.06

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,

GREGORY A. FELSOCI,

Intervenor Defendant-Appellee.

No. 14-3230

Appeal from the United States District Court
for the Southern District of Ohio at Columbus
No. 2:13-cv-00953—Michael H. Watson, District Judge.

Argued: April 22, 2014

Decided and Filed: May 1, 2014

Before: SUHRHEINRICH, GIBBONS, and COOK, Circuit Judges.

COUNSEL

ARGUED: Mark R. Brown, Columbus, Ohio, for Appellants. Bridget C. Coontz, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio for Appellee Husted. Steven W. Tigges, ZEIGER, TIGGES & LITTLE LLP, Columbus, Ohio, for Appellee Felsoci. **ON BRIEF:** Mark R. Brown, Columbus, Ohio, Mark G. Kafantaris, Columbus, Ohio, for Appellants. Bridget C. Coontz, Damian W. Sikora, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio for Appellee Husted. Steven W. Tigges, John W. Zeiger, Stuart G. Parsell, ZEIGER, TIGGES & LITTLE LLP, Columbus, Ohio, for Appellee Felsoci.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellants in this case include the Libertarian Party of Ohio (“LPO”), a ballot-qualified political party in Ohio; Kevin Knedler, the LPO state executive committee chair; Aaron Harris, the LPO state central committee chair; and Charlie Earl, the LPO gubernatorial candidate for Ohio in 2014 (collectively referred to as the LPO). The LPO appeals the denial of its request for a preliminary injunction. The LPO sought an order prohibiting defendant-appellee, the Ohio Secretary of State, Jon Husted, from enforcing section 3501.38(E)(1) of the Ohio Revised Code and thus restoring Earl to the ballot for the May 2014 primary election. Also a party to the appeal is Gregory Felsoci, who intervened in the litigation. Felsoci is the individual whose protest of the certification of LPO candidates resulted in Earl’s removal from the ballot.¹ On appeal, the LPO makes two challenges to the constitutionality of section 3501.38(E)(1): (1) on its face the statute’s employer disclosure requirement violates the First Amendment, and (2) its enforcement violates the LPO’s due process rights. We affirm.

I.

To appear on a general election ballot in Ohio, a political party must participate in the primary. The Ohio Constitution requires that “[a]ll nominations for elective state . . . offices shall be made at direct primary elections or by petition as provided by law.” Ohio Const. art. V, § 7. Ballot-access statutes create the framework for this constitutional mandate. Those statutes impose various requirements on minor parties seeking to appear on primary (and thus general election) ballots. Over the last ten years, the LPO has struggled to become and remain a ballot-qualified party in Ohio through frequent litigation. The LPO has successfully challenged Ohio laws burdening its access to the ballot in three prior lawsuits. *See Libertarian Party v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722, 2011 WL 3957259 (S.D. Ohio Sept. 7, 2011), *vacated as moot*, 497 F. App’x 581 (6th Cir.

¹At the outset, we deny Felsoci’s motion to dismiss and strike his attached appendix which is duplicative of the relevant parts of the record.

2012); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008). As a result of the litigation, the LPO has fielded candidates for local, state-wide, and federal offices in primary and general elections from 2008 to 2013. In the instant lawsuit the LPO previously was successful in obtaining injunctions barring enforcement of an Ohio residency requirement for petition circulators and barring retroactive application of S.B. 193, which voided the Secretary's directives recognizing minor parties as ballot-qualified and changed the criteria for a minor party to obtain ballot access.

The LPO's third motion for a preliminary injunction is the subject of this appeal. Before introducing the facts forming the basis for the LPO's motion, however, a summary of the relevant Ohio ballot-access statute is useful.

A candidate may gain access to a general election only if he or she participates in the primary. *See* Ohio Const., art. V, § 7. To gain access to the primary, candidates must file declarations of candidacy accompanied by petitions ninety days before the primary election. Ohio Rev. Code § 3513.05. If a candidate declares a candidacy for state-wide nomination or election as a candidate of a minor party, then the petition must be supported by the signatures of at least five hundred qualified electors who are members of the same political party as the candidate. *Id.* A petition consists of separate "petition papers," each containing signatures of electors of only one county. *Id.* And only one person, a circulator, can circulate each petition paper. Section 3513.05 further notes that petition papers are governed by a distinct statutory provision, section 3513.38 of the Ohio Revised Code. *Id.*

According to section 3513.38, the signatures provided for on the petition papers must be made by electors qualified to vote on the candidacy or issue which is the subject of the petition. The facts of qualification are determined as of the date the petition is filed. Ohio Rev. Code § 3501.38(A). Signatures must be in ink and include the location of the signer's voting residence, which is the address appearing on the registration records at the board of elections. Ohio Rev. Code § 3501.38(B)–(C). A person shall sign only his or her name, and a person may not authorize another to sign for him or her, so long as he or she is not unable to physically sign because of disability. Ohio Rev. Code §§ 3501.38(D), 3501.382.

Section 3513.38 also includes a provision detailing requirements for circulators, which, because it forms the basis for the instant appeal, is quoted at length:

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 of the Revised Code. 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.*

Ohio Rev. Code § 3501.38(E)(1) (emphasis added).² Petition circulators comply with this disclosure requirement by filling in an employer information box located on the petition paper. Section 3501.38(E)(1) requires the disclosure of all funding sources, irrespective of whether the circulator is working as the servant employee or as an independent contractor of the source. *See State ex. rel. Linnabary v. Husted*, No. 2014-0359, 2014 WL 1317512, at *4 (Ohio Apr. 3, 2014). Further, if a circulator knowingly permits an unqualified person to sign a petition paper or permits a person to write another's name on a petition paper, the petition paper itself is invalid. Ohio Rev. Code § 3501.38(F).

After the candidate collects a number of petition papers containing a sufficient number of signatures and files the declaration of candidacy and accompanying petition with the Secretary of State, the Secretary then transfers the petition papers to the county boards of elections, where they are open to public inspection. Ohio Rev. Code § 3513.05. The boards certify the validity or invalidity of each signature and return their determinations, along with the petition papers, to the Secretary. *Id.* The Secretary then aggregates the totals to determine whether the candidate satisfied the minimum number of required valid signatures and, if the required minimum is met, certifies the candidate to the ballot. But, according to section 3501.38(L) of the Ohio Revised Code, the boards “shall not” invalidate a petition on the basis that the submitted petition does not

²The employer disclosure requirement was added by Am. Sub. H.B. 1 (2004).

satisfy petition requirements. Rather, the Secretary has the power to determine “all other matters” involving the validity or invalidity of the petition papers. Ohio Rev. Code § 3513.05.

Section 3501.39 of the Ohio Revised Code provides that the “secretary of state . . . shall accept any petition described in section 3501.38 of the Ohio Revised Code unless . . . [a] written protest against the petition or candidacy, naming specific objections, is filed, a hearing is held, and a determination is made by the election officials with whom the protest is filed that the petition is invalid, in accordance with any section of the Revised Code providing a protest procedure.” Section 3513.05 provides a procedure for protests of violations of its requirements. Any qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election in which the candidate seeks nomination may protest the candidacy of any person filing a declaration of candidacy for party nomination or for election. *Id.* Protests must be filed at least seventy-four days before the primary, in writing, and with the election officials with whom the declaration of candidacy and petition were filed—normally, for state-wide elections, the Secretary of State. *Id.* A protest triggers a hearing before the Secretary (or another election official with whom the declaration of candidacy was filed), who fixes a time and provides notice to the candidate and protester. *Id.* The Secretary (or, again, another election official with whom the declaration of candidacy was filed) hears the protest and makes a final determination as to the validity of the declaration for candidacy and accompanying petition. *Id.* If the Secretary “find[s] that such candidate . . . has not fully complied with [the requirements set forth in] this chapter, the candidate’s declaration of candidacy and petition shall be determined to be invalid and shall be rejected.” *Id.*

II.

While the LPO was attempting to enjoin Husted’s enforcement of S.B. 193, it was also engaged in the preparation of its declarations of candidacy and accompanying petitions to be filed by the February 5, 2014 deadline. In November 2013, Oscar Hatchett, a professional petition circulator, contacted Robert Bridges, the vice-chair of the executive committee and political director for the LPO. Hatchett offered the LPO his services to assist LPO candidates to qualify for the 2014 primary ballot. Bridges hired Hatchett, dba Easy Access Petitions, to collect signatures for its candidates, including Earl, Steven Linnabary, who sought to file a declaration

of candidacy on behalf of the LPO for attorney general, and Sherry Clark, who sought to file a declaration of candidacy on behalf of the LPO for lieutenant governor.

Hatchett collected 636 signatures for candidates Earl and Clark and 743 signatures for Linnabary. Hatchett billed the LPO for his services as Easy Access Petitions, receiving payment and reimbursements of approximately \$1,785 for signatures for Earl and \$500 or more for signatures for Linnabary. Hatchett shipped his completed petition papers to Bridges without completing the employer information box. Hatchett asked Bridges whether he wanted that portion of the petition papers filled out. Bridges did not give Hatchett any instructions as to whether to fill out the employee information box, although Bridges believed that it was not necessary to do so because Hatchett was an independent contractor. Indeed, at all times, Hatchett was an independent contractor, and not an employee of the LPO.

Like Bridges, Hatchett also believed it was unnecessary to fill in the employee information box. Hatchett had been a professional circulator circulating petitions in Ohio for approximately ten years. During that time, he circulated at least 10,000 petition papers and never completed the employer statement box on any petition paper. He was unaware of any of his signatures being invalidated for failure to complete the employer statement box. In mid-January, the LPO terminated its contractual relationship with Hatchett due to a lack of funds and, presumably, because he had gathered well more than the requisite 500 signatures for the prospective LPO candidates.

Hatchett was not the only circulator circulating petitions in support of the LPO candidates. On January 8, 2014, the LPO found itself, in Knedler's words, in "crisis mode." The district court had just issued a preliminary injunction, ordering Husted to provide the LPO and its candidates access to the 2014 primary and general elections. The LPO had little more than a month until the February 5 filing deadline to collect the requisite signatures for its candidacy petitions, and it confronted the worst weather in 60 years. So the LPO reached out to "some folks outside of the party in the shadows"—including "Tea Party people," "Ron Paul people," independents, and members of the Ohio Democratic Party. Others were reaching out too. Ian James, the owner of The Strategy Network, "a grassroots consultancy and advocacy firm," spoke

with Chris Redfern, the chairman of the Ohio Democratic Party about collecting signatures for the Libertarian candidates.

And additional petitions began to be circulated, but not only by the LPO or its affiliates. For example, Sara Hart collected approximately 241 signatures for Earl and Clark and submitted them to Bridges. She also did not complete the employer information box. The LPO did not pay Hart for her services. Nor did Hatchett, although Hatchett did know Hart from previous petition circulation efforts. Thus, Hart was likely working as an independent contractor for some unspecified third party. Furthermore, on January 28, 2014, an organization, Ohioans for Liberty, paid \$12,000 to The Strategy Network to supervise, manage, and organize efforts to collect signatures for Earl and other Libertarian candidates. The Strategy Network directed four of its employees and interns to collect signatures on behalf of LPO candidates. But neither Ohioans for Liberty nor The Strategy Network is affiliated with the LPO. Ohioans for Liberty is a 501(c)(4) organization, and the vast majority of its funding comes from the Ohio Democratic Party—to the tune of \$828,000. Although James avowedly did not know the affiliation between Ohioans for Liberty and the Ohio Democratic Party, it is reasonable to infer that the Democratic Party was financing the circulation of petitions for LPO candidates.

These efforts, particularly Hatchett's, garnered enough signatures to confidently place the LPO candidates on the primary ballot. On December 30, 2013, Linnabary filed with Husted, pursuant to section 3513.05 of the Ohio Revised Code, a declaration of candidacy and nominating petition for attorney general, consisting of 94 separate petition papers and 968 signatures. And on February 4, 2014, one day before the filing deadline, Earl and Clark filed with Husted a declaration of candidacy and nominating petition for governor and lieutenant governor, consisting of 191 separate petition papers and 1,478 signatures.

On February 6, 2014, these petition papers were transmitted to local boards of elections to determine the validity of the signatures. For Linnabary, the local boards returned 92 valid part-petitions containing 591 valid signatures. For Earl and Clark, the local boards returned 190 valid part-petitions containing 830 valid signatures, well in excess of the 500 required by section 3513.05 of the Ohio Revised Code. On February 18, after Husted received the part-petitions and

determinations of validity from the local boards of election, he certified Linnabary, Earl, and Clark as LPO candidates for the May 6 primary ballot.

At that point Gregory Felsoci, the intervenor-defendant-appellee in this case, entered the picture. Felsoci resides in Akron, Ohio, works as a carpenter, and considers himself a member of the LPO. Felsoci's interest in Ohio ballot-access law apparently began after a Republican friend, John Musca, showed him an unidentified document which Musca claimed to have found in a local coffee shop. In the evidentiary hearing before the district court, Felsoci could not describe the nature of the document Musca showed him and was unable to explain why he believed the truth of the assertions the document contained. He said he believed it because he read it. As far as Felsoci understands, what he read and consequently believed was that the LPO was gathering "votes" without disclosing that those who gathered them were being paid to do so. Musca then asked Felsoci whether he would be willing to stand by his conviction that wrongdoing had occurred and agree to be contacted by someone to discuss pursuing the matter further. Felsoci acquiesced. Soon afterward, the Zeiger, Tigges, and Little law firm contacted Felsoci and offered its assistance. Felsoci is not paying for his representation by the Zeiger law firm; he is unaware who is paying for it. Characterized as a "guileless dupe" by the district court, Felsoci likely is the tool of the Republican Party.³

On February 21, three days after Husted certified Linnabary, Earl and Clark as LPO candidates for the primary ballot, Felsoci filed a protest against the certification of Earl and Clark.⁴ Felsoci argued that section 3501.38(E)(1) of the Ohio Revised Code requires independent contractors, not just employees, to complete the employer information box and thus the LPO candidates failed to comply with the employer disclosure requirement. He also asserted that the circulators were not members of the LPO as required by section 3513.05 of the Ohio Revised Code. Husted referred the protest to Bradley Smith, a hearing officer, to conduct a

³The district court came to this conclusion: "[I]t seems fair to acknowledge the inference, especially in light of the fact that Felsoci's attorneys elicited evidence demonstrating that the Ohio Democratic Party, or its operatives or supporters, provided assistance to Plaintiffs in their efforts to gather petition signatures to qualify for the Ohio May 2014 primary ballot."

⁴Two other individuals filed protests which are not of instant concern: Tyler King also filed a protest against the certification of these three candidates but withdrew his protest fairly quickly. And Carl Akers filed a protest against Linnabary only.

hearing and issue a report and recommendation as to the disposition of the protest. Smith conducted the hearing on March 4, 2014. Persons associated with the LPO, Ohioans for Liberty, and The Strategy Network testified. Smith issued his report on March 7, 2014.

In that report, Smith concluded that all of the challenged petition circulators—Hatchett, Hart, and others—satisfied the requirement of section 3513.05 of the Ohio Revised Code of being members of the same political party as the candidate for whom they were circulating petitions because they had not voted in any primary for the last two years. Smith also concluded that because Hatchett and Hart failed to provide the name and address of the person or entity who compensated them in the employer information box on the petition papers, the signatures gathered for Earl and Clark failed to comply with section 3501.38(E)(1) of the Ohio Revised Code. Accordingly, Smith recommended that all the petition papers submitted by Hatchett and Hart be ruled invalid.

Husted adopted Smith's report and recommendation the same day it was made. Pursuant to his power under section 3513.05 of the Ohio Revised Code, Husted held that the signatures gathered for Linnabary by Hatchett and the signatures gathered for Earl and Clark by Hatchett and Hart were invalid, and, as a result, neither Linnabary nor Earl and Clark had the requisite five hundred valid signatures to be eligible for nomination at the May 6, 2014 primary election as LPO candidates for the offices of attorney general, governor, and lieutenant governor, respectively.

This was the first occasion on which enforcement of the employer disclosure requirement had resulted in the disqualification of a statewide candidate. In the absence of a protest, Husted's practice had been not to check petitions to see whether the employer name and address were omitted.

Husted's invalidation of the signatures and disqualification of the candidates from the ballot has serious consequences for the LPO, which go beyond the May primary. First, having failed to qualify for the primary ballot, Earl, Clark, and Linnabary cannot appear on the ballot for the November 2014 general election. Therefore, it is extremely unlikely that the LPO will

receive two percent of the votes cast in the 2014 gubernatorial race.⁵ Owing to amendments to Ohio's ballot-access statute enacted in S.B. 193, the LPO will very likely lose its recognition as a political party in Ohio. And to requalify as a political party, the LPO would have to file with the Secretary a party formation petition that is (1) supported by a number of signatures equaling one percent of the total vote at the 2014 gubernatorial election (amounting to more than 38,500 signatures, assuming no change in voting numbers from the 2010 gubernatorial election); (2) signed by not fewer than five hundred qualified electors hailing from each of at least a minimum of one-half of the congressional districts in the state (currently eight); and (3) filed at least one hundred and twenty-five (125) days before the general election the party plans to contest. *See* Ohio Rev. Code § 3517.01(A)(1)(b). Furthermore, the LPO would *also* have to meet the petition requirements imposed by section 3501.38 of the Ohio Revised Code—which it failed to meet for 500 signatures—for more than 38,500 signatures.

To avoid this result, the LPO again sought the interposition of the courts. Linnabary filed suit in the Supreme Court of Ohio, seeking a writ of *mandamus* to compel Husted to certify his candidacy as LPO candidate for attorney general and restore his name to the ballot. *See Linnabary*, 2014 WL 1317512, at *1. The court concluded that Husted's interpretation of "employing" in section 3501.38(E)(1) of the Ohio Revised Code to cover employment relationships with independent contractors did not clearly disregard applicable law. *Id.* at *5. The court also held that section 3501.38(E)(1) does not comprehend a substantial-compliance standard and that strict compliance is therefore required. *Id.* at *7. Accordingly, the court denied the writ of *mandamus*. *Id.*

The LPO and Earl, by contrast, looked again to the federal district court. On March 7, 2014, the same day as Husted disqualified the LPO from the May primary ballot, the LPO filed a second amended complaint, a third motion for a preliminary injunction, and a motion for a temporary restraining order. In its second amended complaint, the LPO lodged three additional constitutional claims under 42 U.S.C. § 1983. First, in count six, the LPO alleged that the requirement under section 3501.38(E)(1) of the Ohio Revised Code that circulators disclose their

⁵See Ohio Am. Sub. S.B. 193 § 4(B), 130th G.A. (2013) ("A political party that polls for its candidate for Governor at least two per cent but less than twenty per cent of the entire vote cast for that office at the 2014 general election remains a minor political party for a period of four years after meeting that requirement.")

employers facially violates the First Amendment. Second, in count seven, the LPO alleged that Husted's enforcement of that requirement by declaring their previously certified petition papers invalid violates the First Amendment as-applied. Third, in count eight, the LPO alleged that a retroactive application and enforcement of section 3501.38(E)(1) of the Ohio Revised Code violates its rights under the Due Process Clause of the Fourteenth Amendment. The LPO sought a declaration that section 3501.38(E)(1) is unconstitutional, both facially and as-applied, and a preliminary and permanent injunction prohibiting Husted from enforcing the statute as interpreted by him against the LPO with respect to the 2014 primary election. Shortly thereafter, Felsoci moved to intervene.

The district court conducted a preliminary conference and an evidentiary hearing on the LPO's third motion for a preliminary injunction. At the March 13, 2014 evidentiary hearing, the court heard the testimony of live witnesses, subject to cross examination. The court heard additional testimony on March 14 and 17, 2014.

On March 19, the district court issued an opinion and order denying the LPO's third motion for a preliminary injunction. The district court held that the LPO abandoned its due process claim and, moreover, that the claim lacked merit. The court also found that the LPO was unlikely to succeed on the merits of its facial and as-applied First Amendment challenges. After a summary analysis of the other factors to be considered in a motion for a preliminary injunction, *see Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 627 (6th Cir. 2013), the district court concluded that each of them weighed against granting injunctive relief. The LPO gave notice of appeal.

The following day, on March 20, 2014, the LPO filed a motion with this court for an expedited appeal and an immediate injunction pending appeal providing that (1) Husted place Earl's name on the 2014 LPO primary ballot; (2) Husted be enjoined from printing the LPO primary ballots until the motion for an injunction pending appeal is resolved; and (3) Husted be directed to seek a waiver to the requirement that the ballots to be mailed to absent military personnel and overseas voters by March 22, 2014. The LPO concomitantly filed in the district court a motion to stay its ruling pending the outcome of the emergency appeal and to enjoin Husted from printing paper ballots for the May 2014 primary election until after their appeal had

been determined and the Ohio Supreme Court had issued its decision in *State ex rel. Linnabary*. The district court denied the LPO's motion to stay pending appeal, as did this court. We did, however, direct the clerk to expedite the appeal of the district court's denial of the LPO's third motion for a preliminary injunction. Ohio's primary election is scheduled for Tuesday, May 6, 2014. *See* Ohio Rev. Code § 3501.01(E)(1).

III.

"This court reviews the denial of a preliminary injunction for an abuse of discretion, examining findings of fact for clear error and legal conclusions *de novo*." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 624 (6th Cir. 2013). "The reviewing court looks to the same four factors the district court considered: likelihood of success on the merits, irreparable harm to the movant in the injunction's absence, harm to others as a result of the injunction's issuance, and the public interest." *Id.* "When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). "With regard to the factor of irreparable injury, for example, it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Thus, to the extent that the LPO can establish a substantial likelihood of success on the merits of its First Amendment claims, it also has established irreparable harm. *See Reno*, 154 F.3d at 288.

"Likewise, the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Id.* (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in . . . protection of First Amendment liberties."). "Accordingly, because the questions of harm to the parties and the

public interest generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is, and will be in this case, whether the state action at issue is likely to be found constitutional.” *Reno*, 154 F.3d at 288. And “[s]ince ‘likelihood of success’ is a legal question that this court reviews *de novo*, the effective standard of review for a denial of a preliminary injunction in this posture is also *de novo*.” *Autocam*, 730 F.3d at 624 (citing *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012)).

IV.

Before this court, the LPO makes only one First Amendment claim—that section 3501.38(E)(1) is unconstitutional on its face. The as-applied challenge pursued in the district court has thus been abandoned. *See Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (“Issues which were raised in the district court, yet not raised on appeal, are considered abandoned and not reviewable on appeal.”).

We recognize that the LPO’s facial challenge is one of overbreadth. In the First Amendment context, the overbreadth doctrine permits a litigant to assert that a statute is facially invalid because the impermissible applications of the law are substantial when compared against the statute’s plainly legitimate sweep. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (“Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”). The LPO obviously would suffer a burden if it could not hire circulators to circulate petitions for its candidates attempting to qualify for the Ohio ballot. But the First Amendment speech that the LPO alleges is unconstitutionally burdened by section 3501.38(E)(1) is the petition circulation of paid circulators who are not before this court. The LPO maintains that the employer disclosure requirement chills the First Amendment activity of many paid petition circulators and cannot withstand judicial scrutiny.

We also note that the LPO’s facial challenge focuses on the employer disclosure requirement’s impact on paid circulators with respect to candidacy nominating petitions for

minor political parties, a subset of those circulators to whom the requirement applies. Therefore, we review only the part of section 3501.38(E)(1) that requires circulators of candidacy or nomination petitions to disclose the name and address of the person employing them, if any.

The Supreme Court has repeatedly said that disclosure requirements do not impose a ceiling on speech. *See, e.g., McCutcheon v. Fed Election Comm’n*, 134 S. Ct. 1434, 1459 (2014) (plurality); *Citizens United v. Fed Election Comm’n*, 558 U.S. 310, 366 (2010). Although they may burden the ability to speak, disclosure requirements do not prevent anyone from speaking. *Citizens United*, 558 U.S. at 366 (internal citations and quotation marks omitted). In the election context, disclosure requirements serve the important function of transparency, which is essential to the fair contestation for political office. Disclosure requirements provide “the electorate with information about the sources of election-related spending” and “help citizens make informed choices in the political marketplace.” *Id.* at 367 (internal citations and quotation marks omitted). Thus, in the election context, although disclosure requirements may burden speech protected by the First Amendment, they are not automatically subject to strict judicial scrutiny. Rather, the Supreme Court has reviewed First Amendment challenges to disclosure requirements in the electoral context under what it has termed “exacting scrutiny.” *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2818 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (“Since *NAACP v. Alabama*, we have required that the subordinating interests of the State [offered to justify compelled disclosure] survive exacting scrutiny”) (alteration in original) (internal citation omitted); *Citizens United*, 558 U.S. at 366 (“The Court has subjected [disclosure] requirements to ‘exacting scrutiny. . . .’” (quoting *Buckley*, 424 U.S. at 64)); *Davis v. FEC*, 554 U.S. 724, 744 (2008) (governmental interest in disclosure “‘must survive exacting scrutiny’” (quoting *Buckley*, 424 U.S. at 64)); *Buckley v. American Constitutional Law Foundation, Inc. (ACLF)*, 525 U.S. 182, 204 (1999) (finding that disclosure rules “fail[ed] exacting scrutiny”). “That standard ‘requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.’” *Reed*, 130 S. Ct. at 2818 (quoting *Citizens United*, 558 U.S. at 366–67) (internal quotation marks omitted).

“Exacting scrutiny,” despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may. To withstand “exacting

scrutiny,” the Supreme Court has explained, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.* (quoting *Davis*, 554 U.S. at 744). The burden a ballot-access disclosure requirement imposes on a First Amendment right may be sufficiently serious as to require strict scrutiny. *See ACLF*, 525 U.S. at 192 n.12 (explaining that the standard of review applied to paid circulator requirements “is entirely in keeping with the now-settled approach that state regulations impos[ing] severe burdens on speech . . . [must] be narrowly tailored to serve a compelling state interest.” (citing *ACLF*, 525 U.S. at 206 (Thomas, J., concurring in judgment) (alterations in original) (internal quotation marks omitted)). However, it may not be. *See, e.g., Reed*, 130 S. Ct. at 2820 n.2 (explaining that the standard of review applied differs from strict scrutiny). If a disclosure requirement in a ballot-access provision chills First Amendment speech, the level of scrutiny to be applied depends on the severity of the burden. *Compare ACLF*, 525 U.S. 192 n.12, 194–95, 200, and *Meyer v. Grant*, 486 U.S. 414, 420–23 (1988), with *Reed*, 130 S.Ct. at 2821; *see also Citizens for Tax Reform v. Deters*, 518 F.3d 375, 383 (6th Cir. 2008) (recognizing the “sliding-scale” analysis).

A.

We turn then to an examination of the burden placed upon paid circulators for minor parties by the disclosure requirement. Initially, we note that circulating petitions is core political activity. *See Meyer*, 486 U.S. at 422. And we look to the LPO’s description of the chill it asserts the disclosure requirement places on paid circulators: “[R]equiring disclosure of funding sources makes speech and association risky for those who want to support minor parties and unpopular causes.” From there the LPO’s brief moves on to an examination of the evidentiary record in this case. We do the same.

The evidentiary record in the district court included the full transcript of the administrative hearing on Felsoci’s protest. Three items in the administrative record have relevance. First, Hatchett was asked the following by counsel for Felsoci:

Q. Sir, you’ve always understood that you could circulate petitions only as long as you did not affiliate with a particular political party? A. Yes. Q. *All right. And you always understood that an affiliation with a particular political party would substantially restrict the opportunities you would have to make money circulating*

petitions. A. Yes, sir. Q. So it's fair to say you have never been a member of a political party. A. I am unaffiliated, yes."

Second, during the administrative hearing, an attorney appeared on behalf of The Strategy Network to state the objections of its employees and volunteered the following proffer on behalf of Ian James:

Specifically, if [James] were asked these questions he would give these answers: . . . Were you involved in organizing, managing, and supervising the circulators of signatures for the – of petitions for signatures of the Earl and Clark campaign? He would give the answer yes. Would being compelled to disclose the identities of persons with whom you communicated regarding the management, organization, and supervision of the signature-gathering for the Earl/Clark campaign alter how you communicate in the future? He would answer yes. . . . Would compelled disclosure of identities of such persons and your communications with them make them less likely to become involved—make you, rather, less likely to become involved in such activities in the future? He would answer yes. Would compelled disclosure of the identities of such persons and your communications with them make it less likely that others would ask you to become involved in such activities in the future? He would answer yes. As part of your work in political campaigns, do you depend on your ability to attract like-minded associates willing to engage with you in such political activities? He would answer yes. Would compelled disclosure of the identities of such persons and your communications with them . . . negatively affect your ability to attract such associations and form such associations in the future. He would answer yes."

All employees of The Strategy Network disclosed their employment on the petitions they submitted.

Third, despite the attorney's lodging of objections on his behalf, James did indeed appear at the administrative hearing and was called to testify by Felsoci. His testimony recounted his status as a proud Democrat and his discussion with Democratic Party officials about how obtaining signatures for Earl would harm the Republican candidate. And he described his efforts to obtain signatures for the LPO. Counsel for LPO asked James no questions relating to the earlier proffer, and he gave no testimony relevant to any burden on paid circulators.

Prior to the district court's evidentiary hearing, the LPO submitted the affidavit of Paul Frankel. Frankel is both a Libertarian party official living in Alabama and a self-described independent ballot-access contractor. He avers that he has directed and participated in hundreds

of signature drives for candidates and initiatives. Frankel offers his opinion that hiring paid circulators is more difficult when states require that they disclose the source of their payments. He notes that paid circulators work for different candidates and causes and want to preserve anonymity of the sources “to insure future business.” And he indicates that funding sources like to remain anonymous and do not like to pay circulators who must disclose their funding sources. He particularly mentions that funding sources with Democratic or Republican ties do not want their funding of Libertarian Party circulators known and are less likely to pay circulators for Libertarian Party candidates if they know the information will be disclosed. From this, he concludes: “Forcing candidates, parties and circulators to disclose their funding sources places a significant and severe burden on parties’ and candidates’ abilities to retain circulators.”

At the evidentiary hearing in the district court, the Secretary presented the testimony of Brandon Lynaugh, co-owner of the public affairs firm Strategic Public Partners. Lynaugh’s testimony related both to whether the disclosure requirement chilled the work of paid circulators and the governmental interest in preventing fraud, which we discuss later. The district court relied heavily on his testimony. With respect to the disclosure requirement, the district court accurately described it as follows:

SPP has run nine statewide issue campaigns and has coordinated efforts to collect signatures for campaign petitions in Ohio. SPP has participated in the collection of more than one million signatures. . . . Lynaugh also testified that, in the industry, there is no ambiguity as to whether a paid circulator was required to complete the employer information box on part petitions. He was not aware of any instance of a paid petition circulator refusing to provide the information and stated that the disclosure requirement did not prevent him from obtaining the circulators he needed for his petition efforts. Further, Lynaugh indicated he had never heard of harassment of the companies he hired to circulate petitions as a result of the disclosures. Similarly, no commercial petition-circulating firms ever expressed to him that the disclosure requirement impaired their ability to hire individual petition circulators.

In addition, Lynaugh testified that in his experience, commercial petition-circulating firms are not concerned about which side of an issue they work on and opined the ability to obtain signatures for a variety of issues is an indication of talent. He gave an example. Specifically, during one petition drive, one half of SPP worked for one candidate and the other half worked for his opponent. Lynaugh also expressed that transparency as to who is paying for petition circulation is advantageous because both the press and public expect it in this day and age.

Hatchett's testimony at the administrative hearing indicated his willingness to fill out the part of the petition form indicating his employment. No other evidence at the hearing before the district court bears on the issue of chill to circulators who must disclose their employment.

Reviewing the state administrative hearing and the evidentiary hearing before the district court, the relevant evidence of chill—whether to paid circulators generally or to those who circulate on behalf of minor party candidates—can best be described as scant. There is no record of any harassment or other efforts to dissuade circulators from circulating petitions. The proffer by James's attorney is not evidence, and James was not questioned about the issue when he in fact did testify. Hatchett's fleeting testimony about his understanding with respect to whether affiliation with a political party would restrict his employment opportunities says more about the attorney's leading questions than it does about what Hatchett himself thought. And Hatchett indicated to Bridges his willingness to fill in the disclosure information. The Frankel affidavit is conclusory and general. It is not based on Ohio's particular employer disclosure requirement and does not include any assurance that the activity of paid circulating is the same throughout the country. Lynaugh's specific knowledge and his experience, which includes experience in Ohio, speak directly to the issue and support a finding that there is no chill to circulator activity arising from the employer disclosure requirement.

Furthermore, when we assess the chill apt to flow from Ohio's employer disclosure requirement, we note that the disclosure is not made by the circulator to the voter. Rather, the disclosure is made by the circulator when the petition is filed, after the signatures are gathered. So while the core First Amendment activity of communicating with voters is occurring, the disclosure requirement plays no part. The circulator does not directly lose anonymity with the voter whose signature is being solicited. Also, the requirement itself is for an employer name and address only. Unless the political organization directly employs circulators, the employer will probably be a firm with no obvious political affiliation. No payment amounts are included. To be sure, seeking any information about a circulator has some potential, however small, to reduce willingness to engage in circulating. But other than that general observation, little else suggests that chill has occurred or is likely to occur as a result of the requirement. It is also worth noting that the disclosure requirement has been in effect for almost ten years. Yet the

record suggests that paid circulator activity is apparently common and that a variety of sources in Ohio provide the service. The only piece of evidence suggesting that the situation is different for minor parties is the Frankel affidavit, which, as previously noted, is general, conclusory, and does not relate specifically to Ohio. The LPO itself experienced no difficulty in obtaining paid circulators on short notice during a harsh winter. Overall, the LPO has provided “scant evidence” that Ohio’s employer disclosure requirement for paid circulator places any burden whatsoever on circulators of petitions for candidacy nominations. *Cf. Reed*, 130 S. Ct. at 2821 (finding “scant evidence” that a state public records act allowing disclosure of signatories to referendum petitions would chill First Amendment speech).

B.

We turn to the state’s interest in the requirement at issue. Section 3501.38(E)(1) was enacted in 2004 after Ralph Nader’s disqualification from the presidential ballot that year. The disqualification was accompanied by findings of substantial fraud among paid circulators, and the record here includes the hearing examiner’s extensive factual determinations. The fraudulent activity of Nader circulators was a major factor in the disclosure requirement’s enactment.

Evidence before the district court on the state’s interest also included the testimony of Matthew Damshroder, Deputy Assistant Secretary of State and Director of Elections since 2011. According to Damshroder, the employer information requirement helps deter fraud and also to detect it. It encourages employers of circulators to educate the circulators about applicable law and to hire individuals who will not reflect negatively on them. The information also helps if followup is necessary, because employers are often easier to contact than circulators. The information enables the Secretary of State’s Office to cross-check with campaign expenditure reports and thus contributes to overall reporting compliance. Damshroder explained that the Secretary of State lacks resources to examine part petitions for compliance with the requirement. Thus, it relies on protests to uncover noncompliance. This practice accounts for the fact that the disqualification of LPO candidates is the first time the requirement had been enforced resulting in disqualification of a statewide candidate.

Testimony bearing on the governmental interest also came from Lynaugh. Lynaugh described instance of cheating by circulators and recalled circulator frauds detected by law

enforcement in 2006 and 2009. He testified that circulators can commit fraud by obtaining names and addresses from a phone book, and he was aware of one instance where a circulator was caught doing that in the last year. He was unaware of any instance in which a volunteer circulator committed fraud and called the difference of risk of volunteer fraud versus paid circulator fraud “night and day.”

Taking all this testimony together, it appears that the employer disclosure requirement serves substantial and legitimate state interests. The governmental interest is far more than theoretical since Ohio has experienced fraud by paid circulators. The most notable instance of fraud occurred during the circulation of petitions for a minor party candidate, Ralph Nader. The requirement serves an ongoing function of deterring fraud and facilitating its detection.

C.

When we fit this case within the analytical framework established by Supreme Court precedent, we see that the burden imposed on core First Amendment activity is largely theoretical and speculative. And evidence exists suggesting that there is no significant burden at all. *Cf. Reed*, 130 S.Ct. at 2821 (noting “scant evidence” that “only modest burdens” attended disclosure). The burden is thus insufficiently serious to require strict scrutiny of the statutory provision. *See id.* at 2820 (concluding that the disclosure requirement “is substantially related to the important interest of preserving the integrity of the electoral process”). Here, the state interest is substantial, legitimate, and supported by evidence of actual fraud. The record also includes evidence of the contribution the statute makes on an ongoing basis to serving the legitimate state interest. Under “exacting scrutiny” then there is a small burden on First Amendment activity coupled with an important and well-established governmental interest to which the disclosure requirement is substantially related. Therefore, application of “exacting scrutiny” does not render the employer disclosure requirement unconstitutional. *See id.* at 2820–21.

Before leaving the First Amendment issue, we consider how the principal authorities relied on by the LPO relate to and inform our conclusions. Perhaps the most helpful case for LPO is *ACLF*, which involved a facial challenge to a Colorado statute that required that proponents of initiatives report at the time of petition filing names, addresses, and county of

voter registration of all circulators, the amount paid to each circulator, and the amount paid per petition signature. 525 U.S. at 189. Proponents were required to file on a monthly basis the names and addresses of each paid circulator and the amount of money paid and owed to each circulator during the month. *Id.* The circulator disclosure provision was challenged along with requirements that all circulators be registered voters and that circulators wear identification badges stating their names and whether they were volunteers or paid. *Id.* at 188–89. If they were paid, the badge also had to include the name and phone number of their employer. *Id.* at 188. The Supreme Court ruled that the registration and badge requirements violated the First Amendment and also invalidated the provisions of the final and monthly report requirements that related to disclosures about individual circulators. *See id.* at 197–204. With respect to paid circulators, the Supreme Court said, “[W]e agree with the Court of Appeals appraisal: Listing paid circulators and their income from circulation forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts, no more than tenuously related to the substantial interests disclosure serves, Colorado’s reporting requirements, to the extent they target paid circulators, fai[l] exacting scrutiny.” *Id.* at 204 (alterations in original) (internal citations and quotation marks omitted).

The result in *ACLF* certainly requires a very close look at the LPO’s First Amendment challenge. Indeed, we must be vigilant in scrutinizing all First Amendment challenges. But ultimately *ACLF* is not controlling, nor does the LPO suggest that it is. Instead, differences exist between the two cases that dictate a different result here. No single distinction is determinative, but together they point to upholding Ohio’s employer disclosure requirement. The context of *ACLF* is an initiative campaign, and the Court itself noted that ballot initiatives do not pose the same risk of corruption that paying money on behalf of candidates does. *Id.* at 203 (“We note, furthermore, that ballot initiatives do not involve the risk of ‘*quid pro quo*’ corruption present when money is paid to, or for, candidates.”); *see also Meyer*, 486 U.S. at 427–28 (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (“The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public

issue.”)).⁶ While Ohio’s disclosure requirement also applies to paid circulators circulating petitions for ballot initiatives, that is neither our context nor the object of the LPO’s overbreadth challenge, and so we do not consider that aspect of the statute. *See Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912) (“Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand, and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid.”).

Moreover, the record in *ACLF* contained no evidence that paid circulators were more apt to commit fraud than volunteer circulators, and the Court was unwilling to assume the fact “absent evidence to the contrary.” 525 U.S. at 203. The record here, however, includes not only such evidence but also evidence of actual fraud involving paid circulators. And the *ACLF* disclosure itself—in monthly and final reports—both contained more information than is required here (payment amounts) and, there, the information disclosed was more visible to the public than a part-petition submitted on behalf of a candidate. Finally, an important part of the Supreme Court’s analysis in *ACLF* relates to other measures by which Colorado seeks to deter fraud and diminish corruption. *See id.* at 203–04. The LPO does not suggest that other measures employed by Ohio figure in the analysis.

We note too that facts are not insignificant in determining the outcomes of First Amendment cases. So the entire record here plays a role in differentiating this case from *ACLF*. Our court stressed this point in *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008): “[T]he question is fact-intensive, given the ‘sliding scale’ analysis outlined by the Supreme Court in *Meyer*, *Buckley* and other decisions.” *Id.* at 383 (citing *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006) (describing the Supreme Court’s flexible approach in similar First Amendment cases as a “sliding scale”)). A determination that a challenged disclosure requirement unconstitutionally burdens speech protected by the First Amendment on one record does not compel us to conclude the same of a different disclosure requirement on another record. The

⁶While recognizing the differing contexts between ballot initiatives and candidacy nominations, we do not suggest that *ACLF*’s principles are wholly inapplicable to candidate petitions. *See Nader v. Blackwell*, 545 F.3d 459, 476 (6th Cir. 2008).

Supreme Court has cautioned several times that there is “no litmus-paper” test separating valid ballot-access provisions from invalid interactive speech restrictions, *ACLF*, 525 U.S. at 192, and that there is “no substitute for the hard judgments that must be made,” *id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). And in making those hard judgments, we must look to the record before us.

Perhaps the case that the LPO urges us most strongly to follow is our own *Deters* precedent, in which this court invalidated Ohio’s prohibition of compensation for circulators on a per-signature or per-volume basis. 518 F.3d at 388. Yet *Deters* provides little help to the LPO. Instead *Deters* demonstrates the exact approach we employ here: an intensive examination of the record to determine the weight of the burden on petition circulation. While the *Deters* court concluded that the Ohio statutory requirement at issue in that case would diminish petition circulation because the “requirement would make proposing and qualifying initiatives more expensive . . . and . . . professional coordinators and circulators would likely not work under a per-time-only system,” *id.* at 385, the LPO offers no convincing evidence that the employer disclosure requirement at issue in this case would significantly diminish petition circulation, if at all.

The LPO’s reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 335 (1995), is also unavailing. In *McIntyre*, the Supreme Court invalidated an Ohio statute prohibiting the distribution of campaign literature that did not contain the name and address of the person or campaign official issuing the literature. *Id.* at 357. But *McIntyre* is not controlling. There, the Supreme Court concluded that Ohio sought to “indiscriminately outlaw[] a category of speech”—namely, anonymous political speech. *Id.*; *see also id.* at 338 n.3. Here, by contrast, Ohio’s employer disclosure requirement for paid circulators of candidacy nomination petitions does not prohibit a category of speech. *See McCutcheon*, 134 S. Ct. at 1459 (noting disclosure requirements “do not impose a ceiling on speech”); *Citizens United*, 558 U.S. at 366 (disclosure requirements do not prevent anyone from speaking). If the disclosure requirement burdens any speech protected by the First Amendment—a burden for which the LPO has adduced scant evidence—then that burden is only indirect and far less severe than the burden imposed by the statute considered in *McIntyre*. And it is precisely along these lines that the *McIntyre* Court

distinguished its holding from *Buckley*, 424 U.S. at 75–76, in which the Supreme Court upheld disclosure requirements of independent expenditures in excess of a certain threshold to the Federal Election Commission:

Though such mandatory reporting [in *Buckley*] undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint. Mrs. McIntyre’s handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender’s political views. Nonetheless, even though money may “talk,” its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

McIntyre, 514 U.S. at 355. Like the disclosure requirement upheld in *Buckley*, the employer disclosure requirement is a “far cry” from a blanket prohibition on all anonymous campaign literature. While we recognize that the employer disclosure requirement necessarily negates the total anonymity of paid circulators of candidacy nomination petitions, the requirement’s chill of speech protected by the First Amendment is far less than the freeze-out which the *McIntyre* Court confronted. Absent record evidence suggesting otherwise, we do not see that *McIntyre* provides the guidance the LPO believes it does.

Accordingly, we hold that the LPO is not likely to succeed on the merits of its First Amendment overbreadth challenge to section 3501.38(E)(1).

V.

The LPO also lodges a due process claim against the enforcement of section 3501.38(E)(1). As with its First Amendment claim, the LPO fails to establish a substantial likelihood of success on the merits of its due process challenge. The LPO submits that section 3501.38(E)(1)’s disclosure requirement is void for vagueness because it failed to provide adequate notice of what conduct it prohibited. “[I]mprecise laws can be attacked on their face under two different doctrines.” *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (plurality). First, is the overbreadth doctrine, which is the basis of the LPO’s First Amendment facial

challenge. “Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards . . . that are sufficient to guard against the arbitrary deprivation of liberty interests.” *Id.* “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.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citing *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)). “A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.’” *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). A rule or regulation is unconstitutionally vague if it misleads the individuals it regulates into thinking that their conduct is not proscribed. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991). “The question is not whether discriminatory enforcement occurred here, as we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.” *Id.* at 1051.

The void-for-vagueness doctrine is concerned with “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.” *Fox*, 132 S. Ct. at 2317 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). The strictness of our vagueness scrutiny is proportionate to the burden that the law imposes on those whom it regulates. *See Morales*, 527 U.S. at 55 (plurality); *see also Fox*, 132 S. Ct. at 2318 (stating that the abrupt regulatory change was especially concerning because the regulations at issue in that case “touch upon ‘sensitive areas of basic First Amendment freedoms’” (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964))); *id.* at 2319 (noting that lack of fair notice is especially troubling when the regulatory agency imposes a \$1 million fine for the violation). “When speech is involved, rigorous adherence to [the fair-notice] requirements is necessary to ensure that ambiguity does not chill protected speech.” *Fox*, 132 S. Ct. at 2317.

The LPO’s void-for-vagueness challenge centers on the term “employing” in section 3501.38(E)(1). The provision requires disclosure of the “name and address of the person

employing the circulator.” Ohio Rev. Code § 3501.38(E)(1) (emphasis added). The LPO maintains that term “employing” is vague because it connotes the common-law master-servant relationship and therefore did not provide adequate notice that “employing” could be applied to independent contractors. This argument is unconvincing. “Employ,” as the term is commonly used in this context, means simply “to use or engage the services of,” which covers both common law master-servant relationships and independent-contractor-client relationships. Webster’s Ninth New Collegiate Dictionary 408 (9th ed. 1991).

Perhaps vagueness would have been a serious issue had the Secretary interpreted “employing” in any statutory provision to cover some broader range of conduct not associated with use of services. But the LPO offers no evidence of such an interpretation. “[A] statute will be struck down as facially vague only if the plaintiff has demonstrate[d] that the law is impermissibly vague in all of its applications.” *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 825 (6th Cir. 2012) (alteration in original) (internal quotation marks omitted). The LPO has not made such a demonstration. Accordingly, the LPO’s vagueness challenge predicated on the term “employing” fails.⁷

Separately, the LPO argues that the Secretary’s enforcement of the disclosure requirement violated due process because the LPO lacked sufficient notice that the Secretary would enforce the disclosure requirement against it. The LPO stresses that section 3501.38(E)(1) had not been previously enforced and that in 2006 and 2007 the Secretary issued two directives instructing local boards of elections not to invalidate part-petitions when the employer identification box was left incomplete. The LPO’s insufficient-notice argument could be construed in two ways; both collapse.

If, on the one hand, the LPO contends that it had insufficient notice that its petition signatures would be invalidated as a consequence of Hatchett’s failure to comply with the disclosure requirement, then that argument fails. The due process concern of notice goes to “fair notice of *conduct* that is forbidden or required.” *Fox*, 132 S. Ct. at 2317 (emphasis added). That

⁷We note that the Ohio Supreme Court recently put this question of vagueness to rest when it interpreted the term to “appl[y] to all paid circulators, regardless of whether they are employees or independent contractors.” Linnabary, 2014 WL 1317512, at *4.

the LPO was surprised by the enforcement does not necessarily show that the LPO did not know what was required.

On the other hand, the LPO's principal suggestion may be that the Secretary adopted a policy of non-enforcement that assured it that Hatchett and Hart's failure to complete the employer information box was not, in fact, unlawful. This argument relies almost exclusively on the Supreme Court's 2012 decision in *FCC v. Fox Television Stations*—a case we have yet to consider. *Fox* concerned the FCC's treatment of television broadcasts containing expletives and nudity. Title 18, section 1464 of the United States Code prohibits broadcasts of expletives and nudity and specifies the applicable penalties. *Id.* at 2312. From the 1970s until 2004, FCC guidance explicitly stated that passing or fleeting expletives or nudity would not be punished. Then, in 2004, the FCC issued a decision sanctioning NBC for singer Bono's use of the word "f***ing" during the 2003 Golden Globe Awards, thereby breaking from its previous enforcement position. It declared that "any use" of the "F-word" would be considered explicit and therefore indecent. The FCC then applied the new policy to other broadcasts by Fox and ABC, despite the fact that these broadcasts had aired well before the issuance of the Golden Globes order. The FCC declined to fine Fox, but fined 45 ABC affiliates \$27,500 each for the broadcast it aired. *Id.* at 2315–17. Fox and ABC sued. The Supreme Court analyzed Fox and ABC's challenges to the enforcement under the void-for-vagueness doctrine. It held:

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 of § 1464 as interpreted and enforced by the agency 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 (alteration in original) (internal citation and quotation marks omitted). The LPO suggests that the Secretary committed a regulatory change as abrupt as that at issue in *Fox* and that the Secretary cannot show that "a person of ordinary intelligence" would have understood that circulators operating as independent contractors were required to disclose their clients.

The LPO cannot build its due process claim on *Fox*. Unlike in *Fox*, the LPO cannot demonstrate a formal policy change equivalent to the FCC's policy change. Here, there was no

policy change; it was always the case that under Ohio law paid candidacy nomination petition circulators were required to disclose their employers. The LPO adverts to two directives from Husted's predecessors to suggest there was a change of enforcement policy. In 2006, the Secretary issued a directive instructing the board of elections: "Do not invalidate a part-petition if the employer information statement . . . is blank or incomplete" Ohio Secretary of State Directive 2006-58 (Aug. 21, 2006). And in 2007, the Secretary issued a directive containing this exact same language in context of a referendum on a state senate bill. Ohio Secretary of State Directive 2007-14 (Sept. 10, 2007). But these directives do not establish a policy change; rather, they are entirely consistent with the statutory framework at baseline. Section 3501.38(L) of the Ohio Revised Code instructs that the boards "shall not" invalidate a petition on the basis that the petition form does not satisfy petition requirements. And section 3513.05 makes clear that, apart from the petition signatures, the Secretary has the power to determine all questions regarding the validity of the petition papers. The Secretary's directives therefore did little more than restate the applicable law to the boards of elections. They made no statement regarding the Secretary's own enforcement policy as to section 3501.38(E)(1). Much less do they prove that the Secretary had adopted a policy of non-enforcement of the requirements of section 3501.38(E)(1) prior to the events leading up to this case. And, furthermore, the LPO points to no record evidence that they actually relied on these directives in the decision not to complete the employer information box.

Thus, the LPO can establish no analogue to the FCC's pre-Golden Globes enforcement policy. In contrast to the fleeting expletives doctrine and the FCC's abrupt change in *Fox*, the LPO does not point to any non-enforcement policy of the Secretary's office from which the Secretary's enforcement of section 3501.38(E)(1) marks an abrupt change. Thus, the LPO simply cannot establish that they lacked notice as to what conduct was forbidden. *Cf. Fox*, 132 S. Ct. at 2317. The forbidden conduct was clear; that it would be enforced against them was surprising. But the history of non-enforcement of section 3501.38(E)(1) and the LPO's surprise at its enforcement against them do not establish the basis for a due process vagueness claim. What matters is the LPO cannot convincingly maintain that it lacked notice of what conduct was required. (In fact, their First Amendment overbreadth challenge is predicated on paid circulators

being well aware of the requirement.) Accordingly, the LPO fails to demonstrate a substantial likelihood of success on the merits of its due process claim.

VI.

We recognize that absent injunctive relief, the disqualification of the LPO from the 2014 Ohio primary ballot and general election ballots represents a severe and irreparable injury to the LPO. Without a gubernatorial candidate on the general election ballot, given the effect of S.B. 193, the LPO in all likelihood will lose its status as a ballot-qualified party in Ohio. We note that the LPO has struggled to become and remain a ballot-qualified party in Ohio, and we acknowledge that this decision entails that their efforts must continue still. But we also note that we decide one case at a time, on the record before us. In so doing, we preserve the First Amendment's primary place in our democracy over the long run.

“When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.” *Reno*, 154 F.3d at 288. It is also the determinative factor here. Because the LPO has failed to establish a likelihood of success on the merits of its constitutional claims, we affirm the denial of its third motion for preliminary injunction.

ATTACHMENT 2

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

Libertarian Party of Ohio, et al.,

Plaintiffs,

v.

Case No. 2:13-cv-953

**Jon A. Husted,
Ohio Secretary of State,**

Judge Michael H. Watson

Defendant.

OPINION AND ORDER

Plaintiffs bring claims under 42 U.S.C. § 1983, asserting Defendant Ohio Secretary of State Jon Husted (“Secretary Husted”) violated their First Amendment rights when he disqualified their nominating petitions to appear on the May 2014 Ohio primary ballot. Secretary Husted disqualified the petitions because paid circulators who obtained signatures for Plaintiffs’ nominating petitions failed to disclose the name and address of the entity that paid them in the “employer information box” on the petitions as required by Ohio Revised Code § 3501.38(E)(1). In their third motion for a preliminary injunction, Plaintiffs ask the Court to enjoin Secretary Husted from enforcing § 3501.38(E)(1) and order him to include them as candidates for statewide office for the Libertarian Party of Ohio on the May 2014 primary ballot. The Court **DENIES** Plaintiffs’ third motion for a preliminary injunction because § 3501.38(E)(1) places only a minimal burden on political speech and the disclosures it requires are substantially related

Ohio's significant interest in deterring and detecting fraud in the candidate petition process.

I. BACKGROUND

A. The Parties

Four Plaintiffs filed the original complaint in this case: the Libertarian Party of Ohio ("LPO"); Kevin Knedler; Aaron Harris; and Charlie Earl. The LPO has previously been a ballot-qualified political party in Ohio. LPO candidates have run for local, statewide, and federal offices since 2008. Keven Knedler is the Chair of the LPO Executive Committee. Aaron Harris is the Chair of the LPO Central Committee. Both Knedler and Harris are registered voters and intend to vote for LPO candidates in the May 2014 primary election. Charlie Earl seeks to run as the LPO candidate for Governor of Ohio in the 2014 primary and general elections.

Defendant Jon Husted is the Ohio Secretary of State. As Secretary, he is also Ohio's chief elections officer under Ohio Revised Code § 3501.04 and therefore is charged with the duty to enforce Ohio's election laws, including the disclosure requirements of Ohio Revised Code § 3501.38(E)(1). Plaintiffs sue Secretary Husted in his official capacity only.

Intervener Gregory Felsoci's role in this case merits a more detailed explanation. Felsoci resides in Akron, Ohio and works as a carpenter. He considers himself a member of the LPO. Felsoci filed one of the successful

protests with Secretary Husted that resulted in the removal of Plaintiff Earl and other LPO candidates from the Ohio May 2014 primary ballot.

Felsoci testified at the evidentiary hearing before this Court on March 13, 2014. His testimony demonstrates that he lacks even a basic understanding of the nature of the protest he agreed to sign. For example, the guileless dupe Felsoci repeatedly referred to the misdeed that motivated him to protest Plaintiffs' petitions as the LPO's gathering of "votes" without disclosing those who gathered them were being paid to do so. His decision to act as a protester came about after a Republican friend, John Musca, showed him an unidentified document which Musca claimed to have found at a local coffee shop. Felsoci could not as much as accurately describe the nature of the document Musca showed him and was at an utter loss to explain why he believed the truth of the assertions the document contained. He said he believed it because he read it.

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

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

Republican Party orchestrated the protest that Felsoci signed. That inference, while serving as color commentary. Instead, the Court is called upon to determine the constitutionality of Ohio Revised Code § 3901.38(E)(1) on its face and as applied. Nonetheless, it seems fair to acknowledge the inference, especially in light of the fact that Felsoci's attorneys elicited evidence demonstrating that the Ohio Democratic Party, or its operatives or supporters, provided assistance to Plaintiffs in their efforts to gather petition signatures to qualify for the Ohio May 2014 primary ballot.

B. Ohio Revised Code § 3501.38(E)(1)

The statute at issue states as follows:

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 of the Revised Code. 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.*

Ohio Rev. Code § 3501.38(E)(1) (emphasis added). As a practical matter, the statute requires paid circulators of candidate petitions to provide the name and address of the person or entity who paid them in the "employer information box"

that appears on the bottom of each part petition form. The circulator does not fill out the employer information box until after all of the signatures are obtained, and hence, the people whose signatures the circulator solicits never see the payor information. Rather, that information is provided to the Ohio Secretary of State when the petition is filed.

The Ohio General Assembly enacted this statute, in part, in response to fraud committed by petition circulators who were hired to gather signatures for Green Party candidate Ralph Nader when he sought to appear as a candidate for President of the United States in the November 2004 Ohio general election. The Court will not recount those circumstances of fraud in detail as they are discussed at length in at least three decisions: *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Blankenship v. Blackwell*, 341 F. Supp. 2d 911 (S.D. Ohio 2004); *In re Protest of Evans*, No. 06AP-544–48, 2006 WL 2590613 (Ohio App. 10th Dist. Sept. 11, 2006). In a nutshell, the petition circulators that Ralph Nader hired gathered 14,473 signatures for his candidate petition. The local boards of elections found only 6,464 of those to be valid. After conducting a thorough hearing on the protest, then Ohio Secretary of State Kenneth Blackwell invalidated 2,756 of the those 6,464 signatures. See *Nader*, 545 F.3d at 462–67. Although signatures were invalidated for a variety of reasons, 1,956 were disqualified on this basis of actual fraud. See *id.*

Felsoci and Secretary Husted adduced additional evidence of more recent

fraud by paid petition circulators at the evidentiary hearing the Court conducted in this matter. The Court discusses that evidence in detail below in its analysis of Plaintiffs' facial challenge to the statute.

C. Plaintiff's Petitions and Intervener's Protest

In November 2013, Oscar Hatchet contacted Robert Bridges, who serves as the LPO's Political Director and Vice Chair of the LPO's Executive Committee. Hatchet offered the LPO his services as a professional circulator under the name Easy Access Petitions ("Easy Access"). Bridges hired Easy Access to collect signatures for LPO Candidates for Governor and Lieutenant Governor (Plaintiff Earl and Sherry L. Clark, respectively) and Ohio Attorney General (Steven R. Linnabary). In the role of petition circulator, Hatchet acted as an independent contractor and was not an employee of the LPO.

Hatchet collected 636 signatures for Earl and Clark and 743 for Linnabary. The LPO paid Easy Access \$1,785 for the signatures Hatchet obtained for Earl and Clark and about \$500 for the signatures Hatchet obtained for Linnabary. Hatchet shipped the petitions to Bridges with the employer information blocks left blank. At the protest hearing, Hatchet averred he did so after he had a conversation with Bridges about the need to complete the employer information blocks, during which Hatchet asked Bridges whether he wanted that portion of the part petitions filled out. Protest Hr'g Tr. 94–97, ECF No. 63-1. At the hearing in the instant case, Bridges indicated he did not give Hatchet any instructions as to

whether to fill out the employee information box, although Bridges believed it was not necessary to do so because Hatchet was an independent contractor.

The LPO also paid another circulator, Sara Hart, to obtain signatures for its candidates' petitions. It is unclear whether Hart worked for Easy Access, but in the protest proceeding before Secretary Husted, the parties stipulated that the LPO compensated her in some manner for acquiring signatures. Hart also left the employee information box blank on the part petitions she submitted to the LPO.

Earl and Clark filed their nominating petition to appear as the LPO candidates for Governor and Lieutenant Governor with Secretary Husted on February 4, 2013. The petition consisted of 191 part petitions with 1,478 signatures. The part petitions were then transmitted to local boards of elections to verify the validity of the signatures. The local boards determined that 830 of the signatures were valid. Because the number of signatures exceeded the 500 required by Ohio election law, Secretary Husted certified Earl, Clark, and Linnabary as LPO candidates for the May 2014 Ohio primary election.

Felsoci and two other individuals then filed protests with Secretary Husted on February 21, 2014. The protesters argued that the LPO candidates failed to comply with the employer disclosure requirement of Ohio Revised Code § 3501.38(E)(1). They also asserted the circulators were not members of the

LPO as required by Ohio revised Code § 3513.05.

Secretary Husted referred the protests to Professor Bradley A. Smith to conduct a hearing and issue a report and recommendation as to disposition of the protests. Professor Smith conducted the hearing on March 4, 2014 and issued his report and recommendation on March 7, 2014. See Report and Recommendation, ECF No. 57-3.

Professor Smith found that the signatures Hatchet and Hart gathered violated Ohio Revised Code § 3501.38(E)(1) because they failed to provide the name and address of the person or entity who paid them in the employer information box on the part petitions. *Id.*, PAGEID # 1100. Professor Smith therefore recommended that the part petitions containing those signatures be ruled invalid. *Id.* He rejected the protesters' contention that the circulators were not members of the LPO for the purpose of gathering signatures. *Id.*, PAGEID # 1095.

Secretary Husted adopted Professor Smith's report and recommendation the same day. ECF No. 57-4. As a result of the invalidation of the signatures gathered by Hatchet and Hart, the LPO candidates no longer had the requisite 500 valid signatures to appear on the May 2014 Ohio primary ballot. Having failed to qualify for the primary ballot, Earl, Clark, and Linnabary cannot appear on the ballot for the November 2014 Ohio general election.

Plaintiffs filed their third motion for a preliminary injunction the same day.

Mot. Prelim. Inj., ECF No. 57.

D. Procedural History

From the outset, this case has entailed Plaintiffs' efforts to appear on Ohio's May 2014 primary ballot and, having done so, the Ohio ballot for the November 2014 general election. Plaintiffs' claims involve Ohio's requirements for submitting petitions containing signatures of Ohio voters as a condition to appearing on the ballot. Thus far, Plaintiffs have successfully overcome two significant hurdles placed in their paths. First, Plaintiffs successfully moved for a preliminary injunction asking the Court to enjoin enforcement of Ohio's prohibition against using petition circulators who reside in states other than Ohio. Mot. Prelim. Inj., ECF No. 3; Prelim. Inj., ECF No. 18. Second, Plaintiffs sought and obtained another preliminary injunction enjoining retroactive application of S.B. 193, which stripped Plaintiffs of the opportunity to appear on Ohio's May 2014 primary ballot. Second Mot. Prelim. Inj., ECF No. 17; Prelim. Inj., ECF No. 47.

Plaintiffs filed their amended complaint and third motion for preliminary injunction on March 7, 2014. Am. Compl., ECF No. 56; Third Mot. Prelim. Inj., ECF No. 57. Felsoci moved to intervene on March 10, 2014. Mot. Intervene, ECF No. 58.

The Court conducted the informal preliminary conference on Plaintiffs' third motion for a preliminary injunction on March 11, 2014 pursuant to Southern District of Ohio Civil Rule 65.1(a). Counsel for all parties were present and

participated in the conference. As a result of the conference, the Court scheduled the matter for an evidentiary hearing to take place on March 13, 2014. Also on March 11, 2014, Felsoci and Secretary Husted filed their memoranda in opposition to Plaintiffs' third motion for a preliminary injunction. Mem. Op., ECF Nos. 58, 60.

At the March 13, 2014 evidentiary hearing, the Court heard the testimony of live witnesses, subject to cross examination. The Court heard additional testimony on March 14 and 17, 2014. The parties filed closing briefs on March 18, 2014.

II. STANDARD OF REVIEW

The Court considers and balances four factors when considering a motion for a preliminary injunction: “(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” *Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 627 (6th Cir. 2013) (quoting *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004)). The factors are not prerequisites to injunctive relief; rather, the Court must balance them to determine whether they weigh in favor of granting an injunction. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). The moving party bears the burden of justifying the

issuance of an injunction, including showing likelihood of success and irreparable harm. *Id.*

III. DISCUSSION

A. Likelihood of Success

Plaintiffs advance three grounds for their third motion for preliminary injunction. First, they assert Ohio Revised Code § 3501.39(E)(1) is unconstitutional on its face. Second, Plaintiffs maintain the same statutory provision is unconstitutional as applied to them. Third, Plaintiffs argue Secretary Husted changed relevant Ohio law and those changes cannot be applied to Plaintiffs retroactively. The Court will address these arguments *seriatim*.

1. Facial Challenge to Ohio Revised Code § 3501.38(E)(1)

Plaintiffs assert that the employer identification requirement of Ohio Revised Code § 3501.38(E)(1) is unconstitutional on its face because it impermissibly burdens their First Amendment right to engage in political speech. They contend the statute cannot survive the exacting scrutiny standard as that standard is applied to such disclosure requirements. That is, Plaintiffs argue the employer identification requirement in the Ohio statute chills political speech and is not substantially related to a significant state interest. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010). Secretary Husted and Felsoci contend that Plaintiffs' facial challenge fails because the employer identification requirement places only a minimal burden on Plaintiffs' First

Amendment rights, and the requirement serves Ohio's significant interest in detecting and deterring fraud in the signature gathering process.

The Sixth Circuit Court of Appeals recently explained the difference between facial and as applied challenges:

A facial challenge to a law's constitutionality is an effort "to invalidate the law in each of its applications, to take the law off the books completely." *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009) (en banc); see also *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("a 'facial' challenge . . . means a claim that the law is 'invalid in toto—and therefore incapable of any valid application.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974))). In contrast to an as-applied challenge, which argues that a law is unconstitutional as enforced against the plaintiffs before the court, a facial challenge "is not an attempt to invalidate the law in a discrete setting but an effort 'to leave nothing standing[.]'" *Connection Distrib. Co.*, 557 F.3d at 335 (en banc) (quoting *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc)). Sustaining a facial attack to the constitutionality of a state law, as the district court did, is momentous and consequential. It is an "exceptional remedy." *Carey v. Wolnitzek*, 614 F.3d 189, 201 (6th Cir. 2010).

Speet v. Schuette, 726 F.3d 867, 871–72 (6th Cir. 2013). "Facial challenges are disfavored." *Citizens United*, 588 U.S. at 398 (quoting *Wa. State Grange v. Wa. State Republican Party*, 552 U.S. 442, 450 (2008)).

In support of their contention that Ohio Revised Code § 3501.38(E)(1) is unconstitutional on its face, Plaintiffs rely primarily on three decisions: *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *Citizens in Charge v. Brunner*, 689 F. Supp.2d 992 (S.D. Ohio 2010) (Sargus, J.); and (*WIN*) *Wa.*

Initiatives Now v. Rippie, 213 F.3d 1132 (9th Cir. 2000).

Plaintiffs assert two rulings in *Buckley* suggest § 3501.38(E)(1) fails exacting scrutiny. First, *Buckley* struck down a provision of a Colorado statute that required petition circulators to wear badges with their names prominently displayed. 525 U.S. at 198. Second, the Supreme Court invalidated a Colorado law that required ballot initiative proponents to submit “detailed monthly disclosures” of the names and addresses of each paid circulator and the amount paid to them. *Id.*

Next, Plaintiffs note that in *Citizens in Charge*, this Court relied on *Buckley* to invalidate an Ohio law that required ballot committees to report the names and addresses of paid circulators, and the amounts paid to them, ruling the law failed exacting scrutiny. *Citizens in Charge*, 689 F. Supp. 2d at 993. The Court observed that past petition fraud in Ohio did not serve as a valid basis to distinguish *Buckley*. *Id.* In addition, the Court concluded that Ohio’s interest in deterring election fraud was sufficiently served by a separate requirement that all circulators—paid and unpaid—disclose their names and addresses. *Id.*

Plaintiffs also rely on the Ninth Circuit’s decision in *WIN*. In that case, the court struck down a Washington law that required the disclosure of persons who collect signatures for initiative petitions and the amounts paid to them. *Win*, 213 F.3d at 1134. The court opined: “We conclude these requirements chill political

speech protected by the First Amendment, and do not advance any substantial state interest.” *Id.*

Secretary Husted and Felsoci maintain that none of the three decisions support Plaintiffs’ facial attack. First, they note that all of the cases upon which Plaintiffs rely entail disclosure requirements for circulators of *initiative* petitions as opposed to *candidate* petition circulators which are at issue in the present case. They correctly point out that these decisions expressly acknowledged the significance of that distinction.

The Court in *Citizens in Charge* explained: “In *Buckley*, the Supreme Court emphasized the difference between payments made on behalf of a candidate compared to those made in support of a referendum. The Court noted that ‘ballot initiatives do not involve the risk of ‘quid pro quo’ corruption present when money is paid to, or for, candidates.’” *Citizens in Charge*, 689 F. Supp 2d at 993–94 (quoting *Buckley*, 525 U.S. at 203). The court in *WIN* made the same observation, quoting the same language from *Buckley*. *WIN*, 213 F.3d at 1139.

Second, Secretary Husted and Felsoci note that the state laws at issue in *Buckley*, *Citizens in Charge*, and *WIN* all required disclosure of the *amount* of money paid to *each* circulator. In *Buckley*, the Supreme Court upheld the Tenth Circuit’s decision to strike down a Colorado provision that required “detailed monthly reports” disclosing the amount of money paid to each circulator. *Buckley*, 525 U.S. at 201–03. Ohio Revised Code § 3501.38(E)(1) contains no

such requirement. At the same time, *Buckley* recognized that the state had a substantial interest in requiring disclosure of the identities of those who paid circulators and the total amounts they spent to obtain signatures. *Id.* at 202, 205. Moreover, the Court approved of the provision of the Colorado statute that, like the Ohio statute at issue, required disclosure of the identities of *all* circulators. *Id.* at 198–99.

Similarly, the Ohio statute at issue in *Citizens in Charge* required disclosure of the *amount* paid to each circulator. In distinguishing the Supreme Court's decision in *Citizens United*, the Court in *Citizens in Charge* acknowledged a state may legitimately require disclosure of the *sources* of money spent to support *candidates*. *Citizens in Charge*, 689 F. Supp. 2d at 993.

The Washington statute examined in *WIN* required disclosure of the identities of *only* paid petition circulators as well as amounts each of them were paid. In striking down the law, the court in *WIN* observed the law targeted paid circulators for special enforcement but did not require the same disclosure of the identities of volunteer circulators. *Id.* at 1139. In contrast to the law at issue in *WIN*, Ohio Revised Code § 3501.39(E)(1) treats paid and volunteer circulators in precisely the same manner: both must disclose their identities.

Ohio Revised Code § 3501.38(E)(1) does not offend any of the constitutional principles set forth in *Buckley*, *Citizens in Charge*, or *WIN*. To the contrary, those decisions all recognize that a state may legitimately require

disclosure of the identities of candidate petition circulators provided paid circulators are not singled out for such disclosure. In addition, all three decisions acknowledge the states' substantial interest in requiring disclosure of the identity of those who pay petition circulators. Here, the challenged statute goes no farther than requiring those two items of information after the signatures have been gathered and before the part petitions are submitted to the Secretary of State.

The Court also considers the evidence and testimony submitted during the evidentiary hearing in this matter as it bears on the degree of the burden Ohio Revised Code § 3501.38(E)(1) places on candidates' and petition circulators' speech, as well as Ohio's interest in requiring disclosure. Secretary Husted and Felsoci adduced testimony at the hearing to support their contentions that the disclosure of the identities of those who pay circulators does not chill political speech and serves the important state interest of deterring and detecting fraud. The evidence they presented also shows that instances of fraud by paid circulators have been significant and continue to occur.

The Court heard the testimony of Matthew Damshroder, Deputy Assistant Secretary of State, who has worked as the Director of Elections for Secretary Husted since 2011. He began working for Secretary Husted after serving as a Director, and later Deputy Director, for the Franklin County, Ohio Board of Elections, a position he held since 2003. Damshroder explained that the

employer information box disclosure serves in both the deterrence and detection of fraud. With regard to the former, he suggested the disclosure provides motivation to the person or entity paying the individual circulator to ensure that the circulator is properly educated and informed of the applicable law because a circulator's improper conduct might reflect negatively on the one who provided compensation. Damshroder also indicated that payor information is helpful to anyone reviewing a petition for fraud because individual circulators are sometimes difficult to locate, and payors might have more accurate contact information.

Damshroder also stated that the employer information on the part petitions provides information in a form that can be cross-checked with another required disclosure, Form 14, by which campaigns disclose expenditures for petition drives. Notably, while there is no evidence of actual fraud in this case, the cross checking made possible by the employer information box on the part petitions, coupled with the Form 14 disclosure, led to the discovery that Plaintiffs failed to comply with Ohio Revised Code § 3501.38(E)(1). Damschroder indicated that local boards of elections and the Secretary do not, on their own initiative, examine part petitions to determine whether they meet the requirements of Ohio Revised Code § 3501.38(E)(1). Rather, due to the limited resources of the Secretary of State's office, Ohio relies on protesters to uncover noncompliance.

Dana Walch also testified at the hearing. Walch served in three different

election-related positions with former Secretary of State Blackwell from January 1999 to January 2005. In September 2004, Walch became the Director of Legislative Affairs for the Secretary. In that role, he was familiar with discussions that led to the passage of Ohio Revised Code § 3501.38(E)(1). Walch confirmed that the fraud committed by Ralph Nader's paid circulators was a major part of the reason for including the payor disclosure provision in the challenged statute.

The Court also heard the testimony of Brandon Lyndagh, who is a co-owner of the public affairs firm Strategic Public Partners ("SPP"). SPP has run nine statewide issue campaigns and has coordinated efforts to collect signatures for campaign petitions in Ohio. SPP has participated in the collection of more than one million signatures.

Lynaugh described some of the cheating by paid circulators he has encountered in the course of his work at SPP. For example, he recalled a 2006 effort during which local law enforcement officers caught several paid circulators committing fraud. Lynaugh also indicated that fraud by paid circulators occurred in a 2009 voter registration effort.

In addition, Lynaugh explained that a circulator may commit fraud simply by obtaining names and addresses from a telephone book rather than spending an afternoon on a street corner gathering legitimate signatures. He stated he was aware of a paid circulator who was caught doing just that within the past year.

Lynaugh also testified that, in the industry, there is no ambiguity as to

whether a paid circulator was required to complete the employer information box on part petitions. He was not aware of any instance of a paid petition circulator refusing to provide the information and stated that the disclosure requirement did not prevent him from obtaining the circulators he needed for his petition efforts. Further, Lynaugh indicated he had never heard of harassment of the companies he hired to circulate petitions as a result of the disclosures. Similarly, no commercial petition-circulating firms ever expressed to him that the disclosure requirement impaired their ability to hire individual petition circulators.

In addition, Lynaugh testified that in his experience, commercial petition-circulating firms are not concerned about which side of an issue they work on and opined the ability to obtain signatures for a variety of issues is an indication of talent. He gave an example. Specifically, during one petition drive, one half of SPP worked for one candidate and the other half worked for his opponent. Lynaugh also expressed that transparency as to who is paying for petition circulation is advantageous because both the press and public expect it in this day and age.

Lynaugh also has experience with volunteer petition circulators. He stated that he has never encountered a single instance of a volunteer circulator committing fraud. Lynaugh described the difference in the degree of risk of a paid circulator committing fraud compared to a volunteer circulator doing the same as "night and day."

The Court will now make factual findings based on the evidence before it and determine the significance of the evidence to Plaintiffs' facial challenge to Ohio Revised Code § 3501.38(E)(1). The record supports Secretary Husted's assertion that Ohio Revised Code § 3501.38(E)(1) was passed in response to significant fraud on the part of paid candidate circulators. In the 2004 protest of Ralph Nader's campaign petition, paid circulators gathered more than 14,000 signatures. The local boards of elections found only 6,464 of those to be valid. Former Ohio Secretary of State Kenneth Blackwell invalidated 2,756 of the those signatures. See *Nader*, 545 F.3d at 462–67. A total of 1,956 were disqualified on the basis of actual fraud.

The testimony of Brandon Lynaugh tends to show that the problem of fraud by paid circulators continues to exist, and he was specifically aware of an incident that occurred within the past year in which a paid circulator was caught copying names and addresses from a telephone book. Lynaugh further stated that, in his experience, the rate of fraud by paid circulators exceeds that of volunteer circulators.

Lynaugh's testimony also tends to dispel Plaintiffs' assertion that Ohio Revised Code § 3501.38(E)(1) chills political speech. He was unaware of any instances of the disclosure requirement resulting in harassment or otherwise acting to chill or burden paid petition circulators or those who pay them. Indeed, Lynaugh opined that in today's political climate, disclosure and transparency are

valued over anonymity.

Although Lynaugh's testimony is anecdotal, he is part owner of a public relations firm that has gathered more than one million signatures in Ohio, and he has worked with both paid and volunteer circulators in the course of his career. The Court finds that Lynaugh's testimony was credible, and, given the depth and breadth of his experience, deserves some weight.

The testimony of Walch confirms that, in large measure, Ohio Revised Code § 3501.38(E)(1) was enacted in response to the actual fraud committed in 2004 by Ralph Nader's paid circulators. Matthew Damshroder's testimony explains the role the statute plays in deterring and detecting fraud.

Based on the evidence presented at the hearing in this matter, as well as other evidence submitted in this case, the Court finds by a preponderance of the evidence that the disclosure requirements of Ohio Revised Code § 3501.38(E)(1) do not significantly chill political speech. Furthermore, the Court finds by a preponderance of the evidence that the challenged statute is substantially related to Ohio's significant interest in deterring and preventing fraud in the candidate petition process.

In sum, applicable law permits states to require disclosure of identities of candidate petition circulators (provided paid circulators are not singled out for such disclosure) as well as the identities of those who pay them. Moreover, the evidence adduced at the evidentiary hearing shows that the disclosure

requirements at issue do not significantly burden political speech, and the requirements are substantially related to a significant state interest. In the alternative, even if Ohio Revised Code § 3501.38(E)(1) is not substantially related to a significant state interest, the Court would still reject Plaintiffs' facial challenge because the statute's disclosure requirements only minimally burden political speech and the state's interest is sufficient to warrant that slight burden. Accordingly, the Court holds that Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their claim that Ohio Revised Code § 3501.38(E)(1) is unconstitutional on its face.

2. As-Applied Challenge to Ohio Revised Code § 3501.38(E)(1)

Plaintiffs contend that even if Ohio Revised Code § 3501.38(E)(1) is not unconstitutional on its face, the provision is nevertheless unconstitutional as applied to them because it placed a significant burden on the exercise of their First Amendment right to engage in political speech. Secretary Husted and Felsoci maintain that Plaintiffs' as-applied challenge fails because the evidence in the record shows that the disclosure requirement at issue had no chilling effect on Plaintiffs' political speech.

Secretary Husted and Felsoci are correct. The record contains no evidence to support Plaintiffs' contention that the payor disclosure requirement chilled their First Amendment freedoms. Rather, the evidence before the Court demonstrates that the disclosure requirement at issue did not burden Plaintiffs'

political speech in any meaningful way.

Notably, at the protest hearing, the circulator LPO hired, Oscar Hatchet, expressed no reservations about completing the employee information box. Regardless of whether he ever discussed the matter with Bridges, Hatchet indicated he was willing to provide the information because he “wanted [his] signatures to count.” *Id.* at 97. The disclosure requirement apparently had no chilling effect on Hatchet.

Plaintiffs also offer the testimony of LPO officer Kevin Knedler and LPO gubernatorial candidate Charles Earl, both of whom suggest that Ohio Revised Code § 3501.38(E)(1) severely burdens their First Amendment rights because application of the statute resulted in the disqualification of LPO candidates from the May 2014 primary ballot. Plaintiffs’ argument misses the mark. The relevant inquiry is whether *compliance* with the disclosure requirement of Ohio Revised Code § 3501.38(E)(1) severely burdens rights secured by the First Amendment. In other words, the *disclosure requirement* itself did not curtail Plaintiffs’ rights; rather, the harm they suffered occurred because Plaintiffs *violated* the statute even though it would have been relatively simple to comply with it. In that regard, Plaintiffs do not articulate how requiring the petition circulators they hired to disclose their identities and the identities of those who paid them burdened Plaintiffs’ First Amendment right to engage in political speech.

Aside from that, Plaintiffs rely on colorful hypothetical scenarios to

demonstrate a chilling effect, such as a devout Catholic who wants to fund petition circulation in support of same sex marriage, or a son paid by his father to circulate a petition for his political party's candidate, thereby risking the ire of his mother, who is a member of a different party. Their efforts fall short, as the facts of Plaintiffs' hypothetical questions shed no light on the impact of Ohio Revised Code § 3501.38(E)(1) on Plaintiffs or the circulators they hired.

Evidence of harassment of petition circulators is also absent. The only example Plaintiffs provide is the conduct of Felsoci's counsel toward adverse witnesses at the protest hearing. That example does not suffice.

For the above reasons, the Court holds that Plaintiffs have failed to demonstrate a likelihood of success on their as-applied challenge to Ohio Revised Code § 3501.38(E)(1).

3. Retroactive Change in Ohio Law

Lastly, in their third motion for a preliminary injunction, Plaintiffs argue the Court should grant relief because Secretary Husted impermissibly changed Ohio law and applied that change retroactively, suggesting he "moved the goal post" because previously independent contractors were not required to fill in the employer information box on part petitions. Secretary Husted and Felsoci maintain that prior to the events giving rise to this case, Ohio law was, and remains, that all paid circulators must complete the employer box on part petitions. They also assert that Ohio law requires the Ohio Secretary of State to

invalidate any petition or part petition that fails to comply with the mandatory provisions of the Ohio Revised Code. Plaintiffs fail to respond to these arguments or discuss their retroactive application theory in their reply memorandum. The Court therefore deems Plaintiffs to have abandoned their third ground for injunctive relief.

In any event, Plaintiffs' third ground lacks merit. Ohio law has never contained such an exception for independent contractors, and prior to the events that gave rise to this matter, Ohio courts and Secretary Husted indicated paid circulators were required to fill in the employer information box on part petitions with the name and address of the payor regardless of whether the circulator was an employee or independent contractor. See *Rothenberg v. Husted*, 129 Ohio St. 3d 447 (2011) (accepting as reasonable Secretary Husted's assertion that Ohio Revised Code § 3501.38(E)(1) requires paid circulators to disclose the payor in the employer information box); *In re Protest of Evans*, No. 06AP-544-48, 2006 WL 2590613 (Ohio App. 10th Dist. Sept. 11, 2006) (finding Ohio Revised Code § 3501.38(E)(1) requires the circulator to disclose the identity of the entity that directly paid the circulator, and finding the employer/independent contractor distinction irrelevant).

The notion that independent contractors are exempt from the disclosure requirement appears to be little more than urban legend based on a misreading of *Rothenberg*. Further, the earlier Directives of the Ohio Secretary of State to

which Plaintiffs refer have no bearing on the issue. Those Directives constitute instructions to the local boards of elections and do not purport to be the law of Ohio as it pertains to protest proceedings before the Secretary of State. Moreover, both Directives expired long before the events giving rise to this case took place.

To reiterate, Plaintiffs waived their retroactive application argument, and the argument lacks merit. For these reasons, the Court holds that Plaintiffs are not likely to succeed on their assertion that Secretary Husted improperly applied a novel interpretation of Ohio Revised Code § 3501.38(E)(1) to them retroactively.

In sum, Plaintiffs have failed to show they are likely to succeed on the merits of any of the grounds they advance in their third motion for a preliminary injunction.

B. Irreparable Harm

Plaintiffs assert that this case implicates their First Amendment rights, and violation of those rights constitutes irreparable harm.

It is well established that even a temporary violation of First Amendment rights constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, however, no violation of the First Amendment has occurred. And while Plaintiffs will suffer the harm of being excluded from the Ohio May 2014 primary ballot, as well as the November 2014 general ballot, that harm was self-inflicted.

Consequently, the Court finds Plaintiffs will not suffer the requisite irreparable harm in the absence of a preliminary injunction.

C. Harm to Others

Plaintiffs argue an injunction would not harm others. Secretary Husted argues Ohio's interests will suffer if the Court takes away the Ohio General Assembly's prerogative to deter and detect fraud in the candidate petition process through the challenged disclosure requirements. The Court does not intrude upon the Ohio legislature's prerogative lightly and finds that this factor weighs against granting an injunction.

D. Public Interest

The Court finds that in this instance, the public interest is best served by allowing Ohio to acquire the identities of petition circulators and those who pay them in order to detect and deter fraud in the election process.


E. Balancing the Factors

All of the factors weigh against granting injunctive relief. Accordingly, the Court declines to issue a preliminary injunction.

IV. DISPOSITION

Based on the above, the Court **DENIES** Plaintiffs' third motion for a preliminary injunction. ECF No. 57.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT