

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

<b>BRIAN MOORE,</b>	)	
<b>DERON MIKAL, and</b>	)	
<b>SHERRY SUTER,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>Case No. 2:08cv224</b>
	)	
<b>v.</b>	)	<b>Judge Frost</b>
	)	
<b>JENNIFER BRUNNER,</b>	)	
<b>Ohio Secretary of State,</b>	)	<b>Magistrate Judge_____</b>
<b>in her official capacity,</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**PLAINTIFFS’ REPLY TO DEFENDANT’S OPPOSITION**

**FACTS**<sup>1</sup>

Plaintiff, Brian Moore, seeks to gather voters’ signatures in order to qualify for Ohio’s presidential ballot. *See* Declaration of Brian Moore, Attachment 1 to Motion for Preliminary Injunction (Docket Entry #2) (filed March 7, 2008).<sup>2</sup> He seeks to use circulators, both volunteers and professionals, who are not registered to vote in Ohio. *Id.* He further seeks to use circulators, both volunteers and professionals, who are not residents of Ohio. *Id.* Moore has sought professional assistance in Ohio, but has

---

<sup>1</sup> These are additional facts to be read in conjunction with the Plaintiffs’ Complaint and initial Memorandum in Support of Motion for Preliminary Injunction (Docket # 2).

<sup>2</sup> Declarations under 28 U.S.C. § 1746 are proper substitutes for affidavits in federal courts. *See United States v. Gomez-Vigil*, 929 F.2d 254, 258 (6<sup>th</sup> Cir. 1991) (“Section 1746 authorizes the use of unsworn declarations under penalty of perjury, rather than sworn declarations under oath, whenever the law, rule, regulation, order or requirement permits the matter to be supported, evidence, established or proved by sworn declaration.”). Declarations need not be sworn or notarized. *See, e.g., Carter v. Clark*, 616 F.2d 228 (5<sup>th</sup> Cir. 1980) (invalidating local rule under requiring that verified documents be notarized under § 1746).

discovered that the signature-collection firms in Ohio focus their efforts on initiatives. *See* Second Declaration of Brian Moore (Attachment 7). Moore has located a Florida company that will assist with his signature collection efforts in Ohio. *Id.*

Sherry Suter is an Ohio resident who is eligible to vote but who is not registered to vote in Ohio. She seeks to assist Moore by collecting signatures in Ohio. *See* Declaration of Sherry Suter, (Docket Entry # 4) (filed March 10, 2008).

Deron Mikal is a Florida resident who is registered to vote in Florida. *See* Declaration of Deron Mikal (Docket Entry # 8) (filed March 20, 2008). Mikal seeks to assist Moore in Ohio by collecting signatures. *Id.*

## ARGUMENT

### **I. Plaintiffs Challenge to O.R.C. § 3503.06(A) is As-Applied.**

Brunner makes much of the constitutional difference between facial and as-applied challenges. *See* Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction (Docket # 9) at 2-5 (hereinafter "Opposition"). This distinction, however, is not an obstacle in the present case for the simple reason that Plaintiffs' Complaint and Motion for Preliminary Injunction do not make facial claims. Plaintiffs concede that § 3503.06(A) can be applied to voters. Plaintiffs argue that § 3503.06(A) cannot be constitutionally *applied* to circulators. More specifically, they argue that § 3503.06(A) cannot be constitutionally applied to Brian Moore's candidacy for President.

Plaintiffs' Complaint, by its terms, challenges the constitutionality of applying § 3503.06(A)'s residence and registration requirements *to circulators of candidates' petitions* under the First and Fourteenth Amendments, *see* Complaint (Docket # 1) ¶ 32 (First Cause of Action challenging registration), *see id.* ¶ 35 (Second Cause of Action

challenging residence), the Privileges and Immunities Clause, *see id.* ¶ 38 (Third Cause of Action challenging residence), and the Dormant Commerce Clause. *See id.* ¶ 41 (Fourth Cause of Action challenging residence). In all of these counts, Plaintiffs challenge the “application” of § 3503.06(A) to Plaintiffs. *See id.* ¶¶ 33, 36, 39 and 42.

Plaintiffs’ Motion for Preliminary Injunction specifically seeks to enjoin Brunner from applying § 3503.06(A) to Moore’s candidacy, *see* Motion for Preliminary Injunction (Docket # 2) at 1, and further seeks to prevent her from applying it to any other persons “who circulate part-petitions on behalf of any candidate for President in the State of Ohio.” *Id.* Plaintiffs at this stage of the proceedings seek relief only in the context of presidential elections.

Even assuming that the Plaintiffs did make some sort of facial challenge, Brunner’s argument still misses the mark. The Second Circuit recognized in *Lerman v. Board of Elections*, 232 F.3d 135, 143 (2d Cir. 2000) (striking down New York’s residence requirement for circulators), that the challengers “in addition to [having] standing to challenge the [New York] witness residence requirement as applied to their own speech and associational activity, ... also have third party (or *jus tertii*) standing to challenge the witness residence requirement on its face.” The court rejected the argument that Brunner makes here: “since the plaintiffs challenge a statute regulating the ability to engage in interactive political speech and associational activity, their standing to challenge the statute on its face is governed by the overbreadth doctrine.” *Id.* at 144 & n.10.

Because regulation of circulators’ activities necessarily impacts “core political speech,” the First Amendment is always a central concern. And because the First

Amendment embraces facial challenges under the overbreadth doctrine, no court has ever dismissed a challenge to a circulation law on the ground that it was facial versus as-applied. Unlike the Second Circuit in *Lerman*, most courts have ignored any distinction and have simply moved on to the merits. *See, e.g., Krislov v. Rednour*, 236 F.3d 851 (7<sup>th</sup> Cir. 2000) (striking down Illinois residence requirement without discussing whether facial or as-applied challenge).

The Supreme Court, for its part, did not mention any distinction in either *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down a law prohibiting payment of circulators), or *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (striking down a law requiring registration of circulators). It instead proceeded directly to the merits in both cases and invalidated laws banning payment and requiring registration.<sup>3</sup>

## **II. Ohio’s Burdens on First Amendment Rights Are Severe.**

Brunner argues that § 3503.06(A) might “*possibl[y]*” impose “only a slight burden on First Amendment interests.” Opposition at 4 (emphasis in original). “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 ...?” *Id.* at 3. These questions, she claims, not only support her contention that Plaintiffs’ case is not yet ripe, they suggest that a reduced level of constitutional scrutiny should apply.

---

<sup>3</sup> Brunner correctly points out that the Supreme Court in *Washington State Grange v. Washington State Republican Party*, slip op., Nos. 06-713 & 06-770 (March 18, 2008), dismissed a facial challenge to a state election law under the First Amendment. However, that case was clearly not ripe. The challenge was “not in the context of an actual election,” the law was new and the state had “no opportunity to implement” it, *id.* at 5, and it could very likely be legally applied with minor adjustments. *Id.* In contrast, § 3503.06(A) is not new and has been used in the past to invalidate collection efforts. Plaintiffs challenge, moreover, is based on an actual election—the 2008 Presidential election in Ohio.

Brunner’s argument is both legally irrelevant and factually incorrect. The Supreme Court in *Buckley* determined that voter-registration requirements for circulators “severely burden” First Amendment rights. Because they interfere with “core political speech,” they necessarily constitute a severe burden demanding strict scrutiny. *See Buckley*, 525 U.S. at 192 n.12 (“Our decision is entirely in keeping with the ‘now-settled approach’ that state regulations ‘impos[ing] ‘severe burdens’ on speech ... [must] be narrowly tailored to serve a compelling state interest.’”).<sup>4</sup> Whether a lesser level of constitutional scrutiny can be applied is therefore not an open question. *See Heller v. Give Nevada a Raise, Inc.*, 96 P.3d 732, 735 & n.15 (Nev. 2004) (observing that the Supreme Court in *Buckley* found a severe burden on core political speech and applied strict scrutiny to invalidate Nevada’s de facto registration requirement for circulators of initiatives).

The Sixth Circuit recognized that strict scrutiny applies in *Citizens for Tax Reform v. Deters*, No.07-3031, slip op., at 3 (6<sup>th</sup> Cir., March 5, 2008), which invalidated Ohio’s ban on paying circulators based on the number of signatures they collect. The Court rejected the very argument Brunner now makes:

[The state] faults [the plaintiff] for failing to show, in the State's words, that the ban would cause “a significant, quantitative decrease in the number of circulators available” or that it “would decrease the number of issues successfully placed on the ballot.” It asserts that we should apply a “less exacting review” and that,

---

<sup>4</sup> Of course, *Buckley* involved initiatives rather than candidates, but this distinction is irrelevant in the context of circulating petitions. “It is true that the Supreme Court has elsewhere highlighted the differences between initiatives and candidates, but it appears to have done so not because the First Amendment is more protective of initiatives than of candidates, but because elections on initiatives pose lesser risks of quid pro quo corruption.” *Caruso v. Yanhill County*, 422 F.3d 848, 857 (9<sup>th</sup> Cir. 2005) (citing *First National Bank v. Bellotti*, 435 U.S. 765, 790 (1978) (“The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.”)). Although the results in initiative- and candidate-cases may differ depending on the government’s interest, the test is thus the same for both kinds of restrictions. Brunner does not argue the contrary.

under this review, the requirement meets the standard for a “reasonable, nondiscriminatory restriction[ ].”

*Id.* at 4.

Even though “there [was] little in the record to suggest that a substantial number of people in Ohio would be dissuaded from participating in the petition process because of a ban on all payment not based on time worked,” *id.* at 9, the Sixth Circuit addressed the merits and applied strict scrutiny. The Court recognized the obvious, that

[b]y making speech more costly, the State is virtually guaranteeing that there will be less of it. Because its ban on all forms of payment to circulators except based on the amount of time worked would create a significant burden on CTR's and other petitioners' core political speech rights, the State must justify it with a compelling interest and narrowly tailored means.

*Id.* at 11.

*Deters*, like the Supreme Court in *Buckley*, recognized that any interference with “core political activity” is severe and demands strict scrutiny. *Id.* at 3. It correctly applied the same “exacting scrutiny” that was applied in both *Meyer* and *Buckley*. *See id.* at 10. And using the “well-nigh insurmountable obstacle” imposed by strict scrutiny, *see id.* at 5, it invalidated Ohio’s law.

#### **A. Burdens Imposed By Registration**

If *Buckley*, *Meyer* and *Deters* do not automatically establish that burdens like Ohio’s are severe, Ohio’s demographics most certainly do. The citizen-voting-age population in Ohio in 2000 numbered 8,322,126.<sup>5</sup> *See* Table 1-1, Census 2000 PHC-T-

---

<sup>5</sup> According to the United States Census Bureau, Ohio’s total population in 2006 was 11,478,006. *See* U.S. Census Bureau, State & County QuickFacts (<http://quickfacts.census.gov/qdf/states/39000.html>) (attached as Exhibit 4).

31 (attached as Exhibit 1).<sup>6</sup> Ohio's voter registration rate in 2004 ranged somewhere between 58% and 85%. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2004, at 8 (March 2006) (attached as Exhibit 2). The best estimate, then, is that 85% of eligible voters in Ohio were registered in 2004.<sup>7</sup> Using the 2000 census figure for citizen-voting-age population in Ohio reported above, that means that approximately one and a quarter million eligible voters in Ohio did not register to vote in 2004. This means that one and one-quarter million eligible voters in Ohio were prevented from circulating candidate-petitions during the 2004 presidential election.

Brunner, of course, attempts to minimize this burden by arguing that 'all they have to do is register.' *See* Opposition at 15. The simple answer to this contention is that the Supreme Court rejected it in *Buckley*, 525 U.S. at 196: "For these voter-eligible circulators, the ease of registration misses the point."

Brunner further tries to distance Ohio's law from Colorado's ban (struck down in *Buckley*) by arguing that Ohio circulators need not be registered when they circulate; rather, they need only register in time for the election.<sup>8</sup> *See* Brief at 15. Brunner fails to explain, however, how circulators can make use of this "perk." What will Brunner do in

---

<sup>6</sup> Plaintiff requests that the Court take judicial notice of these Census figures. Federal Rule of Evidence 201(d) provides: "A court shall take judicial notice if requested by a party and supplied with the necessary information." Rule 201 further provides, in relevant part, that in order to be judicially noticed, a fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(b)."

<sup>7</sup> A study commissioned by the Cleveland State University Center for Election Integrity assumes that 90% of eligible Ohioans are registered to vote. *See* Mark J. Salling & Ellen Cryan, "Estimates of the Number of Voters Whose Driver's License Address May Differ from Their Voting Address," at 2 (Aug. 2, 2006) (attached as Exhibit 3). Salling and Cryan observe, however, that "[t]hese percentages are inflated by the inactive registered voters in the state." *Id.* Even assuming this larger percentage for registered voters, close to one million eligible adults in Ohio are not registered to vote.

<sup>8</sup> Signatures are verified and counted before the first week of October, when voter registration closes. *See, e.g., Blankenship v. Blackwell*, 341 F. Supp. 2d 911 (S.D. Ohio 2004).

August and September when she verifies circulators' registrations and discovers that one is not registered? Past practice indicates that she will assume the worst and invalidate the circulator's efforts.<sup>9</sup> *See, e.g., Nader v. Blackwell*, No. 06-821 (S.D. Ohio) (dismissed Sept. 19, 2007), appeal pending, No. 07-4350 (6<sup>th</sup> Cir. 2008) (alleging that up to 3000 signatures were invalidated before September 28, 2004 because of circulators' alleged ineligibility).

This trap also risks ensnaring properly registered voters. A study commissioned by the Cleveland State University Center for Election Integrity found that 325,101 properly registered voters move each year in Ohio. *See* Mark J. Salling & Ellen Cryan, "Estimates of the Number of Voters Whose Driver's License Address May Differ from Their Voting Address," at 4 (Aug. 2, 2006) (attached as Exhibit 3). These relocated voters, Salling & Cryan found, are at serious risk of being disenfranchised at the polls each election cycle "due to incorrect application of the address requirements concerning voter ID." *Id.* at 4.

This risk is even higher in the context of circulation, where circulators are required to provide current addresses to prove that they are properly registered. When the addresses do not match, elections officials will naturally (if incorrectly) conclude that the circulator is not properly registered. *See* Sally & Cryan, *supra*. Far from being better than Colorado's registration requirement, Ohio's bizarre and misleading post-circulation registration requirement is worse. It risks mistakes under Ohio's own terms.

## **B. Burdens Imposed By Residence**

---

<sup>9</sup> Every voters' signature on a flawed part-petition in Ohio is invalid. *See State ex rel. Comm. For the Referendum of Loraine Ordinance No. 77-01 v. Lorrain Cty. Bd. of Elections*, 774 N.E.2d 239, 249 (Ohio 2002).

Residence restrictions likewise present severe burdens on First Amendment rights. If proof is needed, consider the fact that Ohio's residence requirement prohibits hundreds of millions of Americans from circulating petitions in Ohio. The durational nature of Ohio's residence requirement likewise prevents thousands upon thousands of newly arrived Ohioans from participating in Ohio's political market. The local nature of Ohio's residence requirement prevents thousands upon thousands more Ohioans from supporting candidates.

Of course, basic economic theory teaches that a smaller supply of circulators will increase demand and raise the price charged consumers (*i.e.*, candidates). Presently, the commercial price for signature-collection is roughly \$2 per signature. *See* Ken Belson & Serge F. Kovalski, *Bloomberg in '08? If So, Paper Chase Starts Soon*, N.Y. TIMES, Jan. 1, 2008 (attached as Exhibit 5). *See also Deters*, slip op. at 1 (reporting the price is \$1.70). Were professional signature collection firms allowed to hire nonresidents, *see, e.g.*, [www.ohiopetitioncompany.com/qualitycontrol.html](http://www.ohiopetitioncompany.com/qualitycontrol.html) (stating that the Ohio Petition Company does residence checks on all of its circulators in order to insure that it hires only residents) (attached as Exhibit 6), this price would naturally drop. Candidates could more readily hire professionals and more easily access ballots.<sup>10</sup>

Moore is having difficulty finding an Ohio company to circulate his part-petitions. He contacted the Ohio Petition Company, but was told that it only circulates initiatives. *See* Second Declaration of Brian Moore (attached as Exhibit 7). Because initiatives generally require more signatures, they promise more revenue for professionals. *See*

---

<sup>10</sup> *See* Belson & Kovalski, *supra* (““Independent candidates try to get volunteers to do most of their work. But in states where a candidate has little or no organization in place—and that describes virtually every state in the case of Mr. Bloomberg—they often turn to firms to recruit hundreds of people to troll for signatures.””).

Belson & Kovakeski, *supra* (“But getting a signature-collection firm is not easy in a general election year, when demand for their services is high. In addition to candidates, groups pushing state ballot referendums often rely on the companies.”); Richard . Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 64 (2003) (“The signature market can be volatile, particularly toward the close of an initiative campaign.”). Were he allowed to use non-residents, Moore might even be able to gain access using volunteers. More likely, firms would be able to expand and fill the market. Either way, candidates would be better able to exercise their First Amendment rights.<sup>11</sup>

### **III. Ohio Imposes a Local Residence Requirement.**

Brunner attempts to distinguish cases that have invalidated residence requirements under the logic of *Buckley*, including the Second Circuit’s decision in *Lerman v. Board of Elections*, 232 F.3d 135, 143 (2d Cir. 2000), and the Seventh Circuit’s holding in *Krislov v. Rednour*, 226 F.3d 851 (7<sup>th</sup> Cir. 2000), as cases that invalidated only *local* residence requirements. *See* Opposition at 8. “From a constitutional perspective, there is a world of difference between that question [i.e., whether a local residence requirement is valid] and the question of an *in-state* residency requirement.” *Id.* at 9 (emphasis in original).

---

<sup>11</sup> Experience teaches that excluding even a single circulator because of residence could prove the difference between qualifying for the ballot or not. One authority has noted that “[t]o collect 75,000 signatures (which could be safely assumed to yield 50,000 valid signatures) ... a volunteer drive would need roughly 66 three hour volunteer shifts (two people) per week, every week for five months.” *Id.* at 57 (citing JIM SCHULTZ, *THE INITIATIVE COOKBOOK: RECIPES AND STORIES FROM CALIFORNIA’S BALLOT WARS* 33 (1998)). This means in Moore’s case, because he effectively needs to collect 7,500 signatures to guarantee that 5,000 are valid, twelve or fourteen steady volunteers are needed for five months. If the Ohio residence requirement cuts the number of devoted volunteers by even one or two, a candidate in Moore’s position might not succeed.

Section 3503.06(A), however, imposes a local residence requirement. It is not enough that a circulator reside in Ohio; circulators 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.” (Emphasis added). Brunner, of course, would like this Court to interpret § 3503.06(A) to impose only a state residence requirement, but it is not the job of federal courts to rewrite state statutes. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) (“it is clearly not this Court’s province to rewrite a state statute”); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1123 (6<sup>th</sup> Cir. 1991) (“the general federal rule is that courts do not rewrite statutes to create constitutionality”).

Assuming that § 3503.06(A) could somehow be rewritten to impose only a *bona fide* (that is, non-durational),<sup>12</sup> state residence requirement, Brunner’s distinction would still fail. First, the Eighth Circuit’s decision in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8<sup>th</sup> Cir. 2001), as well as the handful of District Court opinions sustaining in-state residence requirements, all dealt with local elections. Plaintiffs Motion for preliminary injunctive relief is limited to enjoining § 3503.06(A)’s application to *presidential* elections.

---

<sup>12</sup> “Bona fide residence” focuses on presence coupled with intent to remain. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). For most purposes, bona fide residence is the equivalent of “domicile.” *See Eastman v. University of Michigan*, 30 F.3d 670, 763 (6<sup>th</sup> Cir. 1994). “Durational residence,” in contrast, incorporates a temporal component. Durational requirements are problematic, in the constitutional sense, because they impose waiting periods, which penalize travel as well as the underlying right. *Id.* This is not to say that all durational residence requirements are invalid. But it does give rise to added constitutional difficulty. Thus, while bona fide residence requirements for voting, welfare benefits, and public education, are all clearly 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*, 30 F.3d at 763. In the context of voting, for example, the Supreme Court has invalidated durational requirements that exceed fifty days.

Next, state residence is simply not closely connected to any compelling state interest.<sup>13</sup> Brunner argues that Ohio has a compelling interest in “preventing fraud by ensuring that circulators who commit fraud are subject to the subpoena power of the state.” Opposition at 7. Ohio, no doubt, has a compelling interest in preventing and exposing fraud. However, the rote recitation of this concern does not satisfy strict scrutiny. Ohio must prove that fraud is a problem, and, more importantly, that non-residence is the cause.

The Sixth Circuit in *Deters* noted that Ohio’s proof of fraud and causation were seriously lacking. As here, Ohio pointed to Ralph Nader as proof of fraud and the need for regulation. The court in *Deters*, slip op. at 11, responded that this anecdotal evidence was insufficient: “there is no evidence in the record that most, many, or even more than a *de minimis* number of circulators who were paid by signature engaged in fraud in the past.” Moreover, even if there were sufficient proof of fraud on the part of circulators to justify regulation, the Court in *Deters* observed that “it does not prove that the per-signature feature actually caused or significantly contributed to the circulators' fraudulent acts.” *Id.*

Section 3503.06(A) fails for these same reasons. Even assuming that fraud is a problem in Ohio, there is absolutely no proof of any causal connection between non-residence and proclivity toward wrongdoing. Ohio has cited no study tending to show that non-residence causes or facilitates fraud. To the extent deterrence is the goal, the Court in *Deters*, slip op. at 11, observed:

---

<sup>13</sup> Note that the Sixth Circuit in *Deters* distinguished *Jaeger* to the extent it ruled that states can ban paying professionals for the number of signatures they collect. The Sixth Circuit thus did not find the opinion overly persuasive.

Ohio already has criminalized election fraud, specifically with regard to false signatures. See O.R.C. § 3599 .28 (making false signatures on election-related documents a felony of the fifth degree). This and other criminal provisions of Ohio election law are the types of protections that the Supreme Court has found ‘adequate’ to deter improper conduct with regard to petition circulation, ‘especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.’

Brunner’s argument thus boils down to this: “I want circulators to be residents because I want to be able to easily serve them with administrative subpoenas.” But there is no compelling interest in administrative convenience. The Supreme Court has made this clear on dozens of occasions. State laws that require that businesses sell, buy or operate inside the state because it is more convenient for government have regularly been struck down by the Supreme Court. In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), for example, a city required that milk be pasteurized within 5 miles of the city’s limits in order, it claimed, to facilitate governmental inspections. The Supreme Court rejected the city’s argument under the heightened level of scrutiny demanded by the Dormant Commerce Clause:<sup>14</sup> “such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors.” *Id.* at 354-55.

Using this logic, the Supreme Court has invalidated scores of state laws that prevent non-residents and out-of-state businesses from competing with their in-state counterparts. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (invalidating favorable tax law for charities serving state residents).

---

<sup>14</sup> When states discriminate against non-residents or out-of-state business, the Supreme Court applies the “least restrictive alternative” test: states must have a legitimate interest and employ the least restrictive alternative. See *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978). This test is not as demanding as strict scrutiny, but still is routinely failed by laws that require in-state residence or presence, as *Dean Milk* demonstrates.

Arguments like ‘the state needs to inspect’ and ‘the state needs to reach’ non-resident businesses have never succeeded under the Dormant Commerce Clause. The reason is simple: if the business has minimum contacts with the state it can be reached.<sup>15</sup>

This same logic applies under the First Amendment. If Brunner is to be believed, Ohio can limit speech in public parks, on streets and on sidewalks to Ohio residents. After all, speakers might violate the law and might need to be served. Courts, however, have consistently ruled that “the First Amendment does not permit government to condition a speaker’s access to a public forum on whether the speaker has support in or an indigenouse relationship with the local community.” *Leydon v. Town of Greenwich*, 777 A.2d 552, 572 (Conn. 2001) (holding invalid a local law limiting town’s recreational beach part to town residents).

In *El Dia, Inc. v. Puerto Rico Department of Consumer Affairs*, 413 F.3d 110 (1<sup>st</sup> Cir. 2005), for example, the First Circuit struck down under the First Amendment a local law that required non-resident advertisers to post bonds to cover potential fines. Puerto Rico’s stated concern, of course, was that it might not be able to reach these non-residents and extract the fines. Still, the court concluded that the measure could not even pass a less-demanding level of scrutiny applied to commercial speech.

Of course, if Ohio were really concerned about fraud, and if residence had anything to do with fraud, Ohio would demand that all circulators establish local residence. Yet it does not. Ohio does not require that circulators of *party* petitions comply with § 3503.06(A) or any other statute requiring residence; nor does it require that circulators of initiative-petitions establish the same kind of local residence demanded

---

<sup>15</sup> As pointed out in Plaintiffs’ initial Memorandum in Support of Motion for Preliminary Injunction (Docket # 3) at 12 & n.12, there is no constitutional problem with granting agencies long-arm powers.

of those circulating candidates' petitions. *See* O.R.C. 3503.06(B) (1) ("No person shall be entitled to circulate any initiative or referendum petition unless the person is a resident of this state.").

Brunner fails to explain why the circulators of candidate-petitions are singled out for different treatment.<sup>16</sup> She offers no explanation whatsoever for Ohio's disparate treatment of circulators of party papers. The simple fact is that residence has little to do with either deterring or detecting fraud.

#### **IV. Ohio's Durational Residence Requirement Violates the Right to Travel, the Dormant Commerce Clause and Article IV, § 2 of the Constitution.**

##### **A. Right to Travel**

Brunner devotes a significant portion of her Brief to arguing that Ohio has not imposed a durational residence requirement at all. Of course, it has—the only question is whether its durational requirement is permissible.

The Supreme Court, as Brunner correctly states, has sustained durational residence requirements for voters to the extent they do not exceed fifty days. *See Marston v. Lewis*, 410 U.S. 679 (1973). Thus, were § 3503.06(A) applied only to voting it would pass constitutional muster under the First Amendment, the Fourteenth Amendment, the Dormant Commerce Clause, and Article IV, 2.

The Court has invalidated durational residence requirements in several other settings, however, including the receipt of welfare and medical assistance. *See Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1975). Using the Fourteenth Amendment's

---

<sup>16</sup> Granted, the Supreme Court's holding in *Buckley* provides a partial explanation, because it invalidated registration requirements for circulators of initiatives. But it cannot explain why circulators of initiatives are not subject to the same residence requirement applied to those who circulate candidates' petitions.

Right to Travel, the Court has applied strict scrutiny to durational residence requirements that infringe these “basic necessities,” *see Maricopa*, 415 U.S. at 259, and other “fundamental rights.” *See, e.g., Zobel v. Williams*, 457 U.S. 55, 64 n.11 (1982); *cf. Doe v. Bolton*, 410 U.S. 179 (1973) (invalidating residence requirement for abortions).

Speech is clearly a fundamental right, and as recognized in *Buckley* circulating is “core political activity.” Circulating petitions is thus pure speech and purely fundamental. It is as different from voting as standing on a soap box in the town square. A state cannot ban non-resident speakers from using either a public forum, *see, e.g., Leydon v. Town of Greenwich*, 777 A.2d 552, 572 (Conn. 2001) (striking law that restricted non-residents from using park), or their own privately purchased facility. *See, e.g., El Dia, Inc. v. Puerto Rico Department of Consumer Affairs*, 413 F.3d 110 (1<sup>st</sup> Cir. 2005) (striking down law requiring that non-residents post bond in order to advertise). Residence restrictions like these thus violate not only the First Amendment, but also the Right to Travel.

#### **B. Dormant Commerce Clause and Article IV**

Unlike voting, moreover, circulating petitions has developed an economic market. “Gathering signatures has increasingly become a business, and like any other business it is run for profit.” Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 37 (2003). Thus, it makes perfect sense to apply the Dormant Commerce Clause and Article IV to the circulation business.

The Dormant Commerce Clause and Article IV prohibit states from discriminating against non-residents and out-of-state businesses in the private marketplace. States cannot require, for example, that lawyers be residents. *See Supreme*

*Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (striking down residence requirement for lawyers under Article IV).<sup>17</sup> They cannot demand that goods and services be processed or provided inside the state, nor can states demand that business be performed by local companies. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (striking down law requiring that fruit be packed in-state under Dormant Commerce Clause); *C & A Carbone Inc. v. Clarkstown*, 511 U.S. 383 (1994) (striking down ordinance that required trash be collected by local company under Dormant Commerce Clause). They cannot require that businesses hire local residents. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518 (1978) (striking down local hire law under Article IV); *United Building & Construction Trades v. Camden*, 465 U.S. 208 (1984) (holding that local hire law was subject to intermediate scrutiny under Article IV). They cannot because they cannot show that outsiders—in the context of economic markets—present a “peculiar source of evil.” *See Hicklin*, 437 U.S. at 528; *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (“But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”).

Moore, for example, has located a Florida company to circulate his petitions. Because the Florida firm employs Florida residents, however, it cannot assist him under Ohio law. *See* Second Declaration of Brian Moore (attached as Exhibit 7). Thus, Ohio’s law here demonstrably interferes with an economic market. Ohio interferes with the

---

<sup>17</sup> Article IV’s demands are a bit different, as its test. It protects “privileges and immunities,” which necessarily includes fundamental rights. *Doe v. Bolton*, 410 U.S. 179 (1973). The intermediate scrutiny test applied under Article IV is not as demanding as strict scrutiny, or even the “least restrictive alternative” analysis applied under the Dormant Commerce Clause, but even then residence restrictions are commonly struck down under Article IV. *See, e.g., See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (striking down residence requirement for lawyers under Article IV).

market based on point-of-origin; that is, only locals can work here. Ohio has no reason to believe that out-of-state businesses and non-residents present a peculiar source of evil. They can be served, taxed and reached, just like any other business. Section 3503.06(A)'s ban on outsiders therefore violates both the Dormant Commerce Clause and Article IV.

**V. Ohio's Residence Restriction Cannot Be Severed.**

As explained above, Brunner understandably wants the Court to rewrite § 3503.06(A) to require only state residence. That reading, however, requires a significant amount of editing, redacting and redlining, all of which is clearly beyond the proper role of a federal court.

Next, Brunner in a brief footnote, see Opposition at 16 n.2, invites the Court to sever Ohio's residence requirement to save it from the registration restriction's fate. As argued in Plaintiffs' initial Memorandum, *see* Memorandum in Support of Preliminary Injunction (Document # 2) at 6-7, however, Ohio's residence and registration requirements are inexorably linked. One must be a resident of the county and precinct *where registered* for thirty days. Residence is demanded as part of registration.

Federal courts rarely fix unconstitutional state laws. The Supreme Court has said on numerous occasions that "it is clearly not this Court's province to rewrite a state statute." *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992). In *Wyoming v. Oklahoma*, for example, the Court invalidated an Oklahoma law that discriminated against coal mined outside the state under the Dormant Commerce Clause. Oklahoma sought to save the statute to the extent it applied to government-owned companies (under the Market Participant Exception to the Dormant Commerce Clause). The Court refused: "[the law]

applies to ‘[a]ll entities providing electric power for sale to the consumer in Oklahoma’ and commands them to purchase 10% Oklahoma-mined coal. Nothing remains to be saved once that provision is stricken. Accordingly, the Act must stand or fall as a whole.” *Id.* at 460.

The Sixth Circuit in *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6<sup>th</sup> Cir. 1991), took this same cautious course: “the general federal rule is that courts do not rewrite statutes to create constitutionality.” The Court observed that this is especially true with state statutes: “This Circuit has adhered to the principle that a federal court ‘has very limited powers in construing state statutes or municipal ordinances.’” *Id.* at 1123. Rather, “a federal court must take the state statute or municipal ordinance as written and cannot find the statute or ordinance constitutional on the basis of a limiting construction supplied by it rather than a state court.” *Id.*

For these reasons, Ohio’s local residence restriction must fall or stand as written. And as written it makes no sense without the registration requirement. Where must circulators reside if they are not required to register? How long must they live there if they are not required to register? Had the Ohio legislature wanted a simple state residence requirement for circulators of candidates’ petitions, it could have done what it did with § 3503.06(B) (1) and say so. It chose not to. This Court should not rewrite the Ohio legislature’s handiwork.

## CONCLUSION

For the foregoing reasons, Plaintiffs Motion should be granted.

Respectfully submitted,

*/s/ Mark R. Brown*

Mark R. Brown (# 0081941)  
Newton D. Baker/Baker &  
Hostetler Professor of Law  
Capital University\*  
303 E. Broad Street  
Columbus, OH 43220  
Phone (614) 236-6590  
Fax (614) 236-6596

\* For identification only

## CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2008, I electronically filed the foregoing Reply with the Clerk of Court using the Electronic Filing System which will send notification of such filing to all counsel of record.

*/s/ Mark R. Brown*\_\_\_\_\_

Mark R. Brown