IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIAN MOORE, et al.,	)	
	)	
Plaintiffs,	)	**Case No. 2:08cv224**
	)	
v.	)	**Judge _________________________**
	)	
JENNIFER BRUNNER,	)	
Ohio Secretary of State,	)	**Magistrate Judge_______________**
in her official capacity,	)	
	)	
Defendant.	)	**ORAL ARGUMENT**
______________________________________	)	**REQUESTED**

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Like most states,[1] Ohio requires that independent candidates for President collect voters' signatures in order to have their (the candidates') names printed on the official ballot. Although the number of signatures demanded by Ohio—5,000—is relatively reasonable when compared with numerical requirements in other states, the hurdles placed in the paths of candidates and circulators in Ohio are horrendous.

In particular, Ohio insists that voters' signatures be collected in a technically proper fashion. Among Ohio's many technical requirements, only residents who are properly registered voters are allowed to circulate candidates' petitions (called "part-petitions" in Ohio). *See* O.R.C. § 3503.06(A). If a circulator is not properly registered (which necessarily includes being resident in Ohio for at least thirty days, *see* O.R.C. §

[1] *See* Trevor Potter & Marianne H. Viray, *Barriers to Participation*, 36 U. MICH. J. L. REF. 547, 567-68 (2003) ("In a majority of states, either no fee or a nominal fee is required, or the states offer the option to submit signed petitions in place of the filing fee.").

3503.06(A)),[2] all of the signatures he or she collected are thrown out.[3] Every signature on a flawed part-petition is invalid under Ohio law.[4] And any Ohio voter—including those registered with the two major parties—can protest any circulator's compliance.[5] Administrative protests challenging circulators' residences and voter registrations are common in Ohio, and often prove successful. *See, e.g., Blankenship v. Blackwell*, 429 F.3d 254 (6th Cir. 2005) (describing the administrative protest filed by Democrats that successfully removed Ralph Nader's name from Ohio's ballot because several circulators were not Ohio residents and were not properly registered to vote in Ohio). Consequently, the two major parties can present a significant obstacle to third-party access.

FACTS

Brian Moore is the Socialist Party USA's candidate for President in 2008. Because of Ohio's burdensome party-access laws, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588 (6th Cir. 2006) ("of the seven states that require all political

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[2] Like most states, Ohio limits its franchise to bona fide residents, *see Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004), who have resided in a particular precinct for a defined duration (length of time). "Bona fide residence" focuses on presence and intent to remain. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). For most purposes, it is the equivalent of "domicile." *See Eastman v. University of Michigan*, 30 F.3d 670, 763 (6th Cir. 1994). "Durational residence," in contrast, incorporates a temporal component. Durational requirements are problematic, in the constitutional sense, because they impose waiting periods. *Id*. Thus, while bona fide residence requirements for voting, welfare benefits, and public education, are valid, *see Dunn v. Blumstein*, 405 U.S. 330 (1972), durational requirements have quite often been struck down under the Equal Protection Clause. *See Eastman*. In the context of voting, for example, the Supreme Court has invalidated durational requirements that exceed fifty days. *See Marston v. Lewis*, 410 U.S. 679 (1973).

[3] *See, e.g., In re Protest of Brooks*, 786 N.E.2d 126, 129 (Ohio Comm. Pl. 2003) (invalidating part-petitions because circulator was not Ohio resident).

[4] *See, e.g., State ex rel. Committee for the Referendum of City of Lorain Ordinance No. 77-01 v. Lorain County Board of Elections,* 774 N.E.2d 239, 249 (Ohio 2002) (throwing out part-petition including properly witnessed signatures because circulator did not witness each signature contained in part-petition).

[5] *See* O.R.C. § 3513.263 ("Written protests against …nominating petitions may be filed by any qualified elector eligible to vote for the candidate whose nominating petition he objects to …. Upon the filing of such protests, the election officials with whom it is filed shall promptly fix the time and place for hearing it, … shall hear the protest and determine the validity or invalidity of the petition.").

parties to nominate their candidates in the state's primary election, Ohio imposes the most burdensome restrictions of both automatic qualification and petition qualification; as a result, it has seen the fewest number of minor parties on the ballot"), Moore seeks to run for President as an independent candidate in Ohio in 2008.[6]

Jennifer Brunner is Ohio's Secretary of State. One of Brunner's duties as Ohio's Secretary of State is to enforce Ohio's ballot-access restrictions, including those found in O.R.C. § 3503.06(A). *See* O.R.C. § 3501(M) (stating that the Secretary of State has the power to "[c]ompel the observance by election officers in the several counties of the requirements of the election laws"); *Rosen v. Brown*, 970 F.2d 169, 171 (6th Cir. 1992) (observing that Ohio's secretary of state "compel[s] compliance with election law requirements by election officials"). Defendant consequently has instructed local election boards to enforce O.R.C. § 3503.06(A) during past presidential elections, and will order local election boards to enforce § 3503.06(A) during the 2008 presidential election.[7] Defendant has also in the past enforced § 3503.06(A) herself, since Ohio's Secretary of State has the final say on whether a candidate appears on Ohio's state-wide ballot. Per Ohio law, Defendant intends to enforce § 3503.06(A) during the 2008 presidential election cycle.

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[6] Note that because Moore is not registered with any political party in Ohio, he cannot be prevented from running as an independent. *See, e.g., In re Nader*, 858 A.2d 1167 (Pa. 2004) (holding that Pennsylvania's "sore loser" law could not be applied to an independent presidential candidate who ran under the banner of a minor party in other states).

[7] Local election boards act as an initial screen in the context of state-wide elections in Ohio; before part-petitions are sent to Defendant, they are scrutinized by local election boards to determine whether the circulators have complied with Ohio law, including § 3503.06. In the past, Defendant has ordered local election boards to enforce § 3503.06's residence and registration requirements for circulators. Defendant will do so again during the 2008 election cycle.

Among the restrictions Ohio's Secretary of State has traditionally enforced, and that Brunner is charged with currently enforcing, is O.R.C. § 3503.06(A).[8] That statute requires that individuals who circulate a candidate's petitions (called "part-petitions") be properly registered Ohio voters who have resided in their voting precincts for thirty-days. Specifically, § 3503.06(A) provides that a person is not eligible to be a circulator of a candidate's petitions unless "the person is registered as an elector and will have resided in the county and precinct where the person is registered for at least thirty days at the time of the next election." O.R.C. § 3503.06(A).

Because of § 3503.06(A), Plaintiff Deron Mikal, who resides in Florida, cannot circulate part-petitions for Moore. Plaintiff Brian Moore, who resides in Florida, cannot circulate his own part-petitions. Because of § 3503.06(A), Ohio residents, like Plaintiff Sherry Suter, who are not registered to vote cannot circulate Mr. Moore's part-petitions.

ARGUMENT

"When a district court is asked to issue a preliminary injunction, it … balances four factors …: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1108-09 (6th Cir. 1995). *See also Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007) (same). *See* FED. R. CIV. PRO. 65(a)

[8] The present version of § 3503.06, which was amended on May 2, 2006, distinguishes between circulators for candidates and circulators of initiatives. Circulators of a candidate's part-petitions must be thirty-day residents who are properly registered to vote in Ohio. Circulators of initiative-part-petitions need only be Ohio residents.

I. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS

The Supreme Court has ruled that states cannot constitutionally prohibit unregistered voters from circulating petitions for ballot initiatives. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court struck down a Colorado law requiring that circulators of ballot initiatives be registered voters. "Petition circulation … is 'core political speech' [and] First Amendment protection for such interaction … is 'at its zenith'." *Id.* at 186-87.[9] Because the voter registration requirement greatly reduced the number of potential circulators, the Court found that it significantly burdened First Amendment rights. *Id.* at 194-95. Moreover, the Court rejected Colorado's claim that registration was needed to properly police signature collection. *Id.* at 196. Voter registration, it found, had little in common with the amenability of circulators to official process.[10]

While *Buckley* addressed initiative-circulators, its logic plainly extends to circulators who seek to collect signatures in order to have a candidate's name placed on the ballot. The Chief Justice's dissent in *Buckley* complained that "it would seem that a State can no longer impose an elector or residency requirement on those who circulate petitions to place candidates on ballots, either." 525 U.S. at 232 (C.J., dissenting). Noting that "[a]t least 19 States [including Ohio] … explicitly require that candidate

[9] The Sixth Circuit expressed similar sentiments in *Citizens for Tax Reform v. Deters,* No. 07-3031, slip op. (6th Cir., March 5, 2007), which invalidated Ohio's ban on paying circulators for each signature they collect: "the First Amendment places a high value on the right to engage freely 'in discussions concerning the need for [political] change,' including change accomplished through petitions and elections." (Quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)).

[10] The Court noted that a *bona fide* residence requirement worked better in this regard, though it did not address whether such a requirement would pass strict scrutiny. *Id*. at 197. Lower courts in the wake of *Buckley* have also invalidated residence requirements. *See infra*.

petition circulators be electors," *id.*, the Chief Justice pointed to O.R.C. § 3503.06 as being one of the laws rendered invalid. *Id.* at 232 n.3.

Both the Second and Seventh Circuits have extended *Buckley* to circulators employed by candidates for public office. *See Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000); *Krislov v. Rednour*, 236 F.3d 851 (7th Cir. 2000). Indeed, while the Second Circuit in *Lerman* noted some differences between issue and candidate advocacy, it found these differences counseled in favor of *more* constitutional protection for candidates. 232 F.3d at 149. No court, to the best of counsel's knowledge, has ruled that *Buckley* does not apply to candidates. Section 3503.06's voter registration requirement, as applied to candidates, is thus patently unconstitutional under *Buckley*. *See also Morrill v. Weaver*, 224 F.Supp.2d 882 (E.D. Pa. 2002) (extending *Buckley* to protect circulators of candidates' petitions); *Yassky v. Kings County Democratic Committee*, 259 F.Supp.2d 210 (E.D.N.Y 2003) (same); *Chou v. New York State Board of Elections*, 332 F.Supp.2d 510 (E.D.N.Y. 2004) (same).

Section 3503.06(A)'s thirty-day residence requirement also falls under *Buckley*'s weight. This requirement, after all, is directly tied to voter registration. Circulators must be thirty-day residents because they must be registered voters. One who is not a thirty-day resident cannot legally register to vote. There is no other separate residence requirement under Ohio law.

Because § 3503.06(A) defines residence in terms of registration—no person can be a circulator "unless the person is registered as an elector and will have *resided in the county and precinct where the person is registered* for at least thirty days at the time of the next election"—excising the registration requirement necessarily guts the thirty-day

residence restriction. The residence requirement has no meaning without voter registration. Without the voter registration requirement, where must one reside for thirty days? Where he *could* be registered? Because Ohio's durational residence requirement is necessarily tied to its voter registration requirement, the two fall together. Put another way, § 3503.06's residence requirement cannot be severed from its registration requirement. They are both invalid.

Assuming that Ohio's durational residence requirement can somehow be severed from its registration requirement, it still fails constitutional scrutiny on its own terms. The Supreme Court in *Buckley* did not address the validity of *bona fide* residence requirements for circulators because Colorado's residence restriction was not challenged. 525 U.S. at 197. The Chief Justice in dissent, however, complained that the majority's rationale certainly applied to both residence and registration requirements: "whether a State can limit initiative petition circulation to state residents, the implication of its reading of *Meyer* [*v. Grant*, 486 U.S. 414 (1988)]—that being unable to hire out-of-state circulators would 'limit the number of voices who will convey [the initiative opponents'] message,—is that under today's decision, a State cannot limit the ability to circulate issues of local concern to its own residents." 525 U.S. at 231 (C.J., dissenting) (citation omitted).

The Chief Justice was surely correct. Because of the clear need for professional assistance, the Supreme Court has found that candidates have a constitutional right to hire circulators. S*ee Meyer v. Grant*, 486 U.S. 414 (1988). Professional circulators, however, are not distributed uniformly across the United States. This fact will often, of necessity,

lead candidates to cross state lines in search of assistance. Excluding non-residents interferes with candidates' First Amendment right to hire circulators.

Lower courts have followed the Chief Justice's logic. In *Frami v. Ponto*, 255 F.Supp.2d 962 (W.D. Wis. 2003), for example, the court struck down Wisconsin's residence requirement for circulators of candidate-petitions. The court relied on the Seventh Circuit's decision in *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000), where the Seventh Circuit stated that "[b]ecause circulating nominating petitions necessarily entails political speech, it follows that the First and Fourteenth Amendments compel states to allow their candidates to associate with *nonresidents* for political purposes and to utilize *nonresidents* to speak on their behalf in soliciting signatures for ballot access petitions." (Emphasis added). Although the *Krislov* court struck down a voter registration requirement, the *Frami* court concluded that this language and the Seventh Circuit's ultimate holding were meant to invalidate residence requirements, too:

> Defendant argues that although the [*Krislov*] court referred frequently and disapprovingly to residency requirements in that case, "these references are dicta at best because the statute under review did not contain a residency requirement" …. Instead, the statute required only that would-be circulators be registered to vote in the relevant political subdivision. Defendant's argument is unconvincing. A registration requirement is a de facto residency requirement. … [T]he court of appeals justified its holding by reference to the Illinois statute's negative impact on the "citizens of the other forty-nine States." Had the court of appeals intended to limit its holding to the statute's voter registration requirement, it would have been pointless to refer to out-of-state residents. Needless to say, residents of the other forty-nine states cannot register to vote in Illinois. Thus, the court of appeals understood the Illinois statute to impose a residency requirement and discussed at length the constitutional problems associated with such requirements.

255 F. Supp.2d at 967.

The court in *Frami* rejected the state's claim that residence requirements serve "the important state interest of insuring that local elections are controlled by local voters

instead of external special interests." *Id.* at 968. Quoting *Krislov*, the court stated that "[t]o the extent this law is designed to ... prevent[ ] citizens of other States from having any influence on Illinois elections, we question its legitimacy. Such laws are harmful to the unity of our Nation because they penalize and discriminate against candidates who wish to associate with and utilize the speech of non- residents." *Id.* "This is the same impulse that has led courts to cast a skeptical eye on laws that prohibit candidates from accepting campaign contributions from out-of-district residents." *Id.* (citing *Van Natta v. Keisling*, 151 F.3d 1215, 1217-18 (9th Cir. 1998)). "[B]ecause 'circulating nomination petitions necessarily entails political speech, it follows that the First and Fourteenth Amendments compel States to allow their candidates to associate with non-residents for political purposes and to utilize non-residents to speak on their behalf in soliciting signatures for ballot access petitions.'" *Id.* (quoting *Krislov*, 226 F.3d at 866).

The *Frami* court also rejected the state's claim that "the residency requirement serves the state's compelling interest in preventing electoral fraud." 255 F. Supp.2d at 969. "Defendant argues that a 'circulator residency requirement helps uncover fraud by insuring that those who circulate nomination papers are subject to subpoena in the event they must be called to give testimony regarding the signatures they obtained' and insures that circulators are subject to arrest warrants, which may only be served in the state, if fraud is uncovered." *Id.* However,

> there are other, less burdensome provisions in the challenged statutes that serve Wisconsin's goals of locating out-of-state petition circulators and preventing mischief in the ballot access process. For instance, petition circulators must provide their name and address, with street and number, at the bottom of each nomination paper and certify that they are aware that providing false information is a prohibited act punishable by a fine or jail time or both. These provisions suggest that the residency requirement is not narrowly tailored to facilitate the state's ability to locate out-of-state petition circulators and discourage fraud. As

> for insuring that residents of other states who circulate petitions are subject to the state's judicial processes, I note that other courts have suggested less onerous methods for achieving that end. In *Chandler v. City of Arvada*, 292 F.3d 1236, 1243-44 (10th Cir. 2002), the Court of Appeals for the Tenth Circuit considered an ordinance prohibiting non-residents of the city of Arvada, Colorado, from circulating city initiative, referendum or recall petitions within the city limits. … [The court concluded that] the city could require circulators to agree to submit to the municipal court's jurisdiction for purposes of subpoena enforcement. The city sought to justify the ordinance on the ground that its subpoena power did not extend to persons residing beyond its borders and therefore it could not compel non-residents to participate in hearings contesting the validity of petition signatures.

Id. at 970.

The Second Circuit in *Lerman v. Board of Elections*, 232 F.3d 135 (2d Cir. 2000), struck down a New York residence requirement for similar reasons. Because New York required local—as opposed to state—residence, the court had no occasion to consider a state-wide residence requirement. The Court's rationale, however, applies equally to local and state-wide restrictions:

> even an election law that requires a candidate to obtain 'only a relatively small number of signatures' still can severely burden the right to engage in interactive political speech under the First Amendment 'if it also preclude[s] the candidate from utilizing a large class of potential solicitors to convey his message, or if it substantially restrict[s] the candidate's ability to choose the means of conveying his message.'

Id. at 148. It continued

> There … is little reason to believe the defendants' assertion that district residents are more likely to have 'some familiarity with persons who sign petitions' or be more qualified to ensure the integrity of the petition circulation process. In an electoral district consisting of many thousands of voters, the likelihood of district residents having any greater 'personal familiarity' than non-residents is rather low.

Id. at 150. *See also Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2000) (striking down city's residence requirement under *Buckley*); *Morrill v. Weaver*, 224 F.Supp.2d 882 (E.D. Pa. 2002) (extending *Buckley* to strike down Pennsylvania's local residence

requirement as applied to circulators of candidate-petitions); *Yassky v. Kings County Democratic Committee*, 259 F.Supp.2d 210 (E.D.N.Y 2003) (applying *Buckley* to strike down New York's local residence requirement for circulators of candidate-petitions); *Chou v. New York State Board of Elections*, 332 F.Supp.2d 510 (E.D.N.Y. 2004) (same).

Ohio's Secretary of State has in the past argued that Ohio's registration and thirty-day residence requirements remain necessary after *Buckley* (1) to prevent voter fraud, and (2) to insure that circulators are amenable to state process. If this is true, one wonders why these same demands are not made of circulators of initiative-petitions, *see* O.R.C. § 3503.06(B)(1) (currently stating that "[n]o person shall be entitled to circulate any initiative or referendum petition unless the person is a resident of this state"), and are not applicable to circulators of petitions for party access in Ohio.[11] Are not circulators of initiative- and party-petitions as likely to commit fraud? Are they somehow more amenable to process?

The truth is that neither of these claims satisfies strict scrutiny. In *Citizens for Tax Reform v. Deters,* No. 07-3031, slip op. (6th Cir. 2008), the Sixth Circuit quoted *Buckley* in stating that "[w]hen a State places a severe or significant burden on a core political right, like here, it faces a 'well-nigh insurmountable' obstacle to justify it. The provision must be narrowly tailored and advance a compelling state interest. Although a state need not present 'elaborate, empirical verification' of the weight of its purported justification when the burden is moderate, it must come forward with compelling evidence when the burden is higher." The court in *Deters* concluded that Ohio's interest

[11] By its terms, § 3503.06(A) only applies to circulators of "candidates'" petitions. It does not apply to circulators of "party" petitions. Nor is there any other Ohio statute that requires the circulators of party petitions to be registered voters or residents of Ohio.

in preventing election fraud did not justify its ban on paying circulators for each signature they collected. Although preventing election fraud is certainly compelling, there was no proof that preventing per-signature payment furthered this goal.

Along these same lines, local residence requirements serve no compelling goal. Residence does not establish familiarity with voters. The quaint notion that local residents all know each other—and know who is properly registered to vote—was long ago surrendered to an increasingly complex and mobile American culture. It is almost comical to expect that resident circulators will "know" more than a trivial number of eligible voters in any given presidential election. Millions of voters participate in each state. Whether resident or not, circulators are not likely to know the voters they canvass.

Assuming that circulators are even *needed* to testify to the validity of voters' signatures—a proposition open to some doubt—non-resident circulators can, consistent with common notions of Due Process, be compelled to attend.[12] Residents and non-residents are no different in this regard. Assuming some sort of statutory impediment to the service of subpoenas beyond Ohio's four corners,[13] residence still provides only

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[12] *See, e.g., Sherman v. Berkson*, 661 A.2d 1266, 1272 (N.J. 1995) ("We believe that, consistent with the principles of *International Shoe* [*v. Washington,* 326 U.S. 310 (1945)], a State agency may require the appearance of witnesses from outside New Jersey."). As *Sherman* makes clear, the question is simply one of statutory authorization and constitutional "minimum contacts." *See* Rhonda Wasserman, *The Subpoena Power:* Pennoyer*'s Last Vestige*, 74 MINN. L. REV. 37, 42 (1989) ("Consistent with the due process clause … states can assert subpoena power over non-resident witnesses if the assertion comports with 'traditional notions of fair play'"). It would appear evident that those who circulate petitions in Ohio would possess the minimum contacts needed to support a proper service of process under *International Shoe* and its progeny. The question then is one of Ohio law. That Ohio has apparently chosen not to allow extraterritorial service of its civil subpoenas, *see* RICHARD M. MARKUS, TRIAL HANDBOOK FOR OHIO LAWYERS § 11:3 (2004) ("A witness whose permanent residence is beyond the reach of the court's process generally cannot be compelled to appear and testify. In Ohio state courts, a subpoena for a civil trial may be served anywhere within the state."); *cf.* LEWIS R. KATZ, ET AL., BALDWIN'S OHIO PRACTICE, CRIMINAL LAW § 61:10 (2003) (observing that out-of-state witnesses in criminal cases can be reached using O.R.C. §§ 2939.25 – 2939.29).

[13] In any event, a statutorily created problem cannot trump a constitutional guarantee. If statutory authority to serve process outside the state is a problem, the answer is to change the service of process statute—not deny citizens their First Amendment rights.

marginal assistance in terms of circulators' amenability to process. Residents, after all, are free to leave Ohio after circulating their petitions, and thus can remain just as "beyond the reach" of administrative subpoenas as non-residents.

A better way to insure attendance is to condition circulators' collection efforts on their agreeing to participate in any administrative hearings that might be held. Whether resident or not, circulators can be required to supply permanent addresses. If they refuse to participate, their collection efforts can simply (and constitutionally) be ignored. Once the alternatives are considered, it becomes clear that residence bears little (if any) relation to a circulator's propensity, willingness, or ability to testify.

Compounding § 3503.06(A)'s inefficiency is its durational nature. Ohio does not require simple domicile (*bona fide* residence); rather, it requires that circulators reside in the precinct where they vote for thirty days. While one might argue that this enhances familiarity with the precinct's voters, it adds nothing to a circulator's potential for familiarity with the state's voters—all of whom are eligible to sign a presidential candidate's nominating papers.[14]

Further, if the state's concern is truly amenability to process, requiring *durational* residence, as opposed to *bona fide* residence, makes no sense at all. Durational residents are no more amenable to process than *bona fide* residents.

Plaintiff recognizes that sporadic rulings have sustained residence requirements for circulators in the context of local elections. The Eighth Circuit in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001), for example, sustained a North Dakota durational residence requirement as applied to circulators of ballot

[14] Ohio law does not restrict circulators to their precincts.

initiatives. *Jaeger*, however, is distinguishable. The state's concern there was insuring local support for a local initiative. Presidential elections, in contrast, are national. Ohio cannot share the same local concern that was present in *Jaeger*. Like it or not, national interests play a role in presidential elections. To the extent Ohio is concerned about local support for presidential candidates, that concern can be addressed by requiring signatory support from 5,000 eligible Ohio voters. Excluding outside participation by supporters as circulators in the presidential selection process is more medicine than our constitutional system can bear.[15]

Ohio's residence requirement is doubly unconstitutional, moreover, because of its durational nature. Not only must circulators be residents, they must reside in a particular precinct for thirty days before the election. The Supreme Court has found on a number of occasions that durational residence is invalid in the context of fundamental rights. *See Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down durational residence requirement for voting). Indeed, durational residence is a serious problem even in non-fundamental settings. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), for example, the Court found that the imposition of a durational residence requirement for welfare benefits violated the right to interstate travel found in the Fourteenth Amendment. Bona fide residence requirements for welfare benefits are fine, but durational requirements penalize movement. The Court reached this same result in the context of health care, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), and recently reaffirmed these results

[15] The same is true of *Idaho Coalition for Bears v. Cenarruso*, 234 F.Supp.2d 1159 (D. Idaho 2001), and *Kean v. Clark*, 56 F. Supp.2d 719 (S.D. Miss 1999). *Cenarruso* sustained a residence requirement in Idaho, while *Kean* sustained a residence requirement in Mississippi. Neither of these cases, however, involved presidential elections. The local interests that justified the laws in those cases are not available here, since *national* interests are at stake here. The lone case on all-fours with the present one is *Nader v. Brewer*, 2006 WL 1663032 (D. Ariz. 2006) (appeal pending), which sustained an Arizona residence requirement as applied to Nader's 2004 presidential election. *Brewer* is simply wrong.

in *Saenz v. Roe*, 526 U.S. 489 (1999) (invalidating durational residence requirement for welfare benefits). This line of authority stands for the proposition that government cannot restrict fundamental freedoms—like speaking out on important issues—to durational residents. Restrictions of this nature violate the Fourteenth Amendment.

Ohio's durational residence requirement for circulators does just that. It limits participation in Ohio's political process to thirty-day residents. It prevents new residents from fully participating. While short durational residence restrictions have been sustained in the context of voting, s*ee Marston v. Lewis*, 410 U.S. 679 (1973) (holding that fifty-day durational residence restriction for voting is valid), rote extension to other political activities makes no constitutional sense. If it did, the placing of political signs in homeowners' yards could be restricted to durational residents. This cannot be the law. Instead, new residents, like old ones, must be allowed to fully exercise First Amendment freedoms absent the most compelling reasons. These freedoms must necessarily include petitioning government.

Ohio's residence requirement also violates Article IV, § 2 of the Constitution of the United States. That provision prohibits states from discriminating against non-residents in terms of "privileges and immunities" or fundamental rights. *See, e.g., United Building & ConstructionTrades Council v. Camden*, 465 U.S. 208 (1984) (holding that "local hire" law was presumably invalid under Article IV, § 2). The Supreme Court has concluded that paid circulators cannot be banned by states from the electoral process. *See Meyer v. Grant*, 486 U.S. 414 (1988). Ohio's ban on non-resident-circulators consequently discriminates against non-residents in terms of pursuing a livelihood in Ohio. This is the classical example of impermissible discrimination under Article IV, §

2. *See, e.g., New Hampshire v. Piper*, 470 U.S. 274 (1985) (striking down state law barring non-residents from practicing law).

For similar reasons, Ohio's residence requirement violates the Dormant Commerce Clause of Article I, § 8. The Commerce Clause has been interpreted to mean that states cannot discriminate against non-residents who seek to pursue a livelihood in the state. *See, e.g., C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) (striking down local law that prohibited non-resident trash companies from doing business in town). Ohio's law prevents non-residents from seeking profit in Ohio by circulating candidates' petitions. It thus flies in the face of the Dormant Commerce Clause. *See generally City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating state law that prohibited importation of trash): *Dean Milk v. Madison*, 340 U.S. 349 (1951) (striking down local law that required milk be processed within geographical limits of jurisdiction).

II. IRREPARABLE INJURY

Plaintiffs are threatened with irreparable injury because the time to collect signatures in Ohio for the 2008 presidential election is running short. Ohio law requires that 5,000 voters' signatures be delivered to Defendant no later than 4 PM on August 21, 2008 for an independent presidential candidate to qualify for the 2008 ballot. *See* Plaintiffs' Complaint at ¶ 9.

III. DEFENDANTS WILL SUFFER NO INJURY

Defendant will suffer no injury should the Court enjoin the enforcement of § 3503.06(A). Voters' signatures on part-petitions must still be valid and verified, meaning that candidates without significant support will not gain access to Ohio's ballot.

IV. THE PUBLIC WILL BENEFIT

Preliminary relief will benefit the public because it will insure that Ohio's presidential election complies with the First Amendment.

V. NO SECURITY IS REQUIRED

Rule 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). As noted by one well-recognized authority, however, "the court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant." C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2954. The Sixth Circuit has observed that security is not mandatory under Rule 65(c), and can be dispensed with in the discretion of the court. *See Moltan Co. v. Eagle-Picher Industries, Inc.,* 55 F.3d 1171, 1176 (6th Cir. 1995). Because Defendant will suffer no harm, economic or otherwise, no security should be required.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move the Court to issue a preliminary injunction against Defendant preventing her from enforcing O.R.C. § 3503.06(A) against Plaintiffs or any other presidential candidates and their circulators in Ohio.

Respectfully submitted,

/s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Complaint, this Memorandum and accompanying Motion were electronically mailed and mailed with first-class postage affixed to the Ohio Attorney General's Office, c/o Richard N. Coglianese (rcoglianese@ag.state.oh.us), Assistant Attorney General, 30 E. Broad Street, 17th Floor, Columbus, OH 43215-3428 (FAX (614) 728-7592), Attorney for the Defendant, on this __ day of March, 2008.

*/s/ Mark R. Brown*________________________
Mark R. Brown