Before Ohio Secretary of State

Jon A. Husted

In Re: Protest of Carl Michael Akers Challenging Certification of Steven R. Linnabary as Libertarian Party Candidate for Attorney General	)	
And	)	before Hearing Officer Bradley A. Smith
Protests of Gregory A. Felsoci and Tyler King Challenging Certification of Charles R. Earl and Sherry L. Clark as Libertarian Candidates for Governor and Lt. Governor	)	

REPORT AND RECOMMENDATIONS

I. BACKGROUND

On December 30, 2013, Steven R. Linnabary filed with the Secretary of State, pursuant to Ohio Revised Code § 3513.05, a Declaration of Candidacy and Nominating Petition for Attorney General, consisting of 94 separate petition papers and 970 signatures, pursuant to Ohio Rev. Code § 3513.05. On February 6, 2014, these petition papers were transmitted to local boards of elections to determine the validity of signatures. The local boards returned 92 valid part-petitions containing 519 valid signatures, more than the 500 valid signatures required by Ohio Rev. Code § 3513.05.

On February 4, 2014, Charles R. Earl and Sherry L. Clark filed with the Secretary of State, pursuant to Ohio Revised Code § 3513.05, a Declaration of Candidacy and Nominating Petition for Governor and Lieutenant Governor, consisting of 191 separate petition papers and 1478 signatures, pursuant to Ohio Rev. Code § 3513.05. On February 6, 2014, these petition papers were transmitted to local boards of elections to determine the validity of signatures. The local boards returned 190 valid part-petitions containing 830 valid signatures, more than the 500 valid signatures required by Ohio Rev. Code § 3513.05.

On February 18, the Secretary certified Linnabary, Earl and Clark as Libertarian Party candidates for the State's May 6 primary ballot. On February 21, 2014, pursuant to Ohio Rev. Code §§ 3513.05 & 3501.39, Gregory A. Felsoci and Tyler King filed protests against the certification of candidates Earl and Clark, and Carl Michael Akers filed a protest against the certification of candidate Linnabary.

Pursuant to Ohio Rev. Code § 3513.05, hearings on all three protests were scheduled for Tuesday, March 4, with notice to the Protestors and to Linnabary, Clark, and Earl ("Candidates").[1] At the request of protestors, several witnesses were served with subpoenas to testify and/or to produce documents.[2]

Tyler King withdrew his protest at the start of the hearing on March 4. Because of the substantial overlap between both the legal claims of Felsoci (against candidates Earl and Clark) and Akers, and the evidence necessary to prove those claims,[3] this singular report reviews the facts and law and makes recommendations pertaining to both protests.

II. LEGAL CLAIMS

The Felsoci protest against Candidates Earl and Clark, and the Akers protest against Linnabary, raise the same objections.

1. Both protestors allege that the Candidates failed to comply with Ohio Rev. Code § 3501.38 (E) because paid circulator Oscar C. Hatchett, Jr. failed to "identify the name and address of the person employing the circulator to circulate the petition, if any." Protestor Felsoci makes the same claim regarding

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[1] The hearings were originally scheduled for Monday, March 3 but were rescheduled due to winter storm warnings and the closure of downtown offices on Friday, February 28, due to power system outage.

[2] Two witnesses were served but did not honor the subpoenas-Eileen Voorhees and James Winnett. Mr. Winnett, through counsel, stated that he was unable to appear for medical reasons. Voorhees did not respond. Witness Sara K. Hart did not respond and there is question as to whether her subpoena was properly served. Several other witnesses honored the subpoenas only in part, asserting numerous objections through counsel, including Mark A. McGinnis, Ohioans for Liberty, Inc., and the Strategy Network, LLC. Second-best solutions to most of these objections were eventually agreed to by counsel for these witnesses and for Protestors. Where no agreement was reached, however, the compressed timeframe for holding these hearings made it impractical to compel full compliance within the necessary timeframe. Perhaps more importantly, while the lack of full compliance may have presented the Protestors from setting forth all the facts they would have liked, it is the Hearing Officer's belief that sufficient facts are on the record to reliably adjudicate these protests.

[3] In the interest of saving time, counsel for Mr. Linnabary and for Mr. Akers agreed that all testimony and exhibits adduced in the Felsoci protest against the candidacies of Earl and Clark would be incorporated into the record in the Protest of Akers, except to the extent that Counsel might raise objections not already raised in the Felsoci hearing. The same counsel represented candidates Linnabary, Earl, and Clark. Akers's counsel was offered the opportunity to examine witnesses as they appeared during the Felsoci protest, but chose not to do so.

part petitions submitted by circulator Sara Hart on behalf of candidates Earl and Clark.

2. Both protestors allege that the Candidates failed to comply with Ohio Rev. Code § 3513.05, which provides that a "petition be circulated only by a member of the same political party as stated by the above candidate," because circulator Hatchett was not a member of the Libertarian Party. In addition, Protestor Felsoci makes the same allegation about circulators Hart, Eileen Voorhees, Samuel Runta, Emily Baker and Andrew Goldsmith.

3. In responding to the Protest, Candidate Linnabary asserts that Protestor Akers lacks standing to bring a protest under Ohio Rev. Code § 3513.05 because a protest may only be filed "by 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 for the candidate who declaration of candidacy the elector objects to…." Linnabary asserts that Akers is not a member of the Libertarian Party of Ohio and so ineligible to file a protest.

III. FACTS

As noted above, this protest arises from efforts made from mid-November, 2013 through February 4, 2014, to gather sufficient signatures to qualify LPO candidates for the ballot. The following findings of fact, based on the documents presented and the testimony of witnesses, are grouped loosely in accordance with the legal issue to which they are most relevant. However, they should not be presumed irrelevant to other legal issues in the case.

Standing of Protestor Akers

1. LPO bylaws state that "Membership in the Party shall consist of registered voters who participate in the Libertarian Primary or otherwise cause their voter affiliation in the state voter database to be 'Libertarian.'" Candidates Ex. 1. The Party's website states, "Are you fiscally responsible and socially accepting? You are a Libertarian." Akers Ex. D.

2. Carl Michael Akers stated that he has not voted in a primary election since 2004. He has voted in general elections since that time. Akers stated that he has voted for Democrats and Republicans. He has not voted for Libertarian candidates in the past. He stated that he chooses candidates based on their philosophy. He described his understanding of the LPO philosophy as "that government with governs least, governs best." Based on that understanding of the party philosophy, he states, "I can embrace that… I am there." He states that he is "fiscally responsible and socially accepting," and that he wishes now, and did at the time of filing his protest, to be affiliated with the Libertarian Party of Ohio. He stated that he believes that the Libertarian Party will benefit from more careful adherence to state laws on petitioning, specifically the

requirements of 3501.38 (E) regarding disclosure of the employer of a petitioner. Tr. 249-53. Akers has never voted in a Libertarian Party primary or otherwise caused his voter affiliation in the state voter database to be listed as "Libertarian." He has not contributed financially to the LPO or other parties and candidates. Tr. 245, 255.

Compliance with Ohio Rev. Code § 3501.38 (E) (Failure to Complete Employer Information Box)

3. Robert Bridges is the Vice-Chair of the Executive Committee and Political Director of the LPO. Tr. 35. In November 2013 Mr. Bridges was contacted by Oscar C. Hatchett, Jr., who offered his services as a professional circulator to assist LPO candidates to qualify for the 2014 primary ballot. On behalf of the LPO, Bridges hired Oscar Hatchett, dba Easy Access Petitions, to collect signatures for its candidates, including Earl and Clark and Linnabary. Tr. 37-39.

4. Hatchett eventually collected 662 signatures for candidates Earl and Clark, and 775 signatures for candidate Linnabary. Hatchett billed the LPO for his services as Easy Access Petitions, receiving payment and reimbursements of approximately $1785 for signatures for Earl and $500 or more for signatures for Linnabary. He was paid for all of the signatures gathered. Felsoci Ex. P-14; Tr. 40-43; Akers Ex. B. Hatchett shipped his completed petitions to Bridges without completing the employer information box, based on his prior experience as a petitioner. Tr. 96-97. At some point, probably in mid-January 2014, the LPO ended the contractual relationship with Hatchett due to lack of funds. Tr. 45.

5. At all times Hatchett was an independent contractor, and not an employee of the OLP. The OLP did not withhold payroll taxes, establish, monitor, or supervise working hours, provide Hatchett with an office or other equipment other than blank petitions, provide instructions on acquiring signatures, set work rules, or even, with rare exceptions, converse with Hatchett. Prior to this hearing, Bridges had never met Hatchett. Tr. 37, 57-58, 98-99.

6. Hatchett has been a professional petition circulator for several years. During this time he estimates that he has circulated approximately 10,000 part petitions, all as an independent contractor. He has never completed the employer statement box on any part petition. During this time he has never, to his knowledge, had a petition part invalidated for failure to complete the employer statement box. Tr. 94, 98-99.

7. As noted supra, fn. 2, Sara K. Hart did not testify at the hearing. However, evidence introduced demonstrated that that Hart has worked as a paid petitioner in 2012. Felsoci Ex. P-18. Robert Bridges understood from a phone call with Hart on approximately January 23, 2014, that she was working with Oscar Hatchett to obtain signatures for LPO candidates. He assumed that she

was being paid by Hatchett. Tr. 49-51. The LPO did not pay Hart for any services. Tr. 50. Hart was known to Hatchett from past campaigns as an professional petitioner who worked for campaigns as an independent contractor. Tr. 87-88. He knew that she was collecting signatures for the LPO and assumed, but had no factual knowledge that she was being paid by the LPO for gathering signatures. He has never employed Hart as an employee or independent contractor. Tr. 96-97.

8. Mark A. McGinnis testified on behalf of Ohioans for Liberty that Ohioans for Liberty did not employ or pay Hart. Tr. 138, 145. Similarly, Ian James testified that he was "not certain" if Hart was paid for gathering signatures by James's company, the Strategy Network. Tr. 228. He was requested to review his company's files for any records by noon on March 5, and reported on March 5 that Strategy Network had no records of paying Hart. During the hearing, this Hearing Officer found both Mr. McGinnis and Mr. James to be evasive, non-responsive, and not credible as witnesses. Mr. McGinnis made frequent invocation of ill-defined and questionable claims to attorney-client privilege. No affirmative evidence was adduced at the hearing that either Ohioans for Liberty or the Strategy Network paid Hart to gather signatures. However, given Hart's known history as a paid circulator, the LPO's lack of knowledge of her in any volunteer capacity, and the understanding of Mr. Hatchett, who worked with her in gathering signatures for Earl, and Mr. Bridges (both of whom the Hearing Officer found very credible), there is reason to believe that Hart was paid, or that she intended or intends to be paid, for her work in gathering signatures. Candidates have stipulated that Hart was a paid petitioner. Tr. 54-55.

9. I conclude that Hart did not circulate petitions as an "employee" of any "employer," as those terms are commonly used in the field of employment, labor, and wage and hour regulations. The evidence supports that conclusion that Hart circulated petitions as an independent contractor for an unspecified entity.

10. Hart eventually submitted approximately 240 signatures for Earl and Clark. She did not complete the employer information box. Felsoci Ex. P-22.

Compliance With Ohio Rev. Code § 3513.05 (Party affiliation of Circulators)

11. Petition circulator Oscar Hatchett has not voted in any party primary in the last two calendar years. Tr. 101. Mr. Hatchett states that he is an "unaffiliated voter," and has never been a member of the Libertarian Party or any other political party. Tr. 97-98. In the "Circulator Statement" included on each part petition filed by Hatchett, it states, "I am a member of the Libertarian Party…." The word "Libertarian" was already filled in when the petitions were given to Hatchett. Tr. 61-62, 89.

12. Petition circulator Sara Hart has not voted in any party primary in the last two calendar years. Felsoci Protest, p. 4. On September 9, 2013, Hart completed a Booth Worker Application for the Summit County Board of Elections in which she stated, under penalty of perjury, that her party affiliation was "Democrat." Felsoci Ex. P-20.

13. As it became apparent to Mr. Bridges and LPO Executive Committee Chairman Kevin John Knedler that the Earl/Clark campaign might not obtain sufficient signatures to qualify for the May primary ballot, they attempted to reach out to supporters in the party and allies outside the party for assistance. Tr. 45-47, 72-75. Felsoci Ex. P-82. These included potential allies in the "Tea Party," "Ron Paul people," "independents," and others. Among those others were Ohio Democratic Party Chair Chris Redfern (by Knedler), Tr. 77-78, and James Winnett, former LGBT Outreach Director for the Ohio Democratic Party and now an executive at The Strategy Network (by Bridges). Bridges knew Winnett from their working together on the Freedom to Marry initiative. Bridges did not know of Winnett's affiliation with The Strategy Network. Tr.47. Neither Bridges nor Knedler requested specific assistance from the Democratic Party or the Strategy Network, nor did they discuss any plans for assistance in getting Earl and Clark on the ballot. Tr. 49, 78-79.

14. Eileen Voorhees is an employee of the Strategy Network. Tr. 158. Between January 30 and February 2, 2014, Voorhees circulated three part petitions, collecting 27 signatures to place Earl on the ballot (25 of which were eventually found to be valid by local boards). Felsoci Ex. P-71. On January 20, 2014, Voorhees signed a petition to qualify Jim Prues as a Democratic candidate for Congress in Ohio's First Congressional District. Felsoci Ex. P-70. Also on January 20, 2014, Voorhees signed a petition to qualify David Pepper as a Democratic candidate for Ohio Attorney General. Felsoci Ex. P-67. Each petition to qualify a candidate required Voorhees to affirm that she was "of the same political party as stated above by the candidate," i.e. the Democratic Party. Voorhees has not voted in a primary in the past two calendar years. Felsoci Protest p. 4.

15. Emily Baker is an employee of the Strategy Network. Tr. 155. Between February 2 and February 3, 2014, Baker circulated two part petitions, collecting 3 signatures to place Earl on the ballot. Felsoci Ex. P-60. On January 20, 2014, Baker signed a petition to qualify David Pepper as a Democratic candidate for Ohio Attorney General. Felsoci Ex. P-61, affirming that she was "of the same political party as stated above by the candidate," i.e. the Democratic Party. Baker stated that she completed the petition statements identifying herself as a member of the Libertarian Party, but Baker was a visibly tense, nervous witness and in light of the testimony of Mr. Bridges, that he filled in that information, the testimony of other witnesses that the information was pre-filled, and the similarity in printing style on various petitions, the Hearing Officer believes Baker is mistaken on this point and that the information was pre-filled. Baker also testified that she is not a member of any political party and has no

membership with the LPO, and no affiliation other than circulating the petition. Tr. 171-72. Baker has not voted in a primary in the past two calendar years. Tr. 176, Felsoci Protest p. 4.

16. Andrew Goldsmith is a student at Ohio University and an unpaid intern with the Strategy Network. Tr. 180, 182. On February 1st and 2nd, 2014, at the request of Strategy Network COO Steven Latourneau, Goldsmith circulated a petition, collecting 2 signatures to place Earl on the ballot (one of which was found to be invalid). Tr. 182, Felsoci Ex. P-53. Goldsmith has not voted in a primary in the past two calendar years. Tr. 181, Felsoci Protest p. 4. Goldsmith testified that he is not a member of the Libertarian Party or any other party, but is politically unaffiliated. Tr. 184-85.

17. Samuel Runta is an employee for the Democratic Party caucus in the Ohio House of Representatives. He previously was a page for House Democratic Leader Armond Budish and has worked as a volunteer or intern on a series of campaigns for Democratic Party candidates. Runta also does odd jobs on an hourly basis for the Strategy Network. Tr. 189-192. He was asked by Ian James to circulate petitions for candidates Earl and Clark. Tr. 193. Between January 29 and February 2, 2014, Runta circulated several petitions, collecting 23 signatures to place Earl on the ballot (17 of which were eventually found to be valid by local boards). Felsoci Ex. P-50. Runta states that he has attended Libertarian Party events in the past, and that though he has considered himself "in line with Democratic values," he is not a member of the Democratic Party. He also states that he has told friends that he is a Libertarian. Tr. 195-98. Runta has not voted in a primary in the past two calendar years. Tr. 198, Felsoci Protest p. 4.

IV. LAW

The Protesters in these matters put forth a considerable amount of evidence in support of their claims, and some witnesses seemed prepared to go to considerable lengths to avoid providing evidence. In the end, however, there is little dispute as to the relevant facts. Rather, each grounds for protest, and Linnabary's argument that Mr. Akers lacks standing to protest, ultimately appear to fall on interpretation of the Ohio Rev. Code. Unfortunately, neither Title 35 of the Ohio Rev. Code nor the relative handful of cases of that interpret the provisions at issue in this protest are exemplars of clarity.

One who takes the job of interpreting Title 35 will find that the Ohio Supreme Court commands a liberal interpretation of election laws: "Courts must liberally construe election laws in favor of persons seeking to hold public office to avoid restricting the right of electors to choose from qualified candidates." *State ex rel. Lynch v. Cuyahoga Cty. Bd. of Elections*, (1997), 80 Ohio St. 3d 341, 343; *State ex rel. Davis v. Summit Cty. Bd. of Elections* (2013), 137 Ohio St. 3d 222, 226. The Court has even extended this approach to the

statutory qualifications for law enforcement office, holding that "courts must liberally construe in favor of the person seeking to hold office … limitation[s] on the right to be an eligible candidate for sheriff, so as not to restrict the right of electors to choose from all qualified candidates." *State ex rel. Hawkins v. Pickaway Cty. Bd. of Election* (1996), 75 Ohio St. 3d 275.

One who takes the job of interpreting Title 35 will also find that Ohio courts command strict compliance with election laws: "The settled rule is that election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is." *State ex rel. Barletta v. Fesrsch* (2003), 99 Ohio St. 3d 295.

These commands are not so contradictory as they may first appear. One may interpret a statute liberally, and then demand strict compliance with the statute, so construed. That is the approach adopted here.

A. Standing

Candidate Linnabary asserts that Protestor Akers is not a member of the Libertarian Party of Ohio and so, pursuant to Ohio Rev. Code § 3513.05, Para. 13, ineligible to file a protest. Paragraph 13 restricts protests to members of the "same political party as the candidate," but does not define what it means to be a member of a political party.

Linnabary argues that LPO bylaws define party members as "registered voters who participate in the Libertarian Primary or otherwise cause their voter affiliation in the state voter database to be 'Libertarian.'" Because Akers has not previously vote in a Libertarian primary, or "otherwise cause[d his] voter affiliation to be listed as 'Libertarian,'" Linnabary argues that he does not meet the membership requirements.

The difficulty here in interpreting 3513.05 is that "party membership" in the United States is a remarkably flexible concept. Americans who have never contributed financially to a party, taken formal steps to "join" a party, or attended a party function routinely describe themselves as "Democrats," "Republicans," "Libertarians," or members of some other political party. Indeed, one may offer oneself as a candidate for a party nomination without having done any of those things. What then, legally, constitutes a party member?

While Paragraph 13 provides no direct answer for potential protestors, Paragraph 7 of § 3513.05 does provide a definition for signers of petitions and petition circulators: "[A]n elector is considered to be a member of a political party if the elector voted in that party's primary election within the preceding two calendar years, or if the elector did not vote in any other party's primary election within the preceding two calendar years." Although this definition states that it is "[f]or purposes of signing or circulating a petition of candidacy

for party nomination or election," it provides a logical place to look when interpreting Paragraph 13. Using that definition, Akers has standing to protest.

To require compliance with a party's internal definitions, as Candidate Linnabary suggests, would create a number of difficulties. First, it would create the unusual result that a person with a right to sign and circulate petitions as a party member for one candidate in a primary might not be able to protest perceived illegalities or fraud by another candidate in that same primary. It would also produce a number of interesting scenarios. For example, a voter might be a "member" of a local party or a national party, but not a state party, or vice versa: Which membership (or lack thereof) should control?

However, even if the Secretary were to adopt Candidate Linnabary's position, the facts demonstrate that Akers meets the definition of a Party member set forth in the LPO's by-laws. Ohio has no mechanism for a voter to change his or her party affiliation except by vote at the next primary of that party. Akers has testified in this official proceeding, and it was not contested, that he wishes affiliate with the Libertarian Party, and this seems to be as strong a legal action to affiliate with the Party as the law allows between primaries. Furthermore, the Party Bylaws state that members are those who "participate" (present tense) in the party primary. In addition to testifying as to his desire to affiliate with the Libertarian Party, Akers has testified that he is eligible to vote in the May Libertarian primary. The clear and uncontested implication is an intent to participate in the May Libertarian primary, thus complying with the LPO bylaws.[4] This office has held that in interpreting Ohio Rev. Code § 3513.19 (A), pertaining to challenges to voters in primary elections on the grounds that the voter is not a member of the party whose ballot has been requested, the Clerk should only challenge the right to vote if the official has personal knowledge that the voter is a member of another party. No evidence has been introduced that would allow a challenge to a request by Akers for a Libertarian ballot in the May primary.

Protestor also asserts that even if Akers lacked standing, the Secretary would have independent authority to conduct a hearing into possible violations of Title 35. Because Protestor meets the statutory requirements and the LPO bylaws for protesting under § 3513.05, it is not necessary to address this legal claim.

I conclude that Carl Michael Akers has standing to make this Protest.

B. Compliance with Ohio Rev. Code § 3513.05, Party Affiliation

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[4] The LPO did not have a party primary in the years prior to 2010. While the LPO bylaws have no temporal "look-back" period, clearly Akers has had little chance to vote in an Ohio Libertarian primary. Even the most loyal party members may not vote in every primary election.

As discussed above, Ohio Rev. Code § 3513.05 provides that "[A]n elector is considered to be a member of a political party if the elector voted in that party's primary election within the preceding two calendar years, or if the elector did not vote in any other party's primary election within the preceding two calendar years." Protestors concede that all of the circulators in question—Hatchett, Hart, Voorhees, Baker, Goldsmith and Runta—meet these requirements in that none of the circulators have voted in any other party's primary within the preceding two calendar years. Protestors, however, argue that this is merely a "presumption" which may be rebutted by evidence to the contrary.

If § 3513.05 is merely a rebuttable presumption, then Protestors claim would have legs. Oscar Hatchett clearly testified that he considered himself an unaffiliated voter. Hart signed a sworn statement that she was a Democrat approximately 90 days before she began circulating petitions for Earl and Clark. Circulator Voorhees did not honor her subpoena, but signed two petitions for Democratic candidates for office just days before circulating petitions as a Libertarian. Circulator Emily Baker also signed a petition for a Democratic candidate just days before she began petitioning as a Libertarian. Baker and Andrew Goldsmith both testified that they did not consider themselves affiliated with the Libertarian Party. Samuel Runta has a long history of work for Democratic Party organizations and candidates. However, if the presumption is not rebuttable, all of this evidence is meaningless—none of these petitioners have voted in another party's primary in the preceding two calendar years.

Protestors rely on the authority of *State ex rel. Olsen v. Indus. Comm'n of Ohio* (1967), 9 Ohio St. 2d 47, 50 ("a presumption established by a statute not designating it as conclusive is subject to rebuttal in the same manner as any other presumption") (citing *State ex rel. Pivk v. Indus. Comm'n* (1937), 130 Ohio St. 208, 212).

The problem with Protesters argument is that § 3513.05 does not state that voters meeting the two-year look back requirement are "presumed" to be members of a party, but rather that they are "considered" to be members of a party. While "considered" is a soft verb, suggesting some option for "reconsidering," it is normally conclusive, not merely a presumption. While "considered" can mean "to [have thought] carefully about," it also means, "to regard or deem to be," or to "think, believe, or suppose." Dictionary.com at http://dictionary.reference.com/browse/considered. The cases cited by Protestors relating to "presumption" indicate "considered" does have a stronger meaning than "presumed." The statutory section at issue, Ohio Rev. Code 4123.59, pertaining to payment of industrial compensation death benefits, "(D) the following persons shall be presumed to be wholly dependent for their support upon a deceased employee." However, the statute goes on to use "considered" as a conclusive determination: "No person shall be *considered* a

prospective dependent unless such person is a member of the family of the deceased employee and bears to him the relation of surviving spouse, lineal descendant, ancestor, or brother or sister." (Emphasis added). Thus, it is apparent that in the very statute from which the Ohio Supreme Court drew the doctrine of rebuttable presumption, the legislature intentionally used "considered" as a definitive conclusion as opposed to a presumption.

Protestors cite to *Bell v. Marinko,* 367 F.3d 588 (6th Cir. 2004) for support that § 3513.05 merely creates a rebuttable presumption. That case interpreted Ohio Rev. Code § 3503.02 (D), which provides that in determining a residency for voting purposes, "[t]he place where the family of a married person resides shall be considered to be the person's place of residence… ." In *Bell,* the Plaintiffs argued that this provision was discriminatory and therefore violated the Equal Protection Clause of the Constitution and the National Voter Registration Act, 42 U.S.C. § 1973gg. The Sixth Circuit noted that the constitutionality of the provision might turn on the "conclusiveness of the presumption." The Court found, however, that the Board of Elections had merely treated the statutory language as a rebuttable presumption. The Court expressed no opinion on whether this was a correct reading of the Ohio statute.

Beyond relating to a different, though similarly worded statute, *Bell* is not controlling for reasons particular to that case. First, the parties agreed that in fact the local Board did not interpret the provision as a non-rebuttable conclusion, so the Court had no reason to consider that question. The Court therefore did not opine on the proper construction of the Ohio statute at issue. Further, the Court's ruling was that constitutional equal protection considerations required that the questioned statutory language be interpreted as non-conclusory—in other words, the Court employed the canon of constitutional avoidance, interpreting the statute in a way that avoided potential constitutional conflict, which does not exist in this matter.

Against this, the Ohio Supreme Court appears to have treated the language of 3513.05 as conclusory. In *State ex rel. Green v. Casey* (1990), 50 Ohio St. 3d 716 (Table, No. 90-559, Apr. 19, 1990), the Ohio Supreme Court rejected a challenge to a candidate's eligibility on the grounds that two petition signers had signed a petition for a candidate of a different party after signing the contested petition. The Court made no attempt to analyze the issue as a presumption to be rebutted, holding cursorily, that the challenged "two signers, however, have not voted in a primary election since 1976. Thus, respondents should have considered these signatures to be valid." No further analysis was needed, apparently because the challenged signatories clearly met the minimal statutory requirement to be "considered" a member of a party.

The Court has similarly been reluctant to engage in lengthy, factual reviews of an individual's party affiliation in the context of candidates. For example, in *State ex rel. Davis v. Summit Cty. Bd. of Elections* (2013), 137 Ohio St. 3d 222, the

Court was asked to apply Ohio Rev. Code § 3501.01, requiring an "independent" candidate to be someone "who claims not to be affiliated with a political party," to a particular set of facts. In that case, petitioner Davis sought status as an independent candidate, filing her declaration of candidacy on July 2, 2013. The record showed that less than three weeks earlier, Davis had contributed financially to a Democratic Party candidate. She had financially contributed to another Democratic candidate on April 13, 2013, and she had voted in the Democratic primary in March of 2012, and also in 2008 and 2006. The Court held, nonetheless, that Davis qualified as an independent.

Petitioners argue that if § 3513.05 is non-rebuttable, it would render absurd results – even such well-known partisans as Mitt Romney and Barack Obama could move to Ohio and circulate petitions for any party. Protestors Br. At 10. This is true, perhaps, but a few absurd results are bound to occur when courts or legislatures seek to create bright line rules. Bright line rules, such as that in § 3513.05, have benefits as well. If § 3513.05 is treated as merely rebuttable, then every petition may be open for protest. Given the tight timeframes for certifying candidates, protesting, and resolving protests, the legislature appears to have opted for a bright line rule. Thus, it may seem somewhat galling to some that circulators Baker and Voorhees signed petitions swearing that they were Democrats just days before circulating petitions swearing that they were Libertarians, but the bright line rule of the legislature has corresponding benefits.[5]

Thus while the protestations of some witnesses that they were not members of the Democratic were not of exceptional credibility as those witnesses appeared to self-identify in ordinary activity, that would not affect their standing under § 3513.05. If the language of 3513.05 is not merely a presumption, but the statutory definition, there is nothing improper about a person professing membership in one party, based on the non-legal, common use of the term, and membership in another party based on the statutory definition, for purposes assigned by the statute.[6]

Finally, a more stringent rule such as that favored by the Protestors would severely limit the ability of candidates to petition. It would be very difficult for a

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[5] Again, given the fluid notion of "membership" in political parties in the United States, rapid changes of heart are common – as the Court noted in *Davis, supra.* Particularly, jarring events such as the invasion of Cambodia in 1970, or more recently revelations about National Security Administration surveillance measures, may often be the dramatic moment at which a person declares a new affiliation. The State of Ohio does not attempt to keep track of such moments.

[6] At times this Hearing Officer had the distinct impression that witness Baker was trying–unsuccessfully, thanks to the conclusory operation of the statute—to perjure herself, by denying that she considers herself a Democrat.

candidate to be assured that the signatures gathered were adequate in number if signatures could be disqualified not on the basis of an objective standard, but on the subjective, post-submission determination of officials and courts. This is precisely where the Ohio Supreme Court's guidance of liberal construction, strict compliance should come into play. A strict construction of the statute would likely throw many elections into chaos with numerous protests, and also deprive Ohioans of the opportunity to vote for qualified candidates.

Finally, the construction favored by the Protestors would make it impossible for professional petitioners to assist in circulating petitions for candidates of more than one party in any two-year period. This would dramatically constrict the availability of paid petitioners, an availability that the United States Supreme Court has upheld as a constitutional right of speech and association. *Meyer v. Grant,* 486 U.S. 414 (1988).

I conclude, therefore, that all of the challenged petition circulators meet the requirement of Ohio Rev. Code 3513.05, to be members of the same political party as the candidate for whom they were circulating petitions.

C. Compliance with Ohio Rev. Code § 3501.38 (E), Employer Information

Ohio Rev. Code 3501.38 (E) requires that petition circulators "shall identify … the name and address of the person employing the circulator to circulate the petition, if any." In this protest, it is conceded by Candidates that both Oscar Hatchett and Sara Hart were paid petitioners, and that neither completed this statement on the petitions. The facts clearly show that both Hart and Hatchett were independent contractors, and not "employees" in the sense that that term is used in the field of labor and employment law. Thus question is one of law, not fact.

Protestors argue that § 3501.38 requires independent contractors to complete the employer information box with the name and address of the person paying them for their services. Candidates argue that the requirement applies only actual employees, not to independent contractors.

This provision, relatively new to the Code, has been sparsely and opaquely addressed by Ohio courts. Indeed, both Protestors and Candidates argue that the same passages in the cases support their position.

The only case to address § 3501.38 (E)(1) at length is *In re Protest of Evans,* 2006 WL 2590613 (Ohio App. 2006). Because both Protestors and Candidates argue that *Evans* supports their legal position, it merits an extended discussion.

In *Evans,* the American Cancer Society (ACS) contracted with Arno Political Consultants to gather signatures for a ballot initiative. Arno in turn hired

independent contractors to circulate petitions. *Evans,* ¶ 20. The circulators listed their employer in the petition box as the American Cancer Society, rather than Arno. The Court of Appeals held that "employer," as used in § 3501.38 (E), meant a "typical employment relationship." The Court went on to note the distinctions between "employees" and "independent contractors." *Evans,* ¶¶ 12, 14-19. From this latter discussion it is not surprising that some view *Evans* as creating a sharp division between employees, who would have to complete the employer box, and independent contractors, who would not.

But *Evans* is not so simple. The basis for the protest in *Evans* was not that circulators had listed ACS as the "employer" when, as independent contractors, they should have listed no one (or perhaps themselves), a claim that would be similar to that later brought in *Rothenberg v. Husted, infra.* Rather, the protest was that "some of the circulators identified their employer as the American Cancer Society, *rather than* the professional petition-circulating company that actually employed them. Failure to disclose the *correct* employer, appellee argued, violated R.C. 3501.38 (E)(1)…" *Evans,* ¶ 5 (emphasis added). The trial court in *Evans,* in the words of the Court of Appeals, "granted the appellee's motion on the ground that … failure to provide the *correct* employer information violated R.C. 3501.38(E)(1)." *Id.* ¶ 7 (emphasis added).

Further, the Court began its analysis by citing the dictionary definition of "employ," which would typically encompass an independent contractor relationship: "In common everyday language, the word 'employ' means '1. to hire or engage the services of (a person or persons) … 2. To keep busy or at work,… .' Similarly, it can mean 'a. To engage the services of; put to work; …." *Id.* ¶ 12 (citations omitted). The Court sought to explain why § 3501.38 did not "contemplate a broader relationship," that is to say, the appellants' argument that it should refer not to the person putting the circulator to work and paying the circulator directly, but to the ultimate source of payment, in the case ACS. *Id.* ¶ 13. What the Court sought to illustrate was simply that "the trial court correctly concluded that ACS was not the person employing affected circulators.." *Id.* ¶ 20

The Court was well aware that "Arno… retained and paid circulators as independent contractors." *Id.* Yet at no point did it suggest that those paid circulators had no obligation to complete the employer information box, and had that been its holding, much of the opinion would serve no purpose. Rather, the Court merely held that "Arno and/or other entities provided all employment-related services to the circulators, had direct contact with the circulators, and directed their day-to-day work … we agree with the trial court that ACS was not the person employing the affected circulators for purposes of R.C. 3501.38 (E)(1). *Id.* ¶ 23.

The Court then engaged in a lengthy analysis of legislative history. The Court noted the distinction between the old "payer" disclosure of former Rev. Code §

3519.05 and the "person employing" disclosure of § 3501.38 (E). The old "payer" statement, the Court noted, was on the front of the petition and completed prior to circulation, thus being visible to those asked to sign the petition. The "person employing" statement, in contrast, is on the back of the petition and need not be completed until the circulator has completed the circulation of the part petition. "Therefore, the purpose of the employer disclosure is not to inform a potential signer about the financial support for the petition effort. Rather, the purpose of the employer disclosure is to inform election officials about the entity that hired the circulator. As we noted previously, this type of disclosure makes sense given the legislature's intent to curb fraud and dishonesty in the petition process, particularly as it relates to business entities that pay circulators on a per-signature basis." *Id.* ¶ 45.

Noting legislative concerns about possible dishonesty by circulators with an economic incentive to get signatures, good or bad, *Evans* added, "Against this backdrop it makes sense that the legislature would have focused its efforts on requiring the disclosure of the person or entity paying a circulator, particularly a circulator being paid on a per-signature basis. Thus, our reading of the statute as requiring the disclosure of the entity that not only directly controls the manner and means of the circulator's work, but also directly pays the circulator, furthers this legislative purpose." *Id.* ¶ 29.

The *Evans* court then addressed the appellants' claim that disclosing entities other than ACS as the payer would infringe on their First Amendment rights of association, and prohibit them from using paid circulators. The Court noted that "[a]ppellants are free to use paid circulators; those circulators must simply disclose *the correct* employment information." *Id.* ¶37 (emphasis added). The assumption was that independent contractors would have to disclose the identity of the person paying them—otherwise there would have been no claim to interference with freedom of association, as disclosure would not have been required at all since the Arno circulators were independent contractors. This understanding of all parties is reflected in the Court's opinion: "[Appellants] have presented no evidence that disclosing an entity *other than ACS* would be any more restrictive than disclosing ACS as the person employing the affected circulators." *Id.* ¶ 37.

In summary, the clear underlying assumption of *Evans* was that paid circulators would disclose *some* person as the employer. To exempt independent contractors from the disclosure provisions would allow disclosure of paid petitioning to be avoided by the simple expedient of using independent contractors rather than employees.

The Ohio Supreme Court's singular decision on the current statute is *Rothenberg v. Husted* (2011), 129 Ohio St. 3d 447, a five paragraph, per curiam opinion. In *Rothenberg,* petition circulators who appear to have been independent contractors. Some of these circulators completed the employer

information box on the petitions with the name and address of Arno Political Consulting (APC), itself an independent contractor that had hired the circulators. Relators argued that because the circulators were independent contractors, they were not "employees" and therefore should not have listed APC as the employer. Relators argued that these independent contractors should have listed themselves as their own employers. Merit Br. Of Relators, Candidates Ex. 3. The Secretary argued, in response, that the independent contractors were not required to list themselves as employers, since they are not "employees" of themselves. The Secretary further argued, however, that circulators should identify the person paying them to circulate petitions. Merit Br of Secretary of State, p. 4-5, Candidates Ex. 4.

The Supreme Court's substantive discussion of § 3501.38 (E) is set forth here in its entirety:

> "Relator's legal claims lack merit, and the secretary of state's construction of the applicable statutory provisions is reasonable and is entitled to deference. Part-petitions of compensated circulators are not improperly verified and subject to invalidation simply because the circulators, who might actually be independent contractors, listed the entity or individual engaging or paying them to circulate the petition as "the person employing" them."

129 Ohio St. 3d at 447.

The question, then, is what "is reasonable" and "entitled to deference"? Is it merely the interpretation that the statute does not require independent contractors to list themselves as their own employers (an interpretation that alone would have resolved the case), or does it include the second proposition offered by the Secretary, that independent contractors must name the person paying them? The Supreme Court's brief opinion leaves unclear whether this was simply a case of "no harm, no foul"—the circulators included information that was not required but would not have misled voters—or whether the independent contractors had a duty, apparently performed by some but not all independent contractors to disclose who contracted for the work. In either case, *Rothenberg* does not contradict or overrule *Evans.*

Finally, Candidates argue that Secretary of State Directive 2006-58, issued on August 21, 2006, and 2007-14, issued September 10, 2007, specifically instruct local boards not to invalidate a petition if the employer information statement is "blank or incomplete." Candidates argue that these Directives are the binding law of the State. However, both Directives apply, by their own terms, only to specific ballot issues. Directive 2006-58 applies by its terms only to the 2006 petitions for the proposed "Smoke Less" constitutional amendment. Directive 2007-14 applies, by its terms, only to the referendum of Substitute Senate Bill No. 16. Both Directives, therefore, expired with the ballot issues to

which they were directed. Furthermore, while Directives may inform the public, they are binding only on the local boards to whom they are addressed, and may not override the provisions of the Revised Code.

The current legal position of the Secretary of State on the interpretation of § 3501.38 (E) was set forth nearly more than 30 months ago in the *Rothenberg* litigation:

> [U]nder R.C. 3501.38 (E)(1), paid circulators must disclose the person or entity that gives work to them and pays for that work. …
>
> [T]here is no requirement in R.C. 3501.38(E)… that a paid circulator must be an "employee" of anyone. The term "employee" is not used in either R.C. 3501.38 (E)(1)… and the use of the phrase "employing" in R.C. 3501.38 (E)(1) does not automatically infer an employer/employee relationship is required by the statute. An "employer" may "employ" an employee, an independent contractor, or any person by simply giving work to that person and paying them for it. Certainly, a petition-circulating company may "employ" independent contractors to circulate petitions… .

Merit Br of Secretary of State, p. 4-5 (citations omitted).

In *Rothenberg,* the Ohio Supreme Court held that "the secretary of state's construction of the applicable statutory provisons is reasonable and is entitled to deference."

This is a purely legal issue, as there is no dispute of facts. Under the Secretary's previously stated interpretation of the provision at issue, as set forth in *Rothenberg,* and supported by the decision in *Evans,* the petitions fail to meet the requirements of § 3501.38 (E)(1). "Election laws are mandatory and require strict compliance and that substantial compliance is acceptable only when an election provision expressly states that it is." *Barletta,* 99 Ohio St. 3d 295.

V. CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, the Hearing Officer offers the following conclusions and recommendations:

1) that Carl Michael Akers has standing to Protest the certification of Steven R. Linnabary as Libertarian Party Candidate for Attorney General;

2) that signatures gathered for Candidates Earl and Clark and Linnabary by circulators Voorhees, Baker, Goldsmith, and Runta should be ruled valid under the Ohio Rev. Code sections raised by the Protestors;

3) that signatures gathered for Candidate Linnabary by circulator Hatchett fail to comply with Ohio Rev. Code § 3501.38 (E)(1) as it has been interpreted by the Secretary and controlling legal authority, and all such part petitions should be ruled invalid;

4) that signatures gathered for Candidates Clark and Earl by circulators Hatchett and Hart fail to comply with Ohio Rev. Code § 3501.38 (E)(1) as it has been interpreted by the Secretary and controlling legal authority, and all such part petitions should be ruled invalid;

Respectfully submitted,

/s/ Bradley A. Smith

Bradley A. Smith
Hearing Officer