I. Mr. Zieger's Testimony is Relevant and Necessary.

The Hearing Officer, Professor Brad Smith, wrote some twenty years ago:

in the United States the political system is under the firm control of two major parties. So powerful is this dominance that since 1928 only one third-party candidate for President has received more than seven percent of the vote. One factor in this sustained dominance is state ballot-access legislation that is designed to present obstacles to third parties. This Note will argue that much of this legislation is unconstitutional, that the Supreme Court has failed to acknowledge this unconstitutionality because of its refusal to consider the
real-world effects of ballot-access restrictions, and that stricter constitutional scrutiny is warranted.


Professor Smith further lamented the "government and private harassment" that historically has followed minor party candidates:

In 1948, for example, newspapers in New Haven, Pittsburgh, Boston, Milwaukee, and Cleveland discouraged support for Henry Wallace—a former Cabinet member and Vice President of the United States—by publishing the names, addresses, and occupations of people who signed his ballot petitions. During the presidency of Woodrow Wilson, Socialist Party members were tarred and feathered and their meetings broken up by vigilantes, despite the fact that the party held majorities in many city councils and was represented in the U.S. Congress. Although such egregious intimidation is uncommon today, it still is “an extraordinary act for Americans to vote for a third party.” In order to vote for the candidate of their choice “they must often endure ridicule and harassment from neighbors and friends . . . .”

*Id.* at 198 (footnotes omitted).

Unfortunately, not much has changed since Professor Smith penned his remarks. Obstacles, like employer statements and residence requirements, are still thrown in the path of circulators -- the bed and butter of minor parties and candidates -- to be called out at a moment's notice if need be. The major parties still harass minor candidates and their supporters. This litigation is proof. And it is bipartisan harassment. Ralph Nader experienced similar treatment from the Democratic Party in 2004. *See generally* Mark R. Brown, *Policing Ballot Access: Lessons From Nader's 2004 Run for President*, 35 Cap. U. L. Rev. 163 (2006) (Exhibit 1).

The hard question is how to get at this abuse. The answer is the First and Fourteenth Amendments. The First Amendment prohibits states from using ballot access mechanisms to
manipulate the outcome of elections and otherwise protect the major parties from competition. See, e.g., Clingman v. Beaver, 544 U.S. 581, 609 (2005) (Stevens, J., dissenting). Although this sentiment was offered in dissent, there is no reason to believe that a majority of Justices in Clingman did not share them.\(^1\) The Supreme Court, after all, has ruled on several occasions that government has no “power to dictate electoral outcomes.” See, e.g., Cook v. Gralike, 531 U.S. 510, 525-26 (2001) (holding that government cannot use pejorative labels to describe candidates on its ballots, in part, because government has no power to “dictate electoral outcomes”).\(^2\)

This prohibition on manipulating electoral outcomes does not give way to the government's use of lawful means. Just as a license to drive does not immunize a motorist from vehicular homicide charges, the use of lawful means does not insulate the government from challenges to its unconstitutional ends. Dozens of First and Fourteenth Amendment precedents

\(^1\) Justices Souter and Ginsburg joined Justice Stevens. Justice O'Connor's concurring opinion, which was joined by Justice Breyer, similarly explained that a state's “asserted interests [in restricting the ballot] [cannot be] merely a pretext for exclusionary or anticompetitive restrictions.” Id. at 598, 603 (O'Connor, J., concurring). There is no reason to believe, moreover, that any of the other Justices would accept the claim that a state has a legitimate interest in preventing competition. In Clingman, Justice Thomas relied on Oklahoma's interests in “preserv[ing] the political parties as viable and identifiable interest groups,” id. at 594, protecting parties' “precious resources,” id. at 596, minimizing voter confusion, id. at 594, and preventing party raiding, id. at 596. None of these translates to preventing competition in the general election. If “States were able to protect the incumbent parties in the name of protecting the stability of the two-party system in general, we might still have the Federalists, the Anti-federalists, or the Whigs.” Id. at 617 n.8 (Stevens, J., dissenting).

\(^2\) "Government thus has no business excluding a candidate from the official ballot because he has too much support. Nor does government have any constitutional business excluding a candidate because of his potential impact on the outcome of the general election. After all, that is what candidacies are designed to do—impact electoral outcomes.” Mark R. Brown, Policing Ballot Access: Lessons From Nader's 2004 Run for President, 35 Cap. U. L. Rev. 163, 219 (2006).
prove this true; improper motives often taint otherwise lawful actions. Firings, prosecutions, and denials of governmental benefits have all been ruled unconstitutional because of illicit objectives. See, e.g., *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 285 (1977) (holding that retaliatory discharge of public school teacher because of speech violates First Amendment, as long as speech is a “substantial part,” even though additional lawful reasons exist).

Consequently, the use of otherwise lawful election requirements -- like signature demands, sore loser laws, employer statements -- cannot insulate illicit governmental objectives from constitutional scrutiny. A state's use of otherwise lawful demands to exclude political speech because of its popularity, content, or impact, see, e.g. *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 682-82 (1998) (holding that publicly owned television station's debate could not exclude third candidate because of his views); is still unconstitutional. Likewise, the government's exclusion of a candidate because of his popularity, views or potential impact is certainly illegal.

Of course, here the Plaintiffs are faced with an ostensibly private actor who is arguably motivated by political animus. Arguably, and this is what Plaintiffs seek to prove, the protest against Plaintiff-Earl is motivated by a desire to keep him off the ballot because he is too popular. If government did this, the First Amendment would surely be violated. But what if a private actor does it?

Private wrongs ordinarily do not conflict with the Constitution. The two major parties, however, are not purely private actors -- at least not in the constitutional sense. The Supreme Court has stated on several occasions that the country's two major parties can, in the context of elections, be treated as state actors.
Smith v. Allwright, 321 U.S. 649 (1944), offers a textbook example. In Allwright, the Democratic Party of Texas forbade African-Americans from voting in its primaries. The Court ruled that this constituted impermissible state action: “[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state.” Id. at 660. It continued, “[The] right to participate in the choice of elected officials without restriction by any state because of race [is] not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.” Id. at 664. When delegated power is permitted to interfere in the electoral arena, Allwright teaches, a major party is cloaked in state garb—it is a state actor.

Nine years later, the Court ruled in Terry v. Adams, 345 U.S. 461 (1953), that a subset of a major party—the Jaybird Democratic Association—acted in the state's stead in Texas's primary electoral arena. There, the Jaybird party excluded African-Americans from voting in its pre-primaries. Justice Black, speaking for a plurality, observed that one of the “admitted party purposes” was to exclude African-Americans from voting while escaping the Fifteenth Amendment's command. For a state to permit such a duplication of its election processes is to permit a flagrant abuse ... of the Fifteenth Amendment.” Id. at 469.

The Court in Morse v. Republican Party of Virginia, 517 U.S. 186 (1996), which held that section 5 of the federal Voting Rights Act applies to major party conventions (as well as primaries), ruled that the Republican Party's use of registration fees for delegates to its Virginia state convention was subject to the preclearance requirements of section 5 of the federal Voting Rights Act. Justice Stevens, writing for himself and Justice Ginsburg, equated section 5's reach
to that of the federal Constitution, as explained in *Terry* and *Allwright*. As in the White Primary cases, Stevens observed, Virginia delegated candidate selection powers to the Republican Party and afforded the selected candidate automatic ballot access. The only difference here is that Virginia has not required its political parties to conduct primary elections to nominate their candidates.” *Id.* at 199. But this grant of “more expansive” power, Stevens concluded, was all the more reason to hold that “the Party acted under authority of the Commonwealth.” *Id.* at 199-200.

Justice Stevens explained that the Court had previously “rejected the contention that the right to vote depends on the success rate of the candidates one endorses.” *Id.* at 218. “The operative test ... is whether a political party exercises power over the electoral process.” *Id.* Justice Stevens then observed that such a “situation may arise in two-party States just as in one-party States.” *Id.* Virginia, after all, was not neutral. It granted “automatic ballot access to only two entities, and requires everyone else to comply with more onerous requirements.” *Id.* at 224 n.36. Along these lines, Justice Stevens noted, “Virginia gives a host of special privileges to the major parties, including automatic access, preferential placement, choice of nominating method, and the power to replace disqualified candidates .... It is perfectly natural, therefore, to hold that Virginia seeks to advance the ends of both the major parties.” *Id.*

Again borrowing from constitutional precedents, Justice Stevens also refused to limit section 5 to claims of racial discrimination. In rejecting the Party's argument, Justice Stevens's opinion strongly suggests that *Terry* and *Allwright* are not Amendment-specific; that is, they are not limited to racial discrimination claims under the Fourteenth and Fifteenth Amendments.
Though not cited in Morse, Justices Stevens and Breyer might have used Bullock v. Carter, 405 U.S. 134 (1972), to support his conclusion. In Bullock, the Supreme Court found Texas's method of assessing filing fees for elected office in violation of the Fourteenth Amendment. Texas law demanded primary candidates to deposit $50 with their party chair in order to appear on their party's ballot, and authorized the respective parties to charge additional fees up to prescribed maximal limits (10% to 15% of an office's annual salary in most cases). All of these additional fees were paid to and retained by the parties, as opposed to the state. Acting under this statutory authority, the Democratic Party commonly set fees at or near the prescribed maxima, without exceptions.

Several Democratic candidates for state and local office, claiming the fees to be invalid under the Fourteenth Amendment, filed suit against their local Democratic Party chairs. No state official was named as a defendant. A three-judge district court relied on Allwright to hold the parties accountable: “It is undisputed that primary elections of political parties are state action and subject to the Fourteenth Amendment.” Carter v. Bullock, 321 F. Supp. at 1360.

On direct appeal to the Supreme Court, the Supreme Court unanimously rejected the Party chairs' “no state action” defense. Rather than respond directly, the Court, per the Chief Justice, deemed the matter irrelevant: “[A]lthough [t]he filing-fee requirement is limited to party primary elections, ... the mechanism of such elections is the creature of state legislative choice and hence is ‘state action’ within the meaning of the Fourteenth Amendment.” 405 U.S. at 140-41.

With or without Bullock, lower courts, see, e.g., Duke v. Cleland, 5 F.3d 1399, 1403, 1406 (11th Cir. 1993) (holding that Republican Party's removal of candidate's name from
presidential primary ballot constituted state action), have concluded that major-party conduct in the course of elections-- like attorneys' use of peremptory challenges to select juries -- constitute state action for purposes of the federal Constitution. The electoral process, after all, is a traditional public function.

Consequently, there is a good deal of precedent for holding that the two major parties are subject to constitutional constraints when, acting with the government's blessing and assistance, they regulate and interject themselves into elections. For this reason, the Fifth Circuit's conclusion that the Texas Republican Party's attempted removal of Tom Delay's name from the state's general election ballot constituted state action was correct. See Texas Democratic Party v. Benkiser, 459 F.3d 582, 589 n. 9 (5th Cir. 2006) (noting that state action was not in dispute and holding that removal of DeLay's name violated the federal Qualifications Clause).

Putting together the constitutional norm -- government cannot manipulate the ballot to exclude candidates with too much support -- with state action theory -- holding that the major parties can be (and often are in the context of ballot decisions) state actors -- the question in this case is whether Ohio's Republican Party is behind, affiliated with, or the cause of the protestor's challenge. If so, if he is simply a pawn, or "innocent agent," of the Republican Party, see, e.g, Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011) (holding that innocent agent or "cat's paw" did not insulate principal with discriminatory animus from liability), and his protest for his principal (the Ohio Republican Party) can violate the Constitution. A principal (the cat) cannot hide behind the actions of its paw. The question here is simply whether Ohio's Republican Party caused the protest. And that question can only be answered by Mr. Zieger. His testimony is vital.
II. Attorney-Client Privilege is No Shield.

Attorney-client privilege does not protect the identity of clients or the amounts paid to attorneys. *See United States v. Ritchie*, 15 F3d 592 (6th Cir. 1994) (rejecting argument that a "constitutionally protected liberty interest in spending large amounts of cash without having to account for it" existed); *In re Grand Jury Investigation*, 723 F.2d 447 (6th Cir. 1983) (identity of client is not protected). *United States v. Leventhal*, 961 F.2d 936 (11th Cir. 1992) (same); *In re Special Grand Jury*, 676 F.2d 1005 (4th Cir. 1982) (fee arrangements are not protected by privilege). Mr. Zieger has no attorney-client privilege defense to disclosing the name of the entity or person paying him or the amount paid.

III. The First Amendment Does Not Insulate Mr. Zieger.

The First Amendment is not a defense to supplying relevant testimony. *See Branzburg v. Hayes*, 408 U.S. 665 (1972). Raising such an argument, of course, is ironic in this case, since Intervenor (through counsel) repeatedly forced colleges students, corporations, and businesses, over First Amendment and attorney-client objections, at the hearing before Professor Smith, to disclose the identities of their employers and payors. What the protestor (through counsel) apparently wants is a double-standard. Circulators, candidates and all others can be forced to disclose the identity of those who supply moneys, and amounts, but protestors are entitled to some sort of immunity. Ohio law may not require this kind of "employer statement" from protestors, but the laws of evidence and First Amendment precedents prove that they can be forced to disclose, when relevnt, in courts of law.
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to allow the examination of Mr. John Zeiger.

Respectfully submitted,

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I certify that copies of this Document were filed using the Court's electronic filing system and will thereby be electronically delivered to all parties through their counsel of record.

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