

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

<b>BRIAN MOORE, STEWART</b>	)	
<b>ALEXANDER, SOCIALIST PARTY</b>	)	
<b>USA,</b>	)	
<b>DERON MIKAL, and</b>	)	
<b>SHERRY SUTER,</b>	)	
	)	
	)	
<b>Plaintiffs,</b>	)	<b>Case No. 2:08cv224</b>
	)	
<b>v.</b>	)	<b>Judge Sargus</b>
	)	
<b>JENNIFER BRUNNER,</b>	)	
<b>Ohio Secretary of State,</b>	)	
<b>in her official capacity,</b>	)	
	)	
<b>Defendant.</b>	)	<b>PRELIMINARY INJUNCTION</b>
<hr style="width:45%; margin-left:0"/>	)	<b>REQUESTED</b>

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION  
TO PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION**

**I. Independent Ballot Access Mechanisms and Limits are Not Relevant to Curing Unconstitutional Limits on Party Access.**

The Secretary makes much of *Schrader v. Blackwell*, 241 F.3d 783 (6<sup>th</sup> Cir. 2001), which ruled that independent candidates have no right to run under party labels in Ohio. That case is no more relevant here than it was in *Libertarian Party of Ohio v. Brunner*. Moore and Alexander are not here seeking to qualify as independent candidates and then claim a party label. Rather, the Socialist Party USA is attempting to qualify as a party in Ohio so that it can run its duly nominated candidates in the 2008 election. Brian Moore and Stewart Alexander just happen to be the Party's candidates for President and

Vice-President, respectively. Should this Court order ballot access for the Socialist Party USA, the Party would be free to run whomever it wants for President and Vice-President.

Even if *Schrader* were somehow relevant, the Supreme Court in *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976), made clear that a federal court's remedial powers are not limited to resurrecting a state's old ballot laws, curing its existing laws, or deflecting candidates to its constitutionally valid alternatives. In *McCarthy*, Texas's ban on independent candidacies for President was struck down by the District Court. Still, it refused to order McCarthy's name on the ballot, because it felt its remedial power was limited to implementing "the former statutory procedure permitting independent Presidential candidates to demonstrate substantial support by gathering a prescribed number of voters' signatures, a procedure still available to independent candidates for most other elective offices." *Id.* at 1321-22.

The Supreme Court disagreed: "[W]here a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as Texas has done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support."

Along these same lines, the fact that Ohio allows *candidates* to gain ballot access as independents by collecting signatures is irrelevant to this Court's remedial power to cure Ohio's constitutional violation in preventing *parties* from accessing the ballot. Even though Moore can qualify as an independent candidate by collecting 5,000 signatures—which he may or may not successfully do—this would not cure Ohio's unconstitutional exclusion of the Socialist Party USA from the ballot as a party. The only way to cure

Ohio's constitutional violation of party-rights is to award parties—like the Socialist Party USA—ballot access. And when this happens, the Socialist Party USA's duly nominated candidates for President and Vice-President will be able to run—regardless of whether they collect 5,000 signatures to qualify as independents.<sup>1</sup>

## **II. Minor Parties Need Not Have As Much Support as the Libertarian Party to Qualify for Ohio's Ballot.**

The State would have this Court hold that the Libertarian Party of Ohio represents a “bottom line” for court-ordered ballot access. Only parties with at least as much support as the Libertarians, the argument goes, have a right to access the ballot. If this is true, then the only parties in Ohio that will have ballot space in 2008 are the Democratic Party, the Republican Party, and the Libertarian Party. It is safe to say that no other minor party in Ohio matches the Libertarian Party in terms of longevity, organization, continuity, and presidential support across the United States. And if that is a proper interpretation of this Court's holding in *Libertarian Party of Ohio v. Brunner*, the Ohio legislature has largely succeeded in its continuing efforts to prevent minor parties from gaining ballot access.

Of course, this Court could not have meant to limit its holding in that fashion. In its opinion, the Court trumpets the inherent value of a *multi*-party system: “the Sixth Circuit clearly expressed a preference for the ‘political dialogue and free expression’ engendered by the presence of multiple parties on the ballot. As in *Blackwell*, ‘the State

---

<sup>1</sup> The Secretary suggests some sort of impropriety in Moore's announced intention to seek both independent access and access through the Socialist Party USA. There is nothing in Ohio law that prevents candidates from pursuing both paths up until the qualification deadline. Bob Barr, for example, was also pursuing an independent path to Ohio's ballot before the Libertarian Party won its case. It is not uncommon for minor candidates to pursue multiple paths to ballots.

has made no showing that the voters of Ohio, who are able to cast an effective ballot featuring several independent candidates, would be flummoxed by a ballot featuring multiple political parties.” *Libertarian Party of Ohio v. Brunner* at 7.

This Court relied heavily on *Goldman-Frankie v. Austin*, 727 F.2d 603, 607 (6<sup>th</sup> Cir. 1984), where the Sixth Circuit affirmed a District Court’s access order even though the candidate’s “demonstration of the requisite community support was not compelling.” The Sixth Circuit sustained the order, in part, because of Michigan’s repeated refusal to cure an unconstitutional ballot law: “it would be understandable if the courts looked with increasing disfavor on the State’s arguments regarding requisite support for a candidate when the State possesses the power to establish a uniform method of assuring such support and continuously refuses to do so.” *Id.* at 607 n.4.

*Goldman-Frankie* thus proves that a party (or candidate) need not have a tremendous amount of support—as Barr and Root obviously do—to win a court order. The question is simply whether a party has *enough* support. The question, moreover, has to be assessed in the context of the state’s wrong and the likelihood of too-complicated and too-cumbersome ballots. Where the state has repeatedly thumbed its nose at the Constitution, *see Goldman-Frankie*, as is also true here, and where there is no evidence that ballots will be rendered confusing or unmanageable by a plethora of candidates, which again is the case here,<sup>2</sup> *enough* support can be minimal. *Goldman-Frankie* proves this.

---

<sup>2</sup> The Columbus Dispatch reported on July 21, 2008, that only three additional parties in Ohio—the Constitution Party, the Green Party, and the Socialist Party USA—might benefit from this Court’s ruling in *Libertarian Party of Ohio v. Brunner*. *See* Mark Niquette, *Minor parties a Nov. 4 wild card: Impact on McCain, Obama in Ohio may hinge on economy*, COLUMBUS DISPATCH, July 21, 2008. Thus, even if all three of these parties’ presidential candidates were listed on the ballot because of *Brunner*, the Ohio ballot would only have six party candidates. (Assuming Nader qualifies as an independent, seven presidential

The Ohio legislature has now been caught *twice* violating the Constitution. First, its draconian ballot access law—which effectively prevented minor parties, including the Socialist Party USA, from accessing ballots and organizing support, was struck down by the Sixth Circuit. Next, the Ohio legislature thumbed its nose at the Constitution and refused to replace the law. Ohio now asks the Court to reward its unconstitutional behavior. It asks the Court to draw the line at three parties (as opposed to two). After years and years of unconstitutionally prohibiting the Socialist Party USA (among others) from emerging as a viable political party in Ohio, Ohio now argues that the Socialist Party USA should not be given a chance—‘after all, it isn’t much of a party.’

If this argument is accepted, Ohio will be encouraged to proceed along its unconstitutional path in the future. It will continue to pass draconian laws that prohibit parties from forming, and will continue to resist judicial oversight. After all, what is the cost if in the end the standard adopted by the court requires a sophisticated party structure, prior ballot access, thousands of members, annual conventions, and etcetera? Not much, since few if any parties—given draconian party restrictions—will be able to emerge and survive.

The better approach, that taken by the Supreme Court, the Sixth Circuit, and this Court in *Brunner*, is to approach support in a common-sense way. Parties need not have qualified for Ohio’s ballots in the past, they do not need to produce thousands of signatures, they do not need presidential candidates on more than half the states’ ballots, nor do they need a sophisticated structure. Rather, the question is simply whether the

---

candidates would appear on Ohio’s ballot.) To Plaintiffs’ knowledge, neither the Constitution Party nor the Green Party has sought ballot access in Ohio.

party has enough support to justify a remedial order—one that will deter a state from acting illegally again. The order, which is by definition remedial, must be designed to undo the wrong. Courts should thus take account of the magnitude of a state’s wrong, *see Goldman-Frankie*, and the causal effect that wrong had on the stature of the victim.

The Socialist Party USA is, of course, not the premier “third party” in America, nor in Ohio; but clearly it would be stronger in Ohio but for Ohio’s unconstitutional ballot access laws. Thus, even if the Socialist Party USA’s claim presented a close question—which it does not under *Goldman-Frankie* and *McCarthy v. Briscoe*, 429 U.S. 1317(1976)—this Court should err on the side of access. Ohio should not be rewarded for violating the Constitution. It should not be rewarded for preventing the Socialist Party USA from becoming a stronger party.

In looking for the Socialist Party USA’s support, moreover, it must be remembered that this is a presidential election. As this Court noted in *Brunner*, where it looked to the Libertarian Party’s presidential ticket’s qualifications in other states, the matter of support extends beyond Ohio’s four corners. Support in the context of presidential elections is gauged nationally.

In *McCarthy v. Briscoe*, 429 U.S. 1317, 1323 (1976), for example, where the Supreme Court ordered that Eugene McCarthy’s name be placed on Texas’s presidential ballot, the Court observed that “Senator McCarthy is a nationally known figure; ... he served two terms in the United States Senate and five in the United States House of Representatives; ... he was an active candidate for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary

elections; and ... he has succeeded this year in qualifying for position on the general election ballot in many States.”

Tellingly, the Supreme Court did not inquire whether McCarthy had collected signatures in Texas, had active supporters in Texas, or had campaign machinery in place in Texas. Instead, the Court put the burden on the state to disprove the presumption that he did: “[t]he defendants have made no showing that support for Senator McCarthy is less substantial in Texas than elsewhere.” *Id.* The assumption, then, is that a presidential candidate’s support across the country is at least matched in the state under review. In the absence of proof to the contrary, this Court should likewise assume that the Socialist Party USA has as much support in Ohio as it does across the United States.<sup>3</sup>

### **III. The Socialist Party USA Meets the Secretary’s Proposed Standards for Awarding Ballot Access.**

In *Brunner*, this Court stated that “[t]he limited record in this case [shows] ... that the Libertarian Party was founded in 1972, has qualified for the Ohio ballot in previous years, and that its presidential candidate, Plaintiff Barr, is on the ballot in 31 other states for the 2008 general election.” *Id.* at 6. To these requirements, the State in its Memorandum Contra Plaintiffs’ Second Motion for Preliminary Injunction apparently adds what appear to be four more. The State complains not only “the Socialist Party USA has never had ballot access in Ohio,” *id.* at 5, and its presidential candidates have only “qualified in two states,” *id.*, but also that the Socialist Party USA “appears not to have held a State convention in 2008,” *id.*, it “may not have an ‘active’ Ohio party,” *id.*, it

---

<sup>3</sup> Even without such an assumption, “Ohio to this day has a disproportionately large number of Socialist Party members.” Declaration of Matt Erard at ¶ 6 (attached as Exhibit to Plaintiffs’ Second Motion for Preliminary Injunction).

has “failed to submit any signatures either to the Secretary of this Court,” *id.*, and it has not chosen to “run candidates for multiple offices.” *Id.* at 6.<sup>4</sup>

Of course, because there exist no party-access laws in Ohio and no official standards or guidelines to follow, the Socialist Party USA could not have been aware that these were the Secretary’s requirements. For that reason, it did not raise these points in its initial Memorandum. Without conceding that these are the constitutionally controlling standards, the Socialist Party USA has met or exceeded them. It should thus be awarded access under the Secretary’s own terms.

First, the Socialist Party USA has qualified for the ballot in the past. As chronicled in its initial Memorandum, the Socialist Party has run several presidential candidates in Ohio over the course of the last century, starting with Eugene Debs and ending with Norman Thomas. That this party was not officially know as the “Socialist Party USA” does not change the fact that it was the same party. Factions have spun off over the course of the years—necessitating reformation and a slight name change—but the history of the Socialist Party USA cannot be denied. The Socialist Party USA is as much the Socialist Party as Abraham Lincoln was a Republican.<sup>5</sup>

Second, the Socialist Party USA’s presidential ticket has now qualified in Vermont, New Jersey and Colorado. To these three states, it expects to (and barring unforeseen events will) qualify in Iowa on August 15, 2008, Tennessee on August 21,

---

<sup>4</sup> As described in Plaintiffs’ initial Memorandum in Support of their Motion for Preliminary Injunction, the Socialist Party USA has a long and storied history in both the United States and Ohio. The State does not contest this evidence, which alone should entitle the Socialist Party USA to ballot access.

<sup>5</sup> The two major parties have also operated under different names throughout history, but no one would deny them their legacies. In 1864, for example, Abraham Lincoln officially ran as the “National Union Party” candidate. *See* DAVID HERBERT DONALD, *LINCOLN* 483 (1995) (“the National Committee of the Republican party ... in the forthcoming election was to call itself the National Union party”). Everyone agrees, however, that this party was the Republican Party, and that Lincoln was a Republican.

2008, Utah, Louisiana and Wisconsin on Sept 2, 2008, and Minnesota and Florida by September 9, 2008. *See* Declaration of Brian Moore (Attached as Exhibit 1). *See* also BALLOT ACCESS NEWS, Aug. 1, 2008, vol. 24, no. 4 (reporting that the Socialist Party presidential candidate is likely to qualify in “Arkansas, Colorado, Florida, Louisiana, New Jersey, Rhode Island, Tennessee, Vermont, Wisconsin, and possibly California and Ohio”). Thus, by early September, when most states require nomination papers, the Moore/Alexander ticket should be on no fewer than ten state ballots, with continuing hopes of reaching perhaps ten more.

Third, the Socialist Party USA holds national conventions in odd-numbered years and organizing conferences in even-numbered years (the last being held August 4-6, 2006 in Detroit, Michigan). Its most recent national convention was held from October 19<sup>th</sup> to the 21<sup>st</sup>, 2007 in St. Louis, Missouri, where it nominated the Plaintiffs, Brian Moore and Stewart Alexander, as its presidential and vice-presidential candidates. The State complains that the Socialist Party USA did not hold a local convention in 2008, as if to suggest that the party must have died between October 2007 and August 2008, or perhaps lacked support in Ohio. The reason that it held no State convention in 2008 is that its presidential and vice-presidential candidates were selected in 2007 at its national convention. And because Ohio law prevented it from running candidates for any offices—that is, until this Court’s holding in *Brunner*—there was no reason to hold a state convention to select local candidates. Under Ohio law, after all, such a convention could not nominate any candidates.

Fourth, the Socialist Party USA has an active state affiliate in Ohio with a Charter and state officers. *See* Third Declaration of Brian Moore (Exhibit 1).

Fifth, the Socialist Party USA, through its presidential and vice-presidential candidates, has collected over 2,000 voters' signatures as of this date in an effort to satisfy the State's independent candidate requirement.<sup>6</sup> Of course, because there is no law in Ohio requiring signature collection for party access, it is not clear how many signatures the Secretary would deem sufficient to show adequate party support. Suffice it to say that Moore/Alexander hopes to collect enough signatures to gain access as independent candidates in Ohio should the Socialist Party USA not win ballot access in this suit.<sup>7</sup>

Sixth, it is true that the Socialist Party USA has not chosen to run more than two candidates (Moore and Alexander) in Ohio. If multiple candidates are a requirement, however, the Party stands ready and willing to nominate more candidates for Ohio's 2008

---

<sup>6</sup> These signatures are not due until August 21, 2008.

<sup>7</sup> Moore and his Socialist Party USA supporters, moreover, would have collected many more signatures by this date had they not been hampered by Ohio's unconstitutional residence and registration requirements. See ORC § 3503.06(A) (requiring that circulators of independent candidates' petitions be Ohio residents who are registered to vote in Ohio). Those requirements were enjoined by Judge Frost on June 2, 2008, meaning that the Socialist Party USA was not able to implement its campaign machinery—using non-resident and unregistered volunteers and hiring out-of-state signature collection companies (both of which it has now done) in addition to local, registered supporters—before then. Thus, its collection effort to date—over 2,000 signatures—is even more substantial given that it occurred over the course of just two months. And because the Party's collection machinery is now fully operational, the rate of signature collection will increase over the course of the next week at a significant rate. Make no mistake, even though Ohio law does not require that parties' collect **any** signatures, the Socialist Party USA will continue to do so at an increased rate up to (and beyond, if necessary) August 21, 2008 (when independent candidates' signatures are due).

ballots.<sup>8</sup> It has not done so because Ohio's draconian law, which was struck down by this Court just last month, made such an effort futile until now.

The foregoing evidence demonstrates that even under the Secretary's own terms, the Socialist Party USA deserves ballot access. It has run presidential candidates in Ohio in the past, has qualified its presidential candidates this year in multiple states, holds conventions or organizing conferences every year, has an active Ohio affiliate, has collected thousands of voters' signatures, and is prepared to run multiple candidates.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Socialist Party USA be awarded ballot access as a minor party in Ohio's 2008 election.

Respectfully submitted,

*/s/ Mark R. Brown*

Mark R. Brown  
Ohio # 0081941  
Professor of Law  
Capital University\*  
303 E. Broad Street  
Columbus, OH 43215  
[mbrown@law.capital.edu](mailto:mbrown@law.capital.edu)

\*For identification only.

---

<sup>8</sup> Plaintiffs suspect that the Defendant does not really want it to run more candidates. Her actions in the *Libertarian Party* case, where she initially resisted the addition of down-ticket Libertarian candidates who were not formally named as plaintiffs in the Complaint, suggests that she would likely resist any attempt by the Socialist Party USA (or any other party) to nominate or add candidates after being qualified as a party. But if that is what is needed to show adequate support, the Socialist Party USA stands ready to call a meeting and nominate more candidates.

**CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing Motion with the Clerk of Court using the Electronic Filing System which will send notification of such filing to all counsel.

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