

**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 Frost
	:	
Jennifer Brunner	:	
Ohio Secretary of State	:	
	:	
Defendant	:	

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendant, Jennifer Brunner, in her official capacity as Secretary of State for the state of Ohio, respectfully asks the Court to deny the Motion for Preliminary Injunction. The Motion is premised on the assumption that R.C. §3503.06(A), Ohio's voter/circulator eligibility statute, is unconstitutional. As explained in the accompanying Memorandum of Law, R.C. §3503.06(A) is constitutional. Plaintiffs can show no substantial probability of success on the merits, and are therefore, not entitled to the extraordinary remedy of injunctive relief.

MEMORANDUM OF LAW

I. Introduction

Under Ohio law,

No person shall be entitled to vote at any election, or to sign or circulate any declaration of candidacy or any nominating, or recall petition, 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.

R.C. §3503.06(A). Thus, Ohio law imposes two distinct requirements upon circulators of candidate petitions (known as “part-petitions”): (1) a registration requirement; and (2) an in-state residency requirement.

Plaintiffs Brian Moore, Sherry Suter, and Deron Mikal allege that the registration requirement violates the First and Fourteenth Amendments, as well as the Privileges and Immunities Clause of Article IV, §2 of the United States Constitution [Counts 1 through 3], and that the residency requirement violates the First and Fourteenth Amendments, the Privileges and Immunities Clause, and the Dormant Commerce Clause. They seek a declaration from this Court that R.C. §3503.06 is unconstitutional and a preliminary injunction against the Ohio Secretary of State, Jennifer Brunner, to prohibit her from performing her duty to faithfully carry out the duties of her office. For the reasons that follow, the preliminary injunction should be denied.

II. Legal Argument

A. Plaintiffs’ Cannot Succeed On Their Facial Challenge

The plaintiffs have brought this action as a “facial” challenge to the constitutionality of R.C. §3503.06, not in response to any action taken by the Secretary of State to enforce the statute. The Supreme Court reiterated its disapproval of facial challenges to election laws as recently as last week in *Washington State Grange v. Washington State Republican Party*, 552 U.S. _____ (2008).

The opinion in *Washington State Grange* lists three reasons why courts ought not to declare statutes facially unconstitutional:

(1) By definition, in a facial challenge, the statute has not yet been applied. It follows that the claim of facial invalidity often requires the reviewing court to speculate

about how the statute might be applied, or reach a premature interpretation based on “factually barebones records.” *Id.*, quoting *Sabri v. U.S.*, 541 U.S. 600, 609 (2004);

(2) Facial challenges violate the principle of judicial restraint, which cautions courts not to “anticipate a question of constitutional law in advance of the necessity of deciding it” or “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Id.*, quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) (internal quotations omitted); and

(3) Facial challenges, like all constitutional challenges, frustrate the democratic will of the people when they are successful. *Id.*, quoting *Avotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (internal quotations omitted).

In this case, it is the first consideration that is paramount. As explained more fully in the next section, courts apply a sliding scale of review to election law challenges, whereby a severe restriction on core First Amendment liberties triggers a strict scrutiny, and the state must demonstrate a compelling interest, narrowly served by the statute, in order for the law to survive. Where the law only slightly or incidentally infringes on First Amendment rights, however, the courts must pay more deference, and the statute will be constitutional if it is merely reasonably related to a legitimate state interest.

Especially in the context of election challenges, these are all fact-specific inquiries. Does the in-state residency requirement dramatically increase the cost of securing enough signatures to get a candidate on the ballot? Are there enough eligible circulators living in Ohio, or is the population so sparse that a candidate must enlist

outside help in order to reach enough voters and get the signatures he needs? There is no way this Court can answer these questions in the absence of a factual record.

A facial challenge can only succeed where no set of circumstances exists under which the Act would be valid, or in other words, the law is unconstitutional in all its applications. *Id.*, citing *U.S. v. Salerno*, 481 U.S. 739 (1987). Here it is certainly *possible*, given Ohio's large population, that the pool of available circulators will prove so large that R.C. §3503.06(A) will impose only a slight burden on First Amendment interests. This is especially true in light of the requirement that an independent joint candidate for President need only submit 5,000 valid signatures from registered Ohio electors. R.C. 3513.257. Therefore, from the perspective of a facial challenge, the statute is constitutional. *Washington State Grange*, supra.

The Supreme Court has recognized a second type of facial challenge in the First Amendment context, under which a law may be overturned as impermissibly overbroad because a "substantial number" of its applications are unconstitutional, "judged in relation to the statute's plainly legitimate sweep." *Washington State Grange*, supra, at n.6, quoting *New York v. Ferber*, 458 U.S. 747, 769-771 (1982). The Supreme Court considers the overbreadth analysis "strong medicine" that is used "sparingly and as a last resort." *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988), quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Where, as in this case, the parties have not described the instances of overbreadth, or indeed even made the argument, the Supreme Court has declined to apply the doctrine.

In the absence of any factual record from the plaintiffs, this Court should conclude that the Ohio law is facially constitutional. Therefore, plaintiffs cannot prevail, and their request for an injunction must be denied.

B. An In-State Residency Requirement For Petition Circulators Is Constitutional

According to the Complaint, Plaintiffs Moore and Mikal are Florida residents who wish to circulate part-petitions in Ohio. Ohio's statute, which limits circulation to people who are in-state residents, is a reasonable government regulation. Thus, it is constitutional.

Obviously, every election law or regulation, from voter registration requirements to time and place ordinances for rallies, imposes *some* burden on First Amendment rights. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). When considering whether such laws are constitutional, courts have applied a sliding scale of review: where the restriction on core political speech rights is severe, the courts apply "strict scrutiny," which means the law must be narrowly tailored to achieve a compelling state interest. *Id.* But if the burden is slight, the law will be upheld so long as it is rationally related to a legitimate interest. *Id.*; see also *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Federal courts have consistently upheld state residency requirements under **both** standards of review.

Any analysis of election law restrictions on petition circulators must begin with the United States Supreme Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1998). *Buckley* limited its holding to the constitutionality of a statute requiring circulators to be registered *voters* (a subject discussed in Section II(D) below), but in instructive dicta, the Court came very near to

declaring that a residency requirement *would* pass constitutional muster. In *Buckley*, Colorado defended its registration requirement on the grounds that it had a “strong interest in policing lawbreakers among petition circulators” and wanted to ensure that circulators would be subject to the Secretary of State’s subpoena power. *Id.* at 196. The Supreme Court did not reject this as a legitimate and compelling state interest; it merely observed that the interest was better served, and infringed less on First Amendment rights, by the requirement that every circulator provide an affidavit which would include a current address. Since, as the Court noted, the Secretary of State’s subpoena power did not extend beyond the borders of Colorado, the Supreme Court’s ruling necessarily assumed that the circulators would have Colorado addresses; otherwise, the affidavit requirement would do nothing to further the State’s interest in subjecting circulators to the Secretary’s subpoena power. Though not a definitive statement of law, the Supreme Court’s analysis has led numerous federal courts to conclude that state residency requirements are constitutional.

The most significant decision comes from the Eighth District Court of Appeals, which affirmed the constitutionality of North Dakota’s residency requirement. *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (2001). The Eighth District found that North Dakota had a compelling interest in preventing fraud and abuse in the petition process, and that the residency requirement served that interest “by ensuring that circulators answer to the Secretary’s subpoena power.” *Id.* at 616. On the other hand, the residency requirement imposed only a slight burden on First Amendment rights because it placed no limitations on North Dakota citizens (unlike the registration requirement struck down in *Buckley*, which barred some Colorado citizens from circulating petitions

within their own state), and only one modest limit on out-of-state actors, to whom “many alternative means” of communicating their views remained open.

Under this same hybrid standard of review, Idaho’s residency requirement for petition circulators was upheld in *Idaho Coalition United For Bears v. Cenarrusa*, 234 F.Supp.2d 1159 (2001). The District Court explained that the residency requirement did not impose a severe burden on core political speech because

Plaintiffs have submitted no evidence that Idaho’s residency requirement makes it more difficult to communicate ideas or to collect signatures. For example, there is no evidence that there are not enough Idaho residents to serve as circulators, or that non-residents make especially effective circulators.

Id. at 1163. In reaching this conclusion, the court rejected as inadequate mere bare-bones assertions that the requirement makes collecting signatures more difficult or expensive. Without question, the same analysis applies in this case: Moore and Mikal have not and cannot prove that Ohio lacks for circulators or that out-of-state circulators would be more effective.

On the other hand, the *Cenarrusa* court recognized that the residency requirement was reasonably related to the state’s legitimate interest in preventing fraud by ensuring that circulators who commit fraud are subject to the subpoena power of the state. Ohio has the same interest in eliminating fraud in the petition process as North Dakota, Idaho, and Colorado. Nor is Ohio’s concern on this score hypothetical or speculative. As this Court has previously noted in *Blankenship*:

The record in this case is replete with credible, unchallenged instances of actual fraud in the circulation of petitions. The Ohio Secretary of State has detailed numerous and substantial instances of fraud on the part of petition circulators. . . . [C]irculators engaged in additional acts of fraud by falsely attesting that

petitions were circulated when they were not and by falsely attesting to signatures.

* * *

The fraud among petition circulators was widespread and took various forms. Seven hundred seventy (770) signatures were invalidated because circulators did not actually circulate petitions and could not distinguish between those actually circulated and those not circulated.

Blankenship v. Blackwell, 341 F.Supp.2d 911, 923 (S.D.Ohio 2004, J. Sargus). There is no reason to believe the 2008 Presidential election will be more pristine than the one in 2004. And as was the case for the Secretaries of State in Colorado, Idaho, and North Dakota, Secretary Brunner's subpoena power does not extend past the borders of Ohio.

Even where courts have applied strict scrutiny to state residency requirements, they have still held them to be constitutional. *See, e.g. Kean v. Clark*, 56 F.Supp.2d 719 (D. Miss.1999), (affirming Mississippi's residency requirement under strict scrutiny); *Yes On Term Limits, Inc. v. Savage*, 2007 U.S. Dist. LEXIS 66432 (W.D.Ok. 2007) (same) [Exhibit A]. However, as noted, the majority of courts have applied an intermediate level of review, since residency requirements impose only slight restrictions on speech but serve a compelling state interest. *Jaeger, supra; Cenarrusa, supra; Nader v. Brewer*, 2006 U.S. Dist. LEXIS 38500 (upholding Arizona's law) [Exhibit B]. Under any standard of review, Ohio's residency requirement is valid under the First Amendment.

C. The Cases Cited By Plaintiffs Are All Distinguishable

The Motion for Preliminary Injunction cites a host of court decisions that purportedly declare in-state residency requirements unconstitutional. However, those cases actually deal with a completely different question: whether a county or municipality may limit the pool of eligible circulators to those who reside within that specific locality.

From a constitutional perspective, there is a world of difference between that question and the question of an *in-state* residency requirement.

Once again, the discussion begins with *Buckley*. Colorado's ordinance said that a part-petition circulator must be a registered elector at the time of circulation in order for the signatures to be valid. The Supreme Court saw this as a significant infringement on First Amendment rights because it drastically reduced the available pool of circulators without any compelling reason for drawing such a distinction. As noted, the Court mused in dicta that a state-wide residency requirement would allow a greater number of potential circulators (all the residents of the state, rather than the smaller number who were actually registered to vote). Although "the citizens of Colorado" is still a smaller pool of people than "all the people in the world," the Supreme Court recognized that this would not be a significant obstacle (because "all the citizens of the state" is a very large number, so there should be little difficulty finding circulators), and there was a compelling reason to justify the restriction (ensuring that circulators remain subject to the subpoena power of the Secretary of State).

With this analysis as background, it is easy to see why the decisions cited by plaintiffs are inapplicable. *Lerman v. Board of Elections*, 232 F.3d 135 (2nd Cir. 2000), involved a New York statute that required circulators to be resident of the political subdivision in which the office in question was to be voted. In concrete terms, the candidate was running for the New York Council to represent the 50th District in Staten Island, but his petition signatures were declared invalid because his circulator was a resident of the 49th District. Applying *Buckley*, the Appellate Court noted that the in-district residency requirement severely limited the pool of available circulators. And, as

with the regulation in *Buckley*, the *Lerman* court found no interest being served by reducing the size of the potential circulator pool.

There . . . is little reason to believe . . . 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.

* * *

Requiring a candidate to have a modicum of support within their district before their name appears on the ballot is well-established as a legitimate and important state interest, which helps to avoid confusion, deception, and even frustration of the democratic process. However, that interest already is advanced by the requirement that candidates obtain a minimum number of signatures by district residents. In light of that requirement, the state's interest in requiring a modicum of support from within the district bears no relationship whatsoever to who actually witnesses or circulates the petition.

* * *

[T]o the extent that the defendants mean to argue that the witness residence requirement helps to prevent non-residents from influencing politics within the district, that interest does not appear to be legitimate at all.

Id. at 150-152 (citations and internal quotation marks omitted).

While reducing the pool of available circulators was invalid when done to exclude unregistered voters or out-of-district residents because neither effort bore any reasonable relation to eliminating fraud, *Lerman* noted that there was a legitimate reason why reducing the pool of circulators to in-state residents would help police against fraud.

The witness residence requirement in section 6-132(2), however, does nothing to advance that end [of ensuring the integrity of elections]. Since the local Boards of Elections in New York have statewide subpoena power, the state's purpose is already served by the less burdensome requirements in section 6-132(2) that a petition witness live anywhere within the State of New York.

Id. at 150. Thus, *Lerman*, like *Buckley*, left the door wide open to the possibility that an in-state residency requirement would serve a compelling state interest and be constitutional.

Most of the cases cited by plaintiffs involve in-district residency requirements, and are therefore inapplicable. See, e.g. *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Dist. 2002) (City Ordinance prohibiting non-residents of Arvada, Colorado from circulating Arvada initiative, referendum, or recall petition unconstitutional); *Morrill v. Weaver*, 224 F. Supp. 2d 882 (E.D.Penn.2002) (state law required petition circulators to be qualified electors (i.e. residents) of district in which candidate was running); *Frami v. Ponto*, 255 F. Supp. 2d 962 (D. Wis.2003) (same in-district requirement).¹ In fact, two cases involved the exact same in-district requirement that was the subject of *Lerman*. *Yassky v. Kings County Democratic County Comm.*, 259 F. Supp. 2d 210 (E.D.N.Y. 2003); *Chou v. N.Y. State Bd. of Elections*, 332 F. Supp. 2d 510 (E.D.N.Y. 2004).

The only case that appears to support plaintiffs' position, upon closer inspection, actually *contradicts* their argument. In that case, *Krislov v. Rednour*, 226 F.3d 851 (2000), cert. denied, 2001 U.S. LEXIS 1153, the Seventh District Court of Appeals considered the constitutionality of an Illinois statute that required a circulator to be both a registered voter **and** a resident/ registered voter in the same political subdivision for which the candidate was seeking election. With respect to the second requirement, this is the same in-district requirement that was at issue in *Lerman* and the other cases discussed

¹ It is true that the decision in *Fermi* strikes at both in-district and in-state residency requirements. However, the District Court expressly noted that the part-petitions in that case were rejected "solely" because the signatures were gathered by out-of-district circulators (*Id.* at 956). Moreover, again according to the Court's own decision, the plaintiffs were only objecting to the in-district requirement (*Id.* at 964). Thus, the Court's ruling improperly reached an issue not before it, and may well have come as a complete surprise to the parties themselves.

above. As previously noted, there is no defensible distinction to be drawn between residents and non-residents of a single municipality, but there **is** a compelling distinction – amenability to the Secretary’s subpoena power – to be drawn between in-state and out-of-state residents.

Finding that the statute severely burdened First Amendment rights, the Appellate Court strictly scrutinized the law and declared it unconstitutional. Illinois offered a number of allegedly compelling justifications for its rule, but the court found that most of those “interests” (ensuring the candidate has a significant level of support in the community, ensuring that circulators were aware of the boundaries of the district, and preventing out-of-state citizens from influencing Illinois elections) were illegitimate, paternalistic, and/or not served by the statute. *Id.* at 863-66.

But the analysis did not end there. Illinois also suggested that it had an interest in preserving the integrity of elections, an interest the Appellate Court conceded would be (at least in the abstract) compelling. However, Illinois (unlike Ohio) “[didn’t] argue that its interest in obtaining valid signatures [was] greatly assisted by the residency restriction, or even that [the restriction was] necessary to achieve this goal.” *Id.* at 865. The Seventh Circuit went on to leave the door open for greater restrictions on out-of-state circulators, including barring their petitions altogether.

This is not to say that a State could never regulate non-citizen circulators. Thus, for example, to ensure the integrity of the process, States might require non-citizens to register with the Board of Elections and agree to submit to the jurisdiction of Illinois courts. *See Buckley*, 119 S.Ct. at 644. **And if the use of non-citizens were shown to correlate with a high incidence of fraud, a State might have a compelling interest in further regulating non-citizen circulators.** But the Board does not assert these interests.

Id. at 866, n.7 (emphasis added).

In summary, Ohio has a compelling interest in protecting the election process from fraud and abuse in the process of gathering part-petition signatures. The 2004 election yielded an ample record of fraud by petition circulators. The in-state residency requirement, whether viewed strictly or under a standard of reasonableness, clearly meets the need of ensuring the Secretary of State can perform her statutory obligation to police the process and guarantee its integrity, while imposing a minimal burden on candidates and out-of-state circulators, and most importantly, no burden on the citizens of Ohio.

D. Ohio Law Does Not Impose A Durational Residence Requirement

Finally, plaintiffs argue that the in-state residence requirement imposes an unconstitutional “durational residence requirement.” In making this argument, plaintiffs misconstrue both the language of the Ohio Revised Code and the holding of the Supreme Court’s decision in *Dunn v. Blumstein*, 405 U.S. 330 (1972).

The facts in *Dunn* were these: Tennessee required its voters to register and demonstrate residency at least 30 days before the election. But if you were a new arrival to the state, you faced two additional requirements, namely, you must also have been a resident of the state for at least one year before the election and of your particular county for at least ninety days. The Supreme Court held that there was no justification for imposing this added restriction, and ruled that it was unconstitutional to discriminate among citizens in this fashion. What plaintiffs fail to appreciate about *Dunn* is that the Supreme Court was careful to acknowledge the legitimacy of the 30-day registration requirement, so long as it was applied to all voters. *Id.* at 346-47.

Like Tennessee, Ohio requires voters to prove eligibility, that is, residency, 30 days in advance of the election. R.C. §3503.06(A). For ease of reference, it is worthwhile to quote that section again in full:

No person shall be entitled **to vote** at any election, or to sign **or circulate** any declaration of candidacy or any nominating, or recall petition, 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.**

Thus, the plain language of the statute avoids the *Dunn* problem. All Ohio citizens are treated alike when it comes to their eligibility to circulate part-petitions: so long as they have been residents for 30 days, they are qualified to be circulators.

The meat of plaintiffs' argument, though, is that the last clause of R.C. §3503.06(A) (in bold above) is not really an in-state requirement, it is actually (either) (1) a requirement that the circulator be a registered elector or (2) an unconstitutional duration requirement. The first argument goes like this: by using the language governing voter registration -- a circulator must have "resided in the county and precinct where the person is registered for at least thirty days at the time of the next election" -- doesn't the second clause effectively mandate that the circulator register to vote? The answer is no, for three reasons: First, the requirement that the circulator be a registered elector is already present in the first clause of R.C. §3503.06(A). Plaintiffs' reading of the statute would make the second clause redundant. Second, the second clause of R.C. §3503.06(A), by its own terms, merely requires that the circulator meet one of the requirements that also applies to voter eligibility, namely residency. It does not require the circulator actually to register.

Third and most importantly, one has to ask what it means to be a resident of a state of Ohio. The answer is found in R.C. §3503.06(A): it means you have been a

resident for at least 30 days before the election. While it may be inartfully drafted, the second clause of R.C. §3503.06(A) can only be read as imposing a 30 residency requirement equally upon both voters and circulators. Plaintiffs' equal protection is meritless, because all Ohio residents are treated alike, and it is constitutionally proper to impose an in-state residency requirement upon both voters and circulators.

E. Ohio's Registration Requirement Is Also Constitutional

R.C. §3503.06(A) also requires part-petition circulators to be "registered as an elector." The Secretary respectfully suggests that the language and operation of Ohio's statute differs from the Colorado statute in *Buckley*, such that it does not restrict First Amendment rights in the same manner. As a result, the statute is constitutional.

Colorado's statute required circulators to be registered voters *at the time they gathered signatures*. The Supreme Court correctly noted that this dramatically reduced the pool of available circulators, since the number of Colorado citizens registered to vote six months before the election is likely to be considerably less than the total number of voting age citizens of Colorado. Thus, the statute imposed a severe burden at the time of the circulator – signer interaction, when, as the Court noted, the First Amendment considerations are at their highest.

Ohio's law, by contrast, does not require circulators to be registered voters at the time they collect the signatures. The Ohio Supreme Court acknowledged this fact when, post-*Buckley*, it declined to declare R.C. §3503.06(A) unconstitutional. *State ex rel. Oster v. Lorain Cty. Bd. of Elections*, 93 Ohio St.3d 480, 487. Unregistered circulators may collect signatures and then later register, so long as they do so just like any person who signed the petition before the petition is submitted. While this may at first blush

seem like a distinction without a difference, it has enormous practical (and therefore constitutional) consequences. Specifically, at the time of the circulator – signer interaction, the moment which implicates the First Amendment, the pool of circulators is *unlimited*. Ohio’s statute imposes **no** burden on the ability of circulators to spread their message or gather signatures. Therefore, the regulation must be subjected to rational basis scrutiny, not the strict scrutiny applied by the Supreme Court in *Buckley*. Ohio’s registration test passes that test easily: voter registration and residency together ensure that the people who seek to affect the ballot in Ohio can be located and subpoenaed when the petitions are reviewed, and it ensures that they have a sufficient stake in the results of the election to become a participant.²

F. Ohio’s Law Does Not Violate The Privileges and Immunities Clause Or The Dormant Commerce Clause

Because the law meets a compelling state interest and does not violate the First Amendment, it also necessarily “serves a legitimate local purpose” and is not contrary to either the Privileges and Immunities Clause or the Dormant Commerce Clause. *Yes on Term Limits v. Savage, supra*. The Privileges and Immunities argument is even weaker when any lesser level of scrutiny is applied. *Initiative & Referendum Inst. v. Secretary of State*, 1999 U.S. Dist. LEXIS 22071 (D.Maine) [Exhibit C].

Plaintiffs’ argument that Ohio’s law violates the “dormant commerce clause” is particularly questionable. According to plaintiff, the dormant commerce clause means “states cannot discriminate against non-residents who seek to pursue a livelihood in the

² In the event that this Court reaches a different conclusion, and declares the registration requirement unconstitutional, it should not strike down the entire statute. Pursuant to R.C. §1.50, statutory provisions are presumptively severable. *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 523 (1994).

state.” However, the Supreme Court has never adopted so expansive an interpretation of the Dormant Commerce Clause.

The purpose of the Commerce Clause (including its Dormant side) is to “prohibit outright economic protectionism or regulatory measures designed to benefit in-state economic actors by burdening out-of-state actors.” *Eastern Ky. Resources v. Fiscal Court*, 127 F.3d 532, 540 (6th Cir. 1997), citing *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). It forbids states from "advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *H.P. Hood & Sons Inc. v. DuMond*, 336 U.S. 525, 535 (1949).

A law that “discriminates” between in-state and out-of-state actors is invalid unless the state can show that the regulation is "demonstrably justified by a valid factor unrelated to economic protectionism." *Limbach*, supra, at 274. In this case, Ohio’s election law has no economic motive; Ohio has clearly demonstrated that the law is substantially justified by the need to protect the integrity of the election process.

A law which is otherwise defensible may still be declared unconstitutional if the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Plaintiffs have made no showing of a “clearly excessive” impact on interstate commerce. Indeed, it is difficult to imagine that the number of professional out-of-state petition circulators could be very large, or that Ohio reaps any economic benefit from excluding them. Plaintiffs’ invocation of the Dormant Commerce Clause has no merit.

G. Plaintiffs Are Not Entitled To An Injunction

A preliminary injunction is “an extraordinary measure” and “one of the most dramatic tools in the arsenal of judicial remedies.” *Bonnell v. Lorenzo*, 241 F.3d 800, 826 (6th Cir. 2001), quoting *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986). When considering this type of extraordinary relief, Courts generally consider four factors in deciding whether to grant the injunction:

- (1) Whether the movant has shown a strong or substantial likelihood or probability of success on the merits;
- (2) Whether the movant has shown that it will suffer irreparable injury if the injunction does not issue;
- (3) Whether issuance of an injunction will cause harm to others; and
- (4) Whether the public interest will be served by granting the injunction.

Bonnell, supra, 241 F.3d at 826. The standard for granting a preliminary injunction is more “stringent” than that required for summary judgment because the preliminary injunction is an “extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied “only in [the] limited circumstances which clearly demand it.” *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000), quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991) (internal quotations omitted).

As the above shows, plaintiffs cannot meet the first element: a significant likelihood of success on the merits. To the contrary, the Secretary of State respectfully suggests that the greater likelihood is that R.C. §3503.06(A) will be deemed constitutional, in whole or in part.

III. Conclusion

For the reasons set forth herein, the Secretary of State respectfully asks the Court to declare that Ohio Revised Code Section §3503.06(A) is facially constitutional, and to deny the request for injunctive relief.

Respectfully submitted,

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ATTORNEY GENERAL**

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing Memorandum In Opposition To Plaintiffs' Motion For Preliminary Injunction was served upon all counsel of record by means of the Court's electronic filing system on this 25th day of March, 2008.

/s Richard N. Coglianesse