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

LIBERTARIAN PARTY OF OHIO, et al.,	:	
	:	Case No. 2:13-cv-00953
Plaintiffs,	:	
	:	Judge Michael H. Watson
v.	:	
	:	Magistrate Judge Kemp
JON HUSTED,	:	
	:	
Defendant.	:	

MEMORANDUM CONTRA PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

As the case law cited by Plaintiffs themselves makes clear, the United States Constitution permits Ohio to require circulators of candidate petitions to disclose the identity and address of the person paying them for that task. The State's disclosure law requires that disclosure only after the signatures have been obtained, and is a reasonable and modest regulation supporting important State interests in election integrity.

The facts in this case are straightforward. Charles Earl and Sherry Clark are the Libertarian Party's joint candidates for Governor and Lieutenant Governor. Steven Linnabary is the Libertarian Party's candidate for Attorney General. The Libertarian Party hired paid circulators to obtain the 500 valid signatures that Earl-Clark and Linnabary needed to qualify for the primary ballot. Ohio law mandates that when a paid circulator gathers signatures "the circulator shall identify the circulator's name, the address of the circulator's permanent residence, and the name and address of the person employing the circulator to circulate the petition, if any." O.R.C. § 3501.38(E)(1).

Oscar Hatchett, Jr. and Sara Hart were paid to circulate the petitions for Linnabary and Earl-Clark. Hatchett had a conversation with Robert Bridges, Political Director of the Libertarian Party, about the petitions he submitted. "I just asked him if I should fill it out (the paid circulator statement) and he said I didn't." (Secretary's Exhibit A, Hearing Transcript at 95). Even though the circulator was willing to fill out the statement if the Libertarians wanted him to, they apparently decided it unnecessary. (*Id.* at 97). Either way, the part-petitions circulated by Hatchett and Hart that were later submitted by Earl-Clark and Linnabary submitted for filing with the Secretary of State did not include the information revealing the name and address of the person who paid them to circulate the petitions. (*Id.* at 79-227).

Linnabary and Earl-Clark filed their nominating petitions with Secretary of State Husted, and the Secretary certified Earl and Clark as a joint candidates for Governor and Lieutenant Governor and Linnabary as a candidate for Attorney General on February 18, 2014. (Doc. 57-3, Hearing Officer's Report. PAGEID # 1095). Exercising their statutory right to challenge these two candidacies, Gregory Felsoci and Tyler King timely filed protests against the Earl-Clark joint candidacy and Carl Michael Akers timely filed a protest against the certification of Linnabary. (*Id.* at PAGEID # 1083).

The Secretary of State appointed Professor Brad Smith as a hearing officer, and on March 4, 2014, a hearing was held pursuant to O.R.C. § 3513.05. At the hearing, King withdrew his protest against the Earl-Clark joint candidacy. The remaining protestors claimed that the petitions submitted by both the Earl-Clark joint candidate and Linnabary failed to comply with O.R.C. § 3501.38(E)(1) because Oscar C. Hatchett, Jr., a paid circulator, failed to "identify the name and address of the person employing the circulator to circulate the petition...." (*Id.* at PAGEID # 1084). Felsoci raised the same claim about part-petitions circulated by Sara Hart on

behalf of the joint candidacy of Earl-Clark. *Id.* Both protestors also claimed that some of the part-petitions circulated on behalf of the two challenged candidacies were circulated by individuals who were not members of the Libertarian Party. (*Id.* at PAGEID # 1085).

On March 7, Professor Smith issued his report and recommendation to the Secretary of State. Professor Smith rejected the claim that the part-petitions were circulated by individuals who were not members of the Libertarian Party. (*Id.* at PAGEID #1100). However, Professor Smith sustained the protests against Earl-Clark and Linnabary, finding that the paid circulators failed to disclose their employers as required by O.R.C. § 3501.38(E)(1). (*Id.*). On the same day, Secretary of State Husted adopted the report and recommendation of Professor Smith and upheld the protest. Thus, Secretary Husted determined that:

> [T]he signatures gathered for Steven R. Linnabary by circulator Hatchett, and signatures gathered for Charles R. Earl and Sherry L. Clark by circulators Hatchett and Hart are invalid and, as a result, neither Steven R. Linnabary, nor Charles R. Earl and Sherry L. Clark have the requisite number of valid signatures to be eligible for nomination as Libertarian candidates for the offices of Attorney General and Governor and Lt. Governor, respectively, at the May 6, 2014 Primary Election.

(Doc. 57-4, Plaintiffs' Third Motion for TRO, Ex. 4, PAGEID # 1102).

Plaintiffs' request for a temporary restraining order and preliminary injunction to enjoin the Secretary's March 7, 2014 decision should be denied. Plaintiffs allege that O.R.C. § 3501.38(E)(1) is unconstitutional on its face and as applied, and that Secretary of State Husted is employing a "new" interpretation of O.R.C. § 3501.38 to require disclosure of independent contractor circulators which Plaintiffs claim cannot be retroactively applied. They are wrong on all counts.

LAW AND ARGUMENT

This Court should deny the Plaintiffs' request for emergency relief for several reasons. First, Plaintiffs are not entitled to temporary and preliminary relief where, as here, the challenged statute O.R.C. § 3501.38 is constitutional on its face and as applied to them. Second, Plaintiffs' request for emergency injunctive relief should be denied where Plaintiffs waited eight years after the passage of O.R.C. §3501.38 to challenge its requirements (or, at a minimum, three years after the Ohio Supreme Court deferred to the Secretary's interpretation in *Rothenberg v. Husted*, 129 Ohio St.3d 447, 953 N.E.2d 327 (2011), that "person employing" encompasses both independent contractors and employees). Finally, the Secretary of State has not adopted a new interpretation of O.R.C.§ 3501.38(E)(1) and Plaintiffs cannot therefore establish that he has "retroactively" applied this interpretation to them. Because the Plaintiffs cannot demonstrate that they are entitled to emergency relief, this Court should reject their request.

A preliminary injunction is an extraordinary remedy and the Plaintiffs bear the burden of demonstrating that they are entitled to it. This court must consider four factors to determine whether it is appropriate to grant the relief requested. Those factors are: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005).

Here, the request for emergency injunction is considered in the elections context, where courts understand that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin*

Cities Area New Party, 520 U.S. 351, 358 (1997). Thus, "[s]tates … have considerable leeway to protect the integrity and reliability of … election processes generally." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 191 (1999).

I. The Plaintiffs are not entitled to a temporary restraining order or preliminary injunction because they are unlikely to succeed on the merits.

A. The Plaintiffs are not likely to succeed on the merits of their claim that O.R.C. § 3501.38(E)(1) is facially unconstitutional.

The State interest in disclosure of who pays petition circulators is strong and well recognized. And the requirement applies **after** signatures have been collected. Thus, R.C. 3501.38(E)(1) requires paid circulators to **identify "the name and address** of the person employing the circulator to circulate the petition."

Revised Code Section 3501.38(E)(1)'s mandates arose after Ohio encountered significant problems in 2004 with the Presidential candidacy of Ralph Nader. As Ohio's Tenth District Court of Appeals observed in *Evans* court observed, there were "numerous and substantial instances of fraud on the part of petition circulators…." *In re Protest Evans*, 2006-Ohio-4690, ¶ 27, quoting *Blankenship v. Blackwell*, 341 F.Supp.2d 911, 923 (2004). Thus the Governor called a special session of the Ohio General Assembly to reform Ohio's campaign finance and other election laws. *Evans*, 2006-Ohio-4690, ¶ 28, 2006 WL 2590613 (Ohio App. 2006), quoting Ohio Atty. Gen. Op. No. 2006-004, at 2 (Feb. 13, 2006). During this special session O.R.C. § 3501.38(E)(1) was amended to include a requirement that paid circulators identify the source of their payment. Plaintiffs cannot succeed in their challenge to that requirement where, as here, they fail to introduce any evidence that the statute "chills" or limits in any way the First Amendment rights of a circulator, or any argument that the State does not have an interest in preventing fraud by circulators.

In *Evans*, the Tenth District upheld the statute at issue in this case. There, the American Cancer Society ("ACS") contracted with Arno Political Consultants, a signature gathering entity, to obtain signatures for a ballot initiative. *Id*. at ¶¶ 5, 20. Arno then hired independent contractors to circulate the petitions. *Id*. at ¶¶ 20-21 ("Arno… retained paid circulators as independent contractors."); *id.* at ¶22 (referencing "Arno and other sub-contracting entities"). Multiple protests were filed because some of the circulators identified ACS as their employer rather than the professional petition circulating company.

In her opinion for a unanimous panel, Judge (now Justice) French recounted the "rampant fraud perpetrated by petition circulators during the 2004 election in Ohio." *Id.* at ¶ 27. She concluded that:

> [I]t makes sense that the legislature would have focused its efforts on requiring the disclosure of the person or entity paying a circulator, particularly a circulator being paid on a per-signature basis. Thus, our reading of the statute as requiring the disclosure of *the entity that not only directly controls the manner and means of the circulator's work, but also directly pays the circulator*, furthers this legislative purpose.

Id. at ¶¶ 28-29 (emphasis added). Evaluating whether the independent contractor circulators had identified the "correct" employer, *Evans* held that the entity that engaged, directed the work of and paid the circulators—Arno (the same entity whom the Court noted hired these circulators as "independent contractors")—was the entity that had to be disclosed under O.R.C. § 3501.38(E)(1). *Id.* at ¶ 23. The *Evans* court found the distinction between independent contractor and employee to be irrelevant and still required disclosure. As the hearing officer in the instant case noted, "the clear underlying assumption of *Evans* was that paid circulators would disclose *some* person as the employer. To exempt independent contractors from the disclosure provisions would allow the disclosure of paid petitioning to be avoided by the simple expedient

of using independent contractors rather than employees." (Doc. 57-3, Hearing Report, PAGEID # 1094).

Applying the *Evans* court construction of O.R.C. § 3501.38(E)(1), the Hearing Officer found that:

- Oscar Hatchett, Jr. and Sara Hart were paid circulators;
- Neither Hatchett nor Hart identified their payors on the candidate petitions they submitted; and
- As a result, the part-petitions they submitted must be rejected.

Because the Earl-Clark and Linnabary candidacies no longer contained 500 valid signatures, the Hearing Office recommended, and Secretary Husted agreed, invalidated the signatures.

Plaintiffs now ask this Court to declare unconstitutional a law with which they failed to comply and urge a result that would allow a scheme whereby a petition circulator could easily evade the requirement to disclose who paid them. But as *Evans* recognized, the "legislative purpose" behind O.R.C. § 3501.38(E)(1) demands transparency. *Evans,* 2006-Ohio-4690, ¶ 29 ("[I]t makes sense that the legislature would have focused its efforts on requiring disclosure of the person or entity paying a circulator…"

Plaintiffs do not cite any cases in which *any court* has held that a State may not require circulators of candidate petitions to disclose the person or entity paying them—regardless of the "employment relationship" between the parties. More significantly, the authorities they *do* cite reflect that Ohio's disclosure requirement is fully consistent with well-established law.

1. The United States Supreme Court, lower federal courts, and Ohio Courts have held that States may indeed require disclosure of who pays petition circulators.

The primary case on which Plaintiffs rely is *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). There, the Supreme Court affirmed the Tenth Circuit's decision upholding a State's requirements for "the disclosure of *payors*, in particular, proponents' names and the total amount they have spent to collect signatures for their petitions." 525 U.S. at 202 (emphasis in original). The Court specifically noted the state's "substantial interest" in such disclosure, stating that: "Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation'." *Id*. at 203. Importantly, the Court stated: "**we reiterate, the State legitimately requires sponsors of ballot initiatives to disclose who pays petition circulators,** and how much." *Id*. at 205 (emphasis added).

Even in the initiative context, then, Plaintiffs cannot argue that *Buckley v. ACLF* precludes a State from requiring disclosure of by whom, if anyone, petition circulators have been paid for their work. Instead, it emphatically rejects any such prohibition.[1] *Citizens in Charge v. Brunner*, 689 F. Supp. 2d 992 (S.D. Ohio 2010), related to committees, and struck down required

[1] *See also, e.g., National Organization for Marriage v. McKee*, 666 F. Supp.2d 193, 205 (D. Me. 2009) ("in *Buckley* [*v. ACLF*], while striking down a number of Colorado regulations concerning that state's petition process, the Court reiterated that a state has an interest in informing the public 'where political campaign money comes from.' It said that a state could require the sponsors of ballot initiatives to disclose the identities of those paying petition circulators and how much they paid."); *Voting for America, Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013) ("'While affirming the striking down of some provisions of Colorado law in *Buckley*, the Court recognized an 'important interest' of the state in protecting the integrity of the ballot initiative process there at issue and in deterring fraud';" upholding as outside of First Amendment scrutiny voter registration regulations that do not restrict or regulate "who can advocate … the manner in which they may do so, or any communicative content").

disclosure of *amounts* paid (not at issue here) of *ballot or initiative petitions* (not at issue here). The Court ruled that affirmance of disclosure requirements in Citizens United did not control "because that decision dealt with disclosure of the *sources* of independent expenditures supporting or opposing federal *candidates*." *Citizens in Charge*, at 993. The Court explained further: "In *Buckley*, the Supreme Court emphasized the difference between payments made on behalf of a candidate compared to those made in support of a referendum. The Court noted that 'ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates.' *Buckley*, 525 U.S. at 203, 119 S.Ct. 636 (citing *Meyer v. Grant*, 486 U.S. 414, 427–28, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988))." *Id.*

This very point was again underscored by *(WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) upon which Plaintiffs also attempt to lean. After observing that a State's interest in combatting fraud is not as heightened in the context of initiative campaigns as it is in candidate contests (quoting from *Buckley* that "ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates"), the Court there emphasized that: "The State's interest in educating voters through campaign finance disclosure is more adequately served by a panoply of the State's other requirements that have not been challenged. Through [another, unchallenged section of law], 'voters are informed of the *source* and amount of money spent by proponents to get a measure on the ballot; in other words, voters [can learn] who has proposed a measure and who has provided funds for its circulation'." *Id*. (citation omitted) (emphasis added).

The other cases upon which Plaintiffs rely most heavily reflect that their position is unsupported. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) concerned the distribution to citizens of advocacy leaflets, and has nothing to do with requiring paid circulators

to disclose to election officials the source of the payment. Indeed, *McIntyre* explicitly distinguished its holding from a requirement that "entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate," that was already affirmed by the Court 514 U.S. at 355, and from provisions that "control the mechanics of the electoral process," *Id*. at 345.

American Civil Liberties Union v. Heller, 378 F.3d 979 (9th Cir. 2002), is equally unhelpful to Plaintiffs, as it also addressed regulation of electioneering advocacy/informational materials themselves. There, the Court observed that "[c]ritical" to the analysis "is the central similarity between this case and *McIntyre*: Both involve campaign statutes that go beyond requiring the reporting of funds used to *finance* speech to affect the *content of the communication itself*." *Id*. at 987 (noting the "distinction between direct regulation of the content of political speech," which was prohibited, "and requiring the later reporting of the funding of speech," which was permitted) (emphasis original).

The conclusion that a State may require such disclosure is also reaffirmed by the same Ninth Circuit. In *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), the Court of Appeals upheld an Oregon law that prohibited paying petition circulators on a per-signature basis, but allowed payment based under other calculations, including validity rates, hours worked, and the like. The Court noted that the state had an "important interest in preventing signature fraud" of the sort encouraged by per-signature payment to circulators. 438 F.3d at 963, citing *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 618 (8th Cir. 2001) (to the same effect). The court further noted that Oregon's restrictions at most impose a "lesser burden" on circulators that will be upheld as reasonable and non-discriminatory. *Id*. at 968. It noted that the "court's duty is not to determine whether the state's chosen method for prevention of fraud is the best imaginable."

Unlike the measure that was upheld in *Prete*, O.R.C. § 3501.38(E)(1) is narrow in that it does not limit *how* a circulator is paid, it simply requires that the circulator disclose *who* makes the payment.

Indeed, the modesty of Ohio's disclosure requirement in comparison with those upheld in *Prete, Jaeger*, and in *Person v. New York State Board of Elections*, 467 F.3d 141 (2d Cir. 2006), is explained by the Sixth Circuit in *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008). There, the Court struck down an Ohio law "making it a felony to pay anyone for gathering signatures on election-related petitions on any basis other than the time worked." *Id.* at 377. That prohibition went farther than the restraints on payment calculation methods upheld by three other circuits, and the Court noted that the statute "[fell] somewhere in between" the permissible bans considered in [*Prete, Jaeger,* and *Person*] and the complete ban on all circulator payment invalidated in *Meyer*. *Id.* at 385. The Court concluded, however, that "[w]ith the broader ban on the types of payment [limiting remuneration payment on an hourly basis only] and harsher criminal sanctions for violations, Ohio's provision lies closer to the complete ban in *Meyer* than the partial bans in the other circuit court cases." *Id.* at 386. What remains is the current disclosure requirement, which is far more modest than the payment constraints of *Prete* that the Sixth Circuit opinion in *Deters* suggests would pass constitutional muster.

2. Ohio's established interest in deterring fraud, diminishing corruption, and investigating potential abuse far outweighs any claimed interests against disclosure.

Although only that conduct that is "inherently expressive" is entitled to First Amendment protection, *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 66 (2006), Plaintiffs argue that they are bringing a First Amendment challenge here. That assertion alone does not dictate the appropriate level of scrutiny that this Court must use. The Supreme Court

has recognized that States have "significant flexibility in implementing their voting systems." *Doe v. Reed*, 130 S.Ct 2811, 2818 (2010). This Court must balance the interests at stake by first looking at the "character and magnitude of the asserted injury" to a plaintiff's constitutional rights. *Burdick*, 504 U.S. at 434 (citing *Anderson* v. *Celebreze*, 460 U.S. 780, 789 (1983)). The Court must then "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id*. If the state law imposes only "reasonable, nondiscriminatory restrictions" upon a protected right, then the State's important regulatory interests are "generally sufficient to justify" the restrictions. *Id.* Only those regulations that "severely burden" a Plaintiff's rights must be "narrowly drawn to advance a state interest of compelling importance." *Id.*, quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992).

In this case, the Plaintiffs are unable to show first that the State law imposes any severe restriction upon their rights. Indeed, Plaintiffs have not produced evidence either during the hearing in front of the Hearing Officer or to this Court showing that requiring paid circulators of candidate petitions to disclose the source of their funding severely impacts an ability to collect signatures. Indeed, Mr. Hatchett testified that he would have been prepared to do so. (Secretary's Exhibit A, Hearing Transcript at 96-97). That evidentiary failure alone is sufficient to reject the Plaintiffs' claims.

As the *Evans* court noted, interested parties in Ohio "are free to use paid circulators; those circulators must simply disclose the correct employment information." *Evans*, 2006-Ohio-4690, ¶ 37. Importantly, that disclosure does not occur while the circulator is communicating with the voter. Instead, the payor information does not have to be completed until *after* the petition is circulated: "the 'person employing…disclosure…need not be completed until after a circulator has completed his or her circulation of the part-petition...the purpose of the employer

disclosure is to inform *election officials* about the entity that hired the circulator...this type of disclosure makes sense given the legislature's intent to curb fraud and dishonesty in the petition process, particularly as it relates to business entities that pay circulators on a per-signature basis. *See* 2006 Ohio Atty. Gen. Ops. No. 2006-004 (emphasis added). As the *Evans* Court noted: "[R]equiring the disclosure of the person hiring and paying a circulator for collecting signatures is a direct way of gathering information necessary to deter fraud, diminish corruption, and investigate potential abuse by a circulator of the entity that paid the circulator to gather signatures. Thus, this disclosure requirement serves a substantial government interest." *Id.* at ¶ 46.

That the State's interest in this case is sufficient to defeat the Plaintiffs' claim is also signaled in *Citizens in Charge v. Gale*, 810 F. Supp.2d 916 (D. Neb. 2011). In *Gale*, after Nebraska's law prohibiting paid circulators was found to be unconstitutional, the State passed a law mandating that petitions include a statement that: "This petition is circulated by a paid circulator," and further requiring that the statement be printed in red ink and printed in 16-point type. This provision *intended to communicate with voters* circulators approached in a way that Ohio's simple post-circulation disclosure law does not. Nonetheless, the *Gale* court found that those requirements did not place a severe burden on the Plaintiffs' first amendment rights. *Id.* at 928. "Neither the plaintiffs nor the intervenors offered any significant or substantially credible evidence that the required language, color and type impaired their ability to obtain signatures. Further, the court finds that the disclosure statement is a reasonable and a nondiscriminatory regulation designed to inform petition signers that the person gathering the petition signatures might be paid for such signatures." *Id.*

Thus, Plaintiffs' advocacy for non-disclosure is not supported in law and must be rejected. Revised Code Section 3501.38(E)(1) is a reasonable, non-discriminatory statute that does not severely burden the rights of circulators or candidates. It furthers the important state interest in combating fraud and gives the state important information allowing it to determine the veracity of campaign finance reports. Plaintiffs are therefore unlikely to succeed on the merits of their facial challenge and their request for temporary relief should be denied.

B. The Plaintiffs are unlikely to succeed on their claim that O.R.C. § 3501.38(E)(1) is unconstitutional as applied.

Here, the Hearing Officer's recommendation and the Secretary's invalidation of signatures collected by Hatchett and Hart—both paid professional circulators working at a per-signature rate—squarely fulfills the legislature's intent behind O.R.C. § 3501.83(E)(1). And Hatchett's own testimony underscores the need for the Secretary to hold circulators, and their employers, to the law's requirements. At the hearing Hatchett testified:

> Q: So you decided that you would leave it in Mr. Bridges' (LPO Official) hands to determine whether you needed to fill out the [employer disclosure] box and you would be available to come to Columbus to fill out the boxes if requested?
>
> Hatchett: Yes.
>
> Q: All right. So you were prepared to do whatever the Libertarian Party told you to do in terms of filling out the box?"
>
> Hatchett: Well I wanted my signatures to count.
>
> Q: So the answer is yes?"
>
> Hatchett: Yeah.

(Secretary's Exhibit A, Hearing Transcript at 96-97).

Under such circumstances, the Secretary's decision, based on Hearing Officer Smith's recommendation, to invalidate the signatures gathered by Hatchett and Hart is entirely consistent with *Evans* and is required by O.R.C. § 3501.38(E)(1). The *Evans* court contemplated that the circulator would identify *someone* as the employer if the circulator was paid. *See generally*, *Evans.*

Further testimony elicited at the hearing plainly demonstrates that O.R.C. § 3501.38(E)(1) was constitutionally applied. During the hearing, the Libertarians stipulated that Hatchett, or his company, paid Hart to collect signatures for the Libertarian candidates.

> Hearing Officer: Okay. So you're prepared to stipulate that Mr. Hatchett paid Ms. Hart, either Mr. Hatchett or the company, which I take to be a sole proprietorship, so it would be the same, but Easy Access Petitions.
>
> Mr. Brown: Exactly, your Honor, yes.
>
> Hearing Officer: Does that satisfy –
>
> Mr. Zeiger: As long as that it's clear that it was paid to collect signatures for the part-petitions for the two Libertarian candidates for Governor and Lieutenant Governor which I think was implicit in his stipulation.
>
> Mr. Brown: Yes, that's fine.

(Secretary's Exhibit A, Hearing Transcript at 55).

Based upon this stipulation, the Libertarians agreed that Ms. Hart was paid by Mr. Hatchett to collect signatures. Mr. Hatchett later testified that he did not pay Ms. Hart but rather she was paid by the Libertarian Party. (*Id.* at 93). The Libertarian Party Political Director testified that Ms. Hart informed them that she was collecting signatures for Mr. Hatchett and that

the party did not pay her. (*Id.* at 50-51). Such inconsistent testimony itself suggests why the disclosure requirement of O.R.C. § 3501.38(E)(1) is appropriate.

Further, the Secretary's decision adopting the Hearing Officer's recommendation to reject the petitions for noncompliance with O.R.C. § 3501.38(E)(1) is entirely consistent with *Rothenberg v. Husted*, 129 Ohio St.3d 447, 953 N.E.2d 327 (2011), the Ohio Supreme Court's only opinion addressing O.R.C. § 3501.38(E)(1). *Rothenberg* was an original action in mandamus in which the Relator sought to invalidate signatures on an initiative petition for a constitutional amendment. 953 N.E. at 447. Rejecting the Relator's arguments to the contrary, the Ohio Supreme Court held that "[p]art-petition circulators are not improperly verified and subject to invalidation simply because the circulators, who might actually be independent contractors, listed the entity or individual engaging or paying them as 'the person employing' them." *Id.* There, as here, the Secretary argued that the circulators should identify who was paying them to circulate petitions. As the hearing examiner here noted, "*Rothenberg* does not contradict or overrule *Evans*" and is consistent with the Secretary's approach. (Doc. 57-3, Plaintiffs' Third Motion for TRO, PAGEID # 1098).

C. The Plaintiffs are unlikely to succeed on their claim that O.R.C. § 3501.38 is being applied "retroactively."

Relatedly, and as reflected by the Secretary's position in *Rothenberg*, Plaintiffs' argument that O.R.C. § 3501.38(E)(1) is being applied retroactively is meritless. Retroactive statutes are those which destroy a *substantial* or *vested* right. *See, e.g., Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conversancy Dist.*, 739 F.2d 1472 (10th Cir. 1984) ("[T]he Supreme Court decisions reveal the necessity of asserting an impact upon "vested rights" in claims founded upon the retroactivity of legislation in violation of the United

States Constitution."). Here, Plaintiffs cannot demonstrate that they have a vested right *not* to comply with Ohio law.

As established above, the Secretary's interpretation of O.R.C. § 3501.38(E)(1) is consistent with long-standing case law and directives. Plaintiffs have been on notice since *Evans* was decided in 2006, and from subsequent notifications, that compliance with O.R.C. § 3501.38(E)(1) is required and that circulators must disclose who is paying them. Plaintiffs' reliance on Directive 2006-58 (Secretary's Exhibit C) and Directive 2007-14 (Secretary's Exhibit D) is misplaced. Further emphasizing that disclosure is required, the Secretary issued Directive 2011-22, which reads:

> Election laws are mandatory and require strict compliance, and substantial compliance is acceptable only when an election provision says that it is. *State ex rel. Vickers v. Summit Cty. Council*, (2002) 97 Ohio St.3d 204. . . . R.C. 3501.38 and R.C. 3519.05 do not say that substantial compliance is permissible. Accordingly, the law requires strict compliance.

(Secretary's Exhibit E, Ohio Sec'y of State Directive 2011-22 (July 7, 2011)). Similarly, Directive 2013-17, issued over five months ago, again reiterated that "[i]f a circulator identifies an employer on the circulator's statement but does not provide a corresponding address, the Board must invalidate the entire part-petition." (Secretary's Exhibit F, Ohio Sec'y of State Directive 2013-17 (Sept. 3, 2013)).

In sum, this is not a case of "moving the goalposts." Rather, the Secretary's interpretation of O.R.C. § 3501.38(E)(1) in this case is entirely consistent with *Evans* (2006), *Rothenberg* (2011), and the Secretary's own 2011 and 2013 directives. Plaintiffs' claim of unconstitutional retroactivity is not likely to succeed on the merits.

D. Plaintiffs' eight year delay in challenging O.R.C. § 3501.38(E)(1) also demands that their request for emergency relief be denied.

Since 2006—for almost eight years—O.R.C. § 3501.38(E)(1) has required that paid circulators list the name and address of their payor on petitions. Eight years after its effective date, Plaintiffs are before this Court asking for *emergency* relief enjoining its enforcement. They waited entirely too long, and now ask the Court to rule on an extraordinarily rushed basis without benefit of normal briefing schedules and time for appropriate deliberation. When Plaintiffs first challenged the prohibition against out-of-state circulators, they admitted that they were using paid circulators—and they were therefore subjecting themselves to O.R.C. § 3501.38(E)(1)'s requirements in order to qualify for the ballot. (Doc. 1, Complaint, PAGEID # 3). Yet, they did not challenge those requirements. Similarly, when they sued to be able to participate in Ohio's primary election they did so knowing that they would have to comply with O.R.C. § 3501.38(E)(1) in order for their candidate to appear on the ballot. But again, they did not challenge the petition requirements. They offer no explanation now for the delay.

Citing the candidate's delay in challenging a statute, the Fourth Circuit rejected an appeal by a presidential candidate who sought to run in the Virginia Primary and claimed that Virginia's prohibition against the use of out of state circulators was unconstitutional. *Perry v. Judd*, 471 Fed. App'x 219 (4th Cir. 2012). Affirming the district court's denial of emergency relief, the Court criticized the candidate for waiting to bring his claim. The Court found that the candidate waited over four months after he declared his candidacy before he pursued his claims:

> Moreover, Movant had every incentive to challenge the requirement at [the time he declared his candidacy]. Success in an early constitutional challenge would have allowed Movant to maximize the number of his petition circulators and minimize the amount of time it took to acquire the requisite 10,000 signatures. Nevertheless, he chose to sit on his right to challenge this provision until after he had been denied a place on the ballot. This deliberate

> delay precludes the possibility of equitable relief. For 'equity ministers to the vigilant, not to those who sleep upon their rights." *Id.* At 224 quoting *Texaco P.R., Inc. V. Dep't of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995).

Id.

A statute is not unconstitutional simply because a particular Plaintiff fails to comply with it and faces the consequences. Plaintiffs' delay in challenging O.R.C. § 3501.38(E)(1) precludes any equitable relief, much less the emergency relief they are requesting. Plaintiffs have been aware that O.R.C. § 3501.38(E)(1) requires paid circulators of statewide candidate and statewide issues to list the name and address of their employer since the law became effective. Yet they waited to challenge it even though they knew they were using paid circulators.

As the *Perry* court stated,

> If we were to find Movant's delay excusable, we would encourage candidates to wait until the last minute to bring constitutional challenges to state election laws. *Once a candidate learned he had been denied a place on the ballot, he would take his disappointment to the courthouse and hapless state election boards would be forced to halt their scheduled election processes to wait for a ruling.* Challenges that came immediately before or immediately after the preparation and printing of ballots would be particularly disruptive and costly for state governments. *See Dobson v. Dunlap*, 576 F.Supp.2d 181, 187 (D. Me. 2008) (applying laches to bar a constitutional challenge to a state election law after noting that the state had "invested approximately 225 person hours in designing, preparing and proofing the paper ballots").

Id. At 225. This Court should follow *Perry* and reject the Plaintiffs' request for emergency relief since they could have challenged O.R.C. § 3501.38(E)(1) in a timely fashion but chose not to.

II. Plaintiffs have failed to demonstrate that they will suffer "irreparable injury" and their request for emergency relief should be denied.

Plaintiffs cannot demonstrate that they will suffer an irreparable injury that justifies the issuance of a temporary or preliminary restraining order. Plaintiffs rely on *Elrod v. Burns*, 427 U.S. 347, 373 (1976), which found that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." But this case is entirely inapplicable here, where O.R.C. § 3501.38(E)(1) is constitutional and, therefore, does not violate Plaintiffs' First Amendment or Fourteenth Amendment rights. The Secretary of State's decision adopting the report and recommendation of the hearing officer to remove these candidates from the ballot was justified and required by law. Plaintiffs made their decision not to comply with the disclosure requirement, and the law establishes the consequences.

III. The State and the Public would suffer substantial harm were the simple disclosure rule to be set aside. This Court should deny the Plaintiffs' request for emergency relief.

The State of Ohio will suffer substantial harm if this Court invalidates an appropriate election-related disclosure requirement. After all, "[u]nder the federalist structure of the United States, the states are responsible for regulating the conduct of their elections." *Voting for America, Inc. v. Steen*, 732 F.3d 382, 387. The State has a legitimate interest in regulating elections, and the State and its citizens would be harmed if it were to lose control of its appropriate regulatory mechanisms. This is especially true here where Ohio's disclosure requirements are minimal compared to others that have been upheld, and Plaintiffs urge a result that would allow this minimal requirement to be circumvented altogether. Moreover, and fundamentally, such a decision would impair the state interest that the United States Supreme Court and Ohio courts alike have recognized as "substantial" in requiring disclosure of who has paid petition circulators to perform that work.

CONCLUSION

For the foregoing reasons, Ohio Secretary State Jon Husted respectfully submits that Plaintiffs' Third Motion for a Preliminary Injunction must be denied. The Secretary requests that the Court hold a hearing at which the parties may present evidence and argument on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2014, the foregoing Answer was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

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