United States Court of Appeals
for the Sixth Circuit

Case No. 15-3447

JON HUSTED,

Appellant,

v.

CITIZENS IN CHARGE, INC., *et al.,*

Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio, Western Division

BRIEF OF PLAINTIFF-APPELLEES ("CORRECTED")

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Cir. R. 26.1, Plaintiffs-Appellees make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: **N/A**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: **N/A**

/s/ Maurice A. Thompson
Maurice A. Thompson
Counsel for Plaintiffs-Appellees

August 3, 2015
Date

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellees respectfully request oral argument to defend the well-reasoned decision of the District Court finding that the Defendant-Appellant violated Plaintiffs clearly-established constitutional rights and is not entitled to qualified immunity.

INTRODUCTION

The State fails to demonstrate that qualified immunity applies to Secretary of State Husted here, and accordingly, the State's Appeal must be denied.

Secretary of State Husted is by all estimations an excellent public official. His office operates professionally, transparently, and efficiently. He is worthy of commendation for much of the work he has done in office, which includes, in this case, abstaining from raising futile and frivolous objections that misallocate public time and resources.[1]

However, the principles surrounding qualified immunity must apply to even the most earnest of public officials, if these principles are to have any meaning at all. And extending qualified immunity *in this context* would convert *qualified* immunity to *absolute* immunity. An award of nominal damages here is therefore necessary not only to conform with applicable legal doctrine, but further, to ensure the accountability of Ohio's public officials.

The right to associate, for political causes such as initiative petition circulation, with Americans residing outside of Ohio, was clearly established at the time that Secretary of

[1] Before the District Court, the Secretary refused to defend the constitutionality of the challenged statute. The Attorney General's Office then intervened and raised a number of defenses that were unlikely to succeed. It is the that office that pursues this appeal.

State Jon Husted enforced the state's new residency requirement against Cincinnati for Pension Reform.

It is no defense to simply recite without support that the restriction was "presumptively constitutional" merely be virtue of having been enacted by the Ohio General Assembly. No objectively reasonable Secretary of State, when provided a $21 million annual budget, a team of lawyers, and a week or even longer to carefully deliberate on the matter and reply in writing, could view the law on this matter as anything other than "clearly established."

In fact, the Plaintiffs here even provided the Secretary with a courtesy rarely available to defendants in qualified immunity actions: they informed the Secretary that the law was unconstitutional, citing to specific authorities, including the authority of this Circuit. It is quite plausible that no civil defendant has ever been given a better opportunity to *avoid* personal liability. And yet the Secretary made clear that he would enforce the law against Plaintiffs, requiring them to hire Ohio residents to achieve ballot access.

The fact that such a requirement was unconstitutional on June 18, 2013 is beyond "clearly established": The United States Supreme Court twice emphasized the constitutional rights of petition circulators as against such requirements, and such requirements were struck down within every circuit to have seriously considered the issue.

As a final matter, the state's conduct undermines the genuineness of its arguments here: it has spent considerably more taxpayer funds appealing this matter than it would have cost to simply settle this issue. The case involves just $3,600 in damages, and plaintiffs

supplied defendants with numerous opportunities to globally settle the case. As a matter of policy, this Circuit should use this case as an opportunity to curb wasteful litigation by the Attorney General's office, recognizing that such a policy is of equal if not greater importance than the policy of leaving state officials free of any responsibility for clear violations of Ohioans' constitutional rights.

STATEMENT OF THE CASE AND FACTS

Through threatening to enforce the residency requirement against Plaintiff Cincinnati for Pension Reform ("CPR"), Secretary of State Husted dramatically increased the cost of ballot access for CPR's pension reform municipal charter amendment.

To review, Ohio Senate Bill 47 became effective on June 21, 2013. That Bill amends R.C. 3503 to enact R.C. 3503.06(C)(1)(a), which now states as follows: "Except for a nominating petition for presidential electors, no person shall be entitled to circulate any petition unless the person is a resident of this state and is at least eighteen years of age."

As to SB 47, the State wrongly claims that "this case stems from the Ohio General Assembly's *revisions to statutes addressing restrictions on non-resident circulators following the Sixth Circuit's determination that the enactment as it existed in 2004 violated the Constitution."*[2] While this factual assertion is not outcome-determinative, it certainly calls the State's credibility into question. There is absolutely no evidence that SB 47 was enacted in response to this Circuit's decision in *Nader v. Blackwell.* Indeed, the State

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[2] June 23, 2015 Brief of Appellant-Defendant, at p. 6.

concedes that SB 47 did not become effective until June 21, 2013, almost *five years* after this Court decided *Nader*. Moreover, SB 47 was a set of wholesale attacks on Ohioans' initiative and referendum rights, described by the Secretary himself, on October 3, 2013, as a Bill "*which changed the ballot initiative process.*"[3]

CPR is an Ohio non-profit corporation registered as a ballot issue political action committee under Chapter 3517 of the Ohio Revised Code, and was the sponsor of an initiative petition effort proposing an amendment to the Charter of the City of Cincinnati concerning the City's retirement system that was submitted to Cincinnati voters on November 5, 2013. See Plaintiffs' Verified Complaint, Paragraph 10, 11, Doc. 1, Page ID 3, 6-8.

On July 12, 2013, CPR's counsel inquired of Secretary of State Husted whether he would be enforcing this new prohibition, writing, *inter alia*:

> We are writing to obtain the Ohio Secretary of State's enforcement position on Ohio Senate Bill 47, which became effective just several weeks ago (June 21, 2013). * * * We represent three separate citizen organizations that are currently circulating initiative petitions within Ohio. Two are circulating statewide issues, and one is seeking to amend a city charter. Two face somewhat imminent filing deadlines (as soon as August), and another will submit signatures to initiate a statewide constitutional amendment in July of 2014. Each has now indicated the need to utilize out-of-state professional signature gatherers to qualify their respective issues for the ballot.

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[3] See *Secretary of State Husted: Proposed Referendum on House Bill 7 Requires Additional Signatures*, available at http://www.sos.state.oh.us/SOS/mediaCenter/2013/2013-09-23.aspx. ("The referendum effort on House Bill 7 is the first statewide issue to be submitted since Senate Bill 47 took effect, which changed the ballot initiative process.")

Id., at Paragraph 32, Doc 1, Page ID 6, citing July 12, 2013 Letter of Maurice A. Thompson to Betsy Schuster, Chief Elections Counsel for Ohio Secretary of State Jon Husted, attached to Verified Complaint as Exhibit B (Doc 1, Page ID 24, 25).

Plaintiffs' Counsel even provided the Secretary with the applicable law demonstrating the rights of the Plaintiffs to be clearly established, stating as follows:

> This residency requirement - - substantially identical to Ohio's prior residency requirement - - would appear to be unsound. In 2008, in *Nader v. Blackwell,* the Sixth Circuit Court of Appeals held Ohio's prior version of the requirement unconstitutional. See 545 U.S. 459. Several other district and circuit courts have enjoined such residency requirements. And indeed, former Secretary of State Brunner issued Advisory 2009-04, refusing to enforce the requirement. *Id.*

Finally, Plaintiffs' counsel indicated that the decision to enforce the residency requirement would result in immediate harm:

> Our request for information carries some degree of immediacy: signatures are currently being gathered, these groups each need to meet daily targets as deadlines loom, and each wishes to hire out-of-state signatures gatherers immediately. I'm sure you can appreciate the uncertainties SB 47 has created for these citizens. *Id.*

Prior to making his decision, the Secretary would have known of the directive of his predecessor on the exact same topic. In 2008, in the context of presidential nominating petitions, the Sixth Circuit Court of Appeals declared unconstitutional Ohio's prohibition on petition circulation (also known as "signature gathering") by residents of other states. In response, on May 18, 2009, then-Secretary of State Jennifer Brunner issued a directive culminating with the statements "I conclude that the residency requirement for circulators of initiative and referendum petitions in R.C. 3503.06(B)(1) is unenforceable," and "no Ohio board of elections may invalidate a candidate or issue petition for the sole reason that the

circulator of the petition is not an Ohio elector or an Ohio resident." See Exhibit A to Verified Complaint, May 18, 2009 Advisory 2009-04, issued by then Secretary of State Jennifer Brunner, at p. 2, Doc. 1, Page ID 21-22.

Secretary Brunner even supplied reasoning that Secretary Husted could have employed, explaining "*the Sixth Circuit indicated that there is no legally significant difference between the circulators of candidate and issue petitions since the circulation of both types of petitions constitutes political speech*," citing *Nader,* at 475, 476. *Id.*

Despite all of this, on July 19, 2013, the Ohio Secretary of State responded to Plaintiffs, indicating "this office and county board of election will implement this law like any other until such time as the legislature acts to make a statutory change or a court directs otherwise." See Exhibit C to Verified Complaint, July 19, 2013 Letter from Secretary of State Jon Husted to Maurice A. Thompson; see also Verified Complaint, at Paragraph 33, Doc. 1, Page ID 27. The SOS copied all Ohio county boards of elections on this letter, thereby signaling enforcement policy to those local boards. *Id.* Through this act, the Defendant directed the Hamilton County Board of Elections to invalidate Cincinnati for Pension Reform petitions circulated by *non-residents.*

In response, CPR hired resident witnesses to accompany and verify non-resident circulators, increasing the cost of the petition circulation drive by several thousand dollars. Complaint, at Paragraphs 12, 35-39, Doc. 1, Page ID 3-4, 6. The choice for CPR was simple: ignore the Secretary's enforcement position and fail to attain ballot access, or in the

alternative, hire Ohio residents to accompany the effort's out-of-state professional petition circulators, at great expense. Needing to make the ballot, CPR chose the latter.

Accordingly, Plaintiffs' Verified Complaint concludes that "CPR's constitutional right to use non-resident petition circulators was clearly established at the time that Defendant Husted conveyed an intention to enforce the prohibition on nonresident petition circulators," and "[u]pon review of the Sixth Circuit's decision in *Nader v. Blackwell,* a reasonable person in Defendant Husted's position would have known that the threat to enforce the residency prohibition was unlawful." *Id.*, at Paragraphs 82, 83, Doc. 1, Page ID 14. Pursuant to these averments, Plaintiff CPR has requested that the District Court "[a]ssess against Defendant Husted, and award to Plaintiff CPR, damages as compensation for extra petition circulation charges incurred as a result of Defendant's threat to enforce R.C. 3503.06(C)(1)(a)." Complaint, at Paragraphs 12, 35-39, Doc. 1, Page ID 14-15.

The Secretary made a deliberate decision to place a clearly unconstitutional act of the General Assembly above the clear precedent of this Circuit Court and others. And as a result, Plaintiff CPR was forced to endure extra costs. Plaintiffs' Complaint simply maintains that one of the two - - either the public official or the citizen - - is forced to bear the cost of unconstitutional conduct by public officials; and in this instance, it is the Secretary, and not the citizens, who should pay that cost.

Through a comprehensive Order on November 13, 2013, the District Court preliminarily enjoined the residency requirement, thoroughly analyzing and examining the

requirement, and properly holding that the matter was governed by preexisting Supreme Court, Sixth Circuit, and other circuit court precedent.

First, this Court's preliminary injunction order accurately characterized as "controlling decisions that bear on the issue before this Court," the United States Supreme Court's 1999 decision in *Buckley v. American Constitutional Law Foundation,* and the Sixth Circuit's 2008 decision in *Nader v. Blackwell.* See November 13, 2013 Opinion and Order and Preliminary Injunction, p. 8, Doc 13, Page ID 135, citing 525 U.S. 182 (1999) and 545 F.3d 459 (2008). The Court's analysis then proceeds to demonstrate why Plaintiffs' rights were clearly established when Defendant threatened them (emphasis added):

- "The registration requirement in *Buckley* is the restriction most closely analogous to the residency requirement at issue in the instant case." *Id.*, at p. 9, Page ID 136.

- "*Nader* involved a challenge to both the registration and residency requirements of a prior version of the statute at issue in the instant case." *Id.*, at p. 10, Page ID 137.

- "The only substantive difference between the statute at issue in *Nader* and the statute challenged in the instant case is that the current statute carves out an exception to the residency requirement for nominating petitions for presidential electors." *Id.*, at p. 10, Page ID 137.

- "Other circuits [in addition to the Sixth Circuit] have * * * overturned residency requirements placed on petition circulators [prior to July of 2013]." *Id.*, at p. 14, Page ID 141, citing on-point precedents issued prior to July of 2013 by the Fourth, Seventh, Ninth, and Tenth Circuits, each invalidating residency requirements for petition circulators.

- "[T]he courts in other circuits discussed at length whether the residency requirements were narrowly tailored to serve compelling state interests." *Id.*, at p. 14, Page ID 141.

- "Several important principles flow from the Sixth Circuit's decision in *Nader* and the decision of other circuits that have struck down residency requirements for petition circulators. * * * [R]esidency requirements do not survive strict scrutiny because less

restrictive means are available to effectively combat fraud * * *." *Id.*, at pp. 15-16, Page ID 142, 143.

- "[T]he only difference between the statute *Nader* struck down and the statute at issue here is that the current version of the statute provides an exception to the residency requirement for circulators of nominating petitions for presidential electors. There is little reason to believe that the exception makes any difference. . . In sum, the exception carved out for nominating petitions for presidential electors does not serve as a meritorious basis to distinguish *Nader.*" *Id.*, at p. 17, Page ID 144.

- "The Court in *Nader* expressly reached the issue of whether the statute's residency requirement was constitutional and unmistakably held the requirement violated the First Amendment, separate and apart from the voter registration requirement." *Id.*, at p. 18, Page ID 145.

- "The current statute is materially indistinguishable from the statute *Nader* struck down as violating Nader's First Amendment right to engage in political speech." *Id.*, at p. 19, Page ID 146.

Thus, this Court had little trouble ascertaining that the right to association with nonresident petition circulators in Ohio was clearly recognized, through *Nader, Buckley,* and the precedents of numerous other circuit courts, existing as of July 2013. In fact, it properly characterized the protection of these rights as "express," "unmistakable," and "binding," since the unconstitutional "prior version" of the statute was "materially indistinguishable."

On April 18, 2014 Secretary of State Jon Husted filed a "Limited Motion for Summary Judgment," demanding qualified immunity. On March 16, 2015, the District Court denied that Motion, explaining, amongst other things, that "prior case law clearly established that a law limiting circulators to Ohio residents was unconstitutional." March 16, 2015 Opinion and Order and Permanent Injunction of District Court, at p. 4, Doc. 43, Page

ID 321. The State then filed this appeal, without any further discussion of the matter with the Plaintiffs or the Court.

SCOPE OF REVIEW ON SUMMARY JUDGMENT

The initial inquiry in ascertaining the validity of a qualified immunity defense is as follows: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[4] To have prevailed on his Motion for Summary Judgment, the Secretary needed to prove "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," with "all reasonable inferences in the light most favorable to the nonmoving party."[5] Fed. R. Civ. P. 56(a). The State failed to demonstrate any entitlement to judgment as a matter of law, and failed to submit any summary judgment evidence whatsoever. Meanwhile, the Plaintiffs placed before the Court their Verified Complaint, along with its Exhibits, and the Affidavit of Petition Circulation expert Paul Jacob.

As an important caveat, the posture of this matter cannot be overlooked: the District Court has *not* ruled that the Secretary is required to compensate the Plaintiffs. Instead, it has only ruled that the Plaintiffs are lawfully entitled to *attempt to prove* that (1) they have been

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[4] *Saucier v. Katz,* 533 U.S. 194, 201, (2001); *See also Silberstein v. Dayton,* 440 F.3d 306, 311 (6th Cir.2006).

[5] *Stansberry v. Air Wisconsin Airlines Corp*., 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); *cf.* Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact" then the Court may "consider the fact undisputed for purposes of the motion").

damaged; and (2) the Secretary proximately caused those damages. The issue before the Court is whether the Plaintiffs should be allowed this right.

SUMMARY OF THE ARGUMENT

The Ohio Secretary of State threatened to enforce a clearly unconstitutional statute, chilling the Plaintiffs' clearly-protected speech and association, and causing them to incur economic harm in order to gain ballot access. Accordingly, the District Court correctly concluded that the Secretary is not entitled to qualified immunity.

The Secretary signaled his intention to enforce the law invalidating all petitions submitted by nonresident circulators, and communicated this enforcement policy to Ohio's County Boards of Elections, which initially review the petitions. The Secretary did so in June of 2013, knowing that Plaintiff CPR was required to submit its petitions the first week of August, in order to attain access to the November 2013 ballot (which it did).

The Secretary did so even though Ohioans' First Amendment rights to associate with Americans outside of Ohio for quintessential political activity such as petition circulation was clearly established at the time he did so.

The Secretary did so even though this Circuit had explicitly declared Ohio's residency requirement unconstitutional in the past, explaining that such restrictions violate the First Amendment, whether applied to petition circulation on behalf of candidates or ballot issues. On this front, the State cites no credible support for the proposition that petition circulation is somehow distinguishable (in fact, the United States Supreme Court has confirmed otherwise).

The Secretary did so even though all other relevant United States Courts of Appeals decisions had previously declared residency requirements unconstitutional; and the United States Supreme Court had issued at least one holding - - *Buckley v. American Constitutional Law Foundation* - -clearly applicable to the residency requirement at issue.

And the Secretary did so even though the statute would have flagrantly violated a second and entirely distinct constitutional limit - - the Dormant Commerce Clause, had the Plaintiffs challenged it on that ground.

Meanwhile, the bulk of the State's protests can be dismissed without complex analysis: qualified immunity does not arise merely because the Secretary was simply enforcing the law enacted by the General Assembly. Otherwise, *qualified* immunity would quickly erode into *absolute* immunity. This is particularly true where the Secretary's predecessor made a conscious choice to abstain from enforcing the residency requirement based on its unconstitutionality, and the requirement was presumptively unconstitutional as a matter of law.

At bottom, the Secretary cannot claim knowledge of and deference to the legislature and its enactments while simultaneously claiming ignorance of and freedom to act independent of the constitutional rulings of this nation's Article III Courts. And this is especially the case as applied to a public official (1) with policy discretion; (2) who commands a $21 million annual budget which includes a team of lawyers; and (3) who has been provided the correct law and a week or longer to diagram a lawful enforcement policy. In such a circumstance, where harm is nevertheless imposed on citizens as a result of

unconstitutional threats, it is the public official, and not the already-injured victim, who should bear the costs of that official's premeditated threat.

For each of these reasons, and those below, the District Court's thorough, thoughtful, and well-considered treatment of the issue must stand: the State's demand for qualified immunity must be denied.

ARGUMENT

The State quite incorrectly contends that the Secretary is entitled to qualified immunity in relation to his enforcement of the residency requirement: the unconstitutionality of residency requirements, as a precondition to initiative petition circulation, was clearly established when the Secretary (1) revived Ohio's theretofore dormant residency requirement; and (2) communicated to Plaintiff Cincinnati for Pension Reform that the requirement would be enforced against it when it submitted its initiative petitions, thus requiring CPR to hire additional circulators from Ohio.

In determining the applicability of qualified immunity, courts asks (1) "do the facts alleged show the officer's conduct violated a constitutional right;" and (2) was the right "'clearly established' to the extent that a reasonable person in the officer's position would know that the conduct complained of was unlawful." [6]

[6] *Bletz v. Gribble,* 641 F.3d 743, 750 (6th Cir. 2011) (citation omitted).

Meanwhile, a specific intent to violate the constitutional rights of another is not required. As the Sixth Circuit has explained in *Pritchard v. Hamilton Twp. Bd. of Trs.*:[7]

> At first blush it might seem unduly harsh to have an expectation that law enforcement officers should know the intricacies of criminal statutes, but this position finds support in other areas of the qualified immunity doctrine that regularly impute knowledge of statutes and caselaw to officers. Indeed, it is a touchstone of qualified immunity doctrine that "a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Likewise, we impute knowledge of clearly established constitutional caselaw to police officers when we state that the "binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point," places a law enforcement official "'on notice that [his] conduct violates established law.'" *Holzemer v. City of Memphis,* 621 F.3d 512, 527 (6th Cir. 2010) (citation omitted) (quoting *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).[8]

Therefore, as a government agent, Secretary of State Husted cannot claim knowledge of *legislation*, but ignorance of *binding precedent*. This is particularly so when his predecessor, in 2009, after the Sixth Circuit Court of Appeals declared Ohio's residency

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[7] 424 Fed. Appx. 492 (6th Cir. 2011); *see also Denton v. Rievley*, 353 Fed. Appx. 1 (6th Cir. 2009) ("Rievley argues that he is entitled to qualified immunity because he was following a Tennessee statute denoting a preference for arrest in cases where there is probable cause of domestic abuse. Tenn. Code Ann. § 36-3-619. Other Circuits have held that while reliance on a statute is a factor to consider in determining whether or not an officer's actions were objectively reasonable, '[r]eliance on a statute does not make an official's conduct *per se* reasonable.' *MIMICS, Inc. v. Angel Fire,* 394 F.3d 836, 846 (10th Cir. 2005) (citing *Roska v. Peterson,* 328 F.3d 1230, 1252, 1253 (10th Cir. 2003)").

[8] *Id.* at 506-07; s*ee also Leonard v. Robinson,* 477 F.3d 347, 358-61 (6th Cir. 2007) (imputing knowledge of First Amendment principles to an officer, and holding that probable cause did not exist because the officer should have known that the defendant's conduct was protected by the Constitution, even though it was probably prohibited by the statute); *Robinson v. Bibb,* 840 F.2d 349, 350 (6th Cir. 1988) (noting that we expect a reasonably competent officer to know the law governing his conduct).

requirement to be unconstitutional and with legislation still on the books, issued a directive culminating with the statements "I conclude that the residency requirement for circulators of initiative and referendum petitions in R.C. 3503.06(B)(1) is unenforceable," and "no Ohio board of elections may invalidate a candidate or issue petition for the sole reason that the circulator of the petition is not an Ohio elector or an Ohio resident."[9]

A. The Secretary enforced the statute against Plaintiffs, causing them harm.

The State repeatedly contends that "[t]he Secretary's mere acknowledgment of his duty to enforce the challenged statute does not provide a basis for personal damages in a pre-enforcement challenge," elaborating that the Plaintiffs here brought suit "before the actual completion of an injury in fact," and "the Secretary has not enforced the statute and he has taken no action that would give rise to damages."[10] This set of arguments is frivolous on multiple levels.

First, to the extent that there are factual questions as to whether the Secretary threatened to enforce the statute and inflicted harm on the Plaintiff CPR in the process, those questions are resolved through reference to Plaintiffs' Complaint alone. In an interlocutory challenge to a qualified immunity decision in a summary judgment motion, "the defendant

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[9] Plaintiffs' Verified Complaint, Paragraph 24, citing May 18, 2009 Advisory 2009-04, issued by then Secretary of State Jennifer Brunner, at p. 2, attached to Complaint as Exhibit A.

[10] June 23, 2015 Brief of Appellant-Defendant, p. 2, 3 ("The Secretary did precisely what he is obligated to do under Ohio law - enforce the election law."); see also p. 14, 17 ("the Secretary never enforced . . . against Plaintiffs, Plaintiffs cannot show that [he] personally violated their constitutional rights").

must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case."[11] Further, "If ... the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal."[12] The only issue a defendant denied qualified immunity may appeal is the question of "whether the facts alleged by the plaintiff constitute a violation of clearly established law."[13]

As established in the Statement of the Case and Facts Section above, Plaintiffs' Verified Complaint clearly alleges that the Secretary signaled his intention to enforce the law to invalidate all petitions submitted by nonresident circulators, and communicated this enforcement policy to Ohio's County Boards of Elections, which initially review, and validate the petitions. The Secretary did so in June of 2013, knowing that Plaintiff CPR was required to submit its petitions the first week of August, in order to attain access to the November 2013 ballot (which it did).

As a matter of law, these facts sufficiently constitute an actionable statement of policy and/or threat of enforcement. The Supreme Court holds that "[g]enerally speaking, government action which chills constitutionally protected speech or expression contravenes

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11 *Fettes v. Hendershot*, 375 Fed.Appx. 528 (6th Cir. 2010), citing *Berryman v. Rieger,* 150 F.3d 561, 562 (6th Cir.1998).

12 *Morrison v. Board Of Trustees Of Green Tp*., 583 F.3d 394 (6th Cir. 2009), citing *Berryman, supra.*

13 *Id.*

the First Amendment,"[14] and "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."[15] And the Sixth Circuit's understanding is that "the harassment necessary to rise to a level sufficient to deter an individual is 'not extreme.'"[16]

Meanwhile, a single act is sufficient to constitute official government policy: "[governmental] liability may be imposed for a single decision by municipal policy makers under appropriate circumstances."[17] Such a circumstance is present where "the decision-maker possesses final authority to establish [governmental] policy with respect to the action ordered."[18] Put another way, "if the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood."[19]

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[14] *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 794, 108 S. Ct. 2667 (1988); *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995); *See also Gehl*, 63 F.3d at 1534-35 ("[i]n the context of a government prosecution, a decision to prosecute which is motivated by a desire to discourage protected speech or expression violates the First Amendment and is actionable under § 1983.")

[15] *NAACP v. Button,* 371 U.S. 415, 433 (1963).

[16] *See Siggers-El v. Barlow,* 412 F.3d 693, 701 (6th Cir. 2005) (remarking that because "there is no justification for harassing people for exercising their constitutional rights, [the deterrent effect] need not be great in order to be actionable").

[17] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018 (1978). In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986).

[18] Id. at 481.

[19] Id.

In *G&V Lounge, v. Michigan Liquor Control Commission,* the Sixth Circuit specifically analyzed the Plaintiff's First Amendment action in response to a city attorney's threat of litigation:

> The city's attorney wrote a letter to Plaintiff stating in pertinent part that: "* * * "in conclusion, if you proceed with your stated intentions of offering any adult-type entertainment at the aforestated location, the City of Inkster will take any and all necessary legal measures to prevent this from occuring [sic]."[20]

Specifically, the Plaintiff alleged, *inter alia,* "the City of Inkster, violated Plaintiff's First Amendment rights when it *threatened* to seek revocation of Plaintiff 's liquor license and entertainment permit *if* Plaintiff presented topless dancing at the bar."[21] Further, the plaintiffs there alleged that *they deliberately refrained from advancing protected expressive activity solely because of the city attorney's threats*.[22] In response, the Sixth Circuit observed "the threat to take away Plaintiff's license or permit has already chilled Plaintiff from presenting a First Amendment protected activity to the public. This is also a distinct and palpable injury in fact, and is actual rather than merely imminent. It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact."[23]

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[20] *G&V Lounge, v. Michigan Liquor Control Commission,* 23 F.3d 1071 (6th Cir. 1994). See also *All Children Matter, Inc. v. Brunner* Not Reported in F.Supp.2d, 2011 WL 665356 (S.D.Ohio,2011).

[21] Id.

[22] Id.

[23] Id., at 1038, citing *See, e.g., Levin v. Harleston,* 966 F.2d 85, 89–90 (2d Cir.1992) (holding that a merely implicit threat to fire a professor for his controversial views chilled professor's First Amendment rights sufficiently to confer standing); *Doe v. University of Michigan,* 721 F.Supp. 852 (E.D.Mich.1989) ("It is not necessary ... that an individual first

Here, the Secretary conditioned the receipt of ballot access on the use of Ohio resident circulators, rather than superior nonresident circulators. As the Plaintiffs' Verified Complaint clearly alleges, the threat of no ballot access forced CPR to associate with Ohio petition circulators at great added expense. Thus, CPR was chilled from associating with its preferred petition circulators and forced to associate with suboptimal circulators, resulting in suboptimal political speech while in this field. This harm is as cognizable (and discriminatory) as if the Secretary had forced a Gubernatorial candidate to refrain from hiring a speech-writer from New York City or a fundraiser from Washington D.C., in this midst of the campaign.

B. Plaintiffs' Right to Associate with Americans who are not Ohio residents, for the purpose of engaging in political activity including initiative petition circulation, was clearly established at the time of enforcement.

The State demands that this Court pretend as though *Nader v. Blackwell* is not controlling, and then further ignore all other precedent (1) acknowledging petition circulation as core political speech; and (2) invalidating residency requirements. More specifically, the State argues, misleadingly, "[p]laintiffs rely solely on a single decision of a panel of this Court determining that an earlier and different version of the challenged statute was unconstitutional," and "the test is not whether the district court. . . finds *Nader* controlling. . . .it is whether this single authority, addressing a different statute . . rendered

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be exposed to prosecution in order to have standing to challenge a statute which is claimed to deter the exercise of constitutional rights."). *Accord NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963) ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions.").

the General Assembly's revised circulator statute so flagrantly unconstitutional that the Secretary should be held liable for announcing that he would enforce it."[24]

However, "For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[25] "A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point."[26]

There need not be a prior case directly on point for a law to be clearly established: generalized statements of the law or a general constitutional rule already identified in the decisional law are sufficient.[27] "[A]n action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, *or [even] from the general reasoning that a court employs*."[28] The Supreme Court has long held that "officials can still

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[24] State's Brief, at p. 25.

[25] *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007) (citation and internal quotation marks omitted).

[26] *Risbridger v. Connelly,* 275 F.3d 565, 569 (6th Cir. 2002) (emphasis added) (citation omitted).

[27] *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010).

[28] *Feathers v. Aey,* 319 F.3d 843, 848 (6th Cir. 2003) (citing *Hope v. Pelzer,* 536 U.S. 730, 740-41, 122 S. Ct. 2508 (2002)); *see also Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) ("[I]n an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law.") (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)); *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508 (2002)) ("[T]here need not be a case with the exact same fact pattern, or even 'fundamentally similar' or

be on notice that their conduct violates established law even in novel factual circumstances."[29]

As Plaintiffs chronicle below, the law was indeed clearly established: residency requirements were clearly unconstitutional on multiple grounds; the right to associate with Americans residing outside of Ohio, for political causes, was clearly established; and the protection of freedoms of speech and association with respect to initiative petition circulation was clearly established. This is proven not just by *Nader v. Blackwell,* but by numerous other authorities as well - - all of which were properly before the District Court.

i. Strict First Amendment protections for initiative petition circulation were clearly established.

The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[30] Although First Amendment protections are not confined to "the exposition of ideas,"[31] "there is practically universal agreement that a major

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'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional.").

[29] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow thatif such a case arose, the officials would be immune from damages [or criminal] liability." (alteration in original) (quoting *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting)) (internal quotation marks omitted)).

[30] *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308 (1957).

[31] *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667 (1948).

purpose of that Amendment was to protect the free discussion of governmental affairs."[32] This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[33]

As an animation of these principles, "the solicitation of signatures for a petition involves protected speech."[34] Indeed, this kind of speech "is at the core of our electoral process and of the First Amendment freedoms – an area of public policy where protection of robust discussion is at its zenith."[35] "[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"[36] That interactive communication comprises both the request for the signature and the signature itself, because the circulation of an initiative petition not only involves the "expression of a desire for political change," but also is a means of "plac[ing] the matter on the ballot, [and thus making] the matter the focus of statewide discussion."[37] As such, "the circulation of a petition involves an element of speech beyond leafleting or

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32 *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437 (1966).

33 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964).

34 *Meyer v. Grant,* 486 U.S. 414, 422 n.5 (1988).

35 *Id.* at 425. (citation and internal quotation marks omitted).

36 *Meyer v. Grant,* 486 U.S. 414, 421–22 (1988).

37 Id.

sign-holding, because the collection of signatures – particularly for an initiative or referendum ballot – is essential to accomplishing the circulator's purpose."[38]

Here, there is no dispute that the Plaintiffs sought to circulate petitions for qualified ballot initiatives. It isn't difficult to imagine how the State's arguments on this front could also be used to prevent Ohio candidates for office from hiring "shifty New York speech-writers" or "fly-by-night D.C. fundraisers." The right to do each is clearly established by the First Amendment, and like each of the above, petition circulation constants core political speech and association. Accordingly, any claim of qualified immunity when suppressing these obvious rights is suspect.

ii. The unconstitutionality of residency requirements was clearly established within the Sixth Circuit by Nader v. Blackwell.

It is difficult to conceive of how a legal principle could be any more clearly established than this one. In 2008, the Sixth Circuit Court of Appeals held Ohio's residency requirement for *candidate* petition circulators unconstitutional, and observed that for the same reasons, restrictions on initiative petition circulators are unconstitutional. In *Nader v. Blackwell,* in the context of circulation of nominating petitions within Ohio by out-of-state residents, for placing independent presidential candidate Ralph Nader on the ballot, the Court considered the constitutional validity of the prior - - and essentially identical - - version of R.C. 3503.06.[39]

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38 Id.

39 *Nader v. Blackwell*, 545 F. 3d 459, 476 (6th Cir. 2008).

There, with each judge on the panel separately weighing in against the restriction's constitutionality (and asserting their opinion to be the Court's opinion), the Court concluded (1) "we hold that the voter-registration restriction and the residency restriction contained in § 3503.06 are both unconstitutional in violation of the First Amendment;"[40] (2) "our holding [is] that Ohio Revised Code § 3503.06 treads too far on constitutionally protected activity. * * * The fact that we reach this holding in resolving a particular plaintiff's claim for money damages does not diminish its applicability to all future cases, and judges bound by the Sixth Circuit's decisions must treat *Nader v. Blackwell* as they would any other published opinion of this Court;"[41] (3) "upon our declaration that portions of § 3503.06 are unconstitutional as applied to Ralph Nader, any subsequent plaintiff who challenges the same provisions may prevail, even if the statute is not unconstitutional as applied to them. In other words, our decision that § 3503.06 is unconstitutional as applied to Ralph Nader has the same practical effect as a declaration that the portions of § 3503.06 which Nader challenges are facially unconstitutional, because any future litigant who raises a First Amendment challenge to the provisions challenged by Nader may prevail by noting that § 3503.06 'significantly

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[40] Id. (Moore, J., concurring, and additionally noting " I also concur in Judge Clay's opinion, making his opinion the opinion of the court. Judge Clay joins my opinion, making this the opinion of the court.").

[41] Id. (Clay, J., concurring, and additionally noting "I join Chief Judge Boggs' opinion only insofar as it does not conflict with the views expressed in this concurring opinion and Judge Moore's concurring opinion. I also join Judge Moore's opinion.")

compromise[s]' the recognized First Amendment rights of Ralph Nader;"[42] and (4) "we hold that the enforcement of the residence requirement as well violated Nader's constitutional rights," and therefore, "[w]e hold that Blackwell violated Nader's First Amendment rights when he enforced Ohio's registration and residency requirements against Nader's candidate-petition circulators."[43]

The Court also explained that "it is undisputable that Blackwell's conduct sharply limited Nader's ability to convey his message to Ohio voters and thereby curtailed Nader's core political speech. Under Blackwell's application of § 3503.06 to Nader's petitions, Nader could only use circulators who resided in Ohio and were properly registered to vote in Ohio. In requiring such from Nader, Blackwell violated Nader's right to use petition circulators who were not Ohio residents and registered Ohio voters."[44]

Thus, the law was clearly established in this Circuit and elsewhere as of July of 2013: prohibition of non-resident petition circulation violates the First Amendment. And here, there is no dispute that Plaintiff Cincinnati for Pension Reform sought to circulate petitions for a ballot initiative, and the process of collecting signatures necessarily involved the expression of opinions about the constitutional amendment being proposed.

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42 Id.

43 Id. (Boggs, J.).

44 Id. *See also Nader v. Brewer,* 531 F.3d 1028, 1036 (9th Cir.2008) (noting that Arizona's in-state residency requirement for circulators "excludes from eligibility all persons who support the candidate but who ... live outside the state of Arizona. Such a restriction creates a severe burden on ... speech, voting and associational rights.").

The State protests that *Nader* is inapplicable because (1) it dealt with a statute limiting petition circulation to registered voters in Ohio, rather than residents, and was thus broader; (2) it dealt with candidate petitions only; and (3) Judge Boggs expressed in his opinion in that case that "a particularized assessment of the restriction and the burdens it imposes is required," and noted a lack of evidence and arguments regarding whether Ohio's requirement was narrowly-tailored to achieve a compelling interest.[45] Each of these protests fails, and because *Nader v. Blackwell* controls, the Secretary is not entitled to qualified immunity.

First, while it is indeed true that *Nader* addressed a requirement that petition circulators be registered voters, which is more stringent than the residency requirement here, it is also irrelevant. This is so because, on this front, the Court concluded (1) "we hold that the voter-registration restriction and the residency restriction contained in § 3503.06 are both unconstitutional in violation of the First Amendment;"[46] (2) "we hold that the enforcement of the residence requirement as well violated Nader's constitutional rights," and therefore, (3) "[w]e hold that Blackwell violated Nader's First Amendment rights when he enforced Ohio's registration and residency requirements against Nader's candidate-petition circulators."[47]

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45 State's Brief, pp. 4-5.

46 Id. (Moore, J., concurring, and additionally noting " I also concur in Judge Clay's opinion, making his opinion the opinion of the court. Judge Clay joins my opinion, making this the opinion of the court.").

47 Id. (Boggs, J.). (Emphasis added).

Second, the distinction between candidate and ballot issue initiative petitions is also irrelevant in this context. In *Nader,* the Sixth Circuit, as other circuits and the Supreme Court of the United States have done, observed that circulation of initiative petitions is entitled to the same protection as is circulation of nominating petitions: the Court relied upon the United States Supreme Court's decision in *Buckley v. American Constitutional Law Foundation*, which held that a requirement that circulators of *initiative* petitions be registered in-state violated the First Amendment,[48] to characterize the issue as "[w]e must decide the extent to which the principles that *Buckley* established regarding initiative-petition circulators and registration requirements *may be extended*."[49] Thus, this Circuit had already determined that prior to 2008, Plaintiffs' right to be free from residency requirements while circulating initiative petitions was clearly established here.

The Court promptly concluded "[t]here appears to be little reason to limit *Buckley*'s holding to initiative-petition circulators. As the Supreme Court noted: 'Initiative-petition circulators also resemble candidate-petition signature gatherers ... for both seek ballot access.'"[50] Given the equal treatment of candidate and initiative petition circulation, it can be no defense that *Nader v. Blackwell* merely addressed *candidate* nominating petitions; nor

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48 *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182, 119 S. Ct. 636 (1999).

49 *Nader v. Blackwell,* supra.

50 *Nader v. Blackwell,* supra., citing *Buckley,* 525 U.S. at 191, 119 S. Ct. 636.

can it be a defense that R.C. 3503.06 merely suppresses circulation of *ballot issue initiative* petitions.

Third, Judge Boggs' opinion in *Nader,* which the State relies on, even though it appears first in order, is not the controlling opinion. In the Court's order, Judge Moore stated "I also concur in Judge Clay's opinion, making his opinion the opinion of the court. Judge Clay joins my opinion, making this the opinion of the court," and Judge Clay stated "I join Chief Judge Boggs' opinion only insofar as it does not conflict with the views expressed in this concurring opinion and Judge Moore's concurring opinion. I also join Judge Moore's opinion." The opinions of Judges Clay and Moore clearly reach the merits of the constitutionality of residency requirements for petition circulators (whether for candidates or issues), as against First Amendment rights.

Because the State's distinctions are irrelevant, *Nader v. Blackwell* controls. Consequently, Plaintiffs' right to be free from residency requirements when circulating initiative petitions was clearly established in June of 2013.

iii. The freedom from residency requirements was clearly established well beyond the Sixth Circuit.

In *Libertarian Party of Virginia v. Judd,* the Fourth Circuit Court of Appeals, addressing a petition circulation residency requirement, explained "[a]s the law has developed following the Supreme Court's decisions in *Meyer v. Grant,* and *Buckley v. American Constitutional Law Foundation*, a consensus has emerged that petitioning

restrictions like the one at issue here are subject to strict scrutiny analysis,"[51] and were unconstitutional.

In also finding strict scrutiny appropriate, the Ninth Circuit, in *Nader v. Brewer*, explained that "Because the restriction creates a severe burden on plaintiffs' First Amendment rights, strict scrutiny applies. This is a conclusion we believe to be mandated by the Supreme Court in *Buckley.* The Court held in *Buckley* that significantly reducing the number of potential circulators imposed a severe burden on rights of political expression."[52]

Likewise, in *Chandler v. City of Arvada,* the Tenth Circuit held that a city ordinance requiring petition circulators to be residents imposed a severe burden on the speech rights of initiative proponents; and it therefore applied strict scrutiny.[53] In doing so, the court observed that "[s]trict scrutiny is applicable where the government restricts the overall

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51 *Libertarian Party of Virginia v. Judd,* 718 F.3d 308 (4th Cir. 2013); *See also Yes on Term Limits, Inc. v. Savage,* 550 F.3d 1023 (10th Cir.2008) (applying strict scrutiny to overturn Oklahoma prohibition on nonresident circulators of initiative petitions); *Nader v. Blackwell,* 545 F.3d 459 (6th Cir.2008) (declaring unconstitutional, as failing strict scrutiny, Ohio ban on nonresidents circulating nominating petitions); *Nader v. Brewer,* 531 F.3d 1028 (9th Cir.2008) (invalidating, pursuant to strict scrutiny analysis, Arizona deadline and residency provisions relating to nominating petitions and circulator-witnesses).

52 *Nader v. Brewer,* 531 F.3d 1028 (9th Cir.2008), citing *Buckley,* at 194–95, 119 S.Ct. 636.

53 292 F.3d 1236, 1238–39, 1241–42 (10th Cir. 2002).

quantum of speech available to the election or voting process," and *must* be applied when the rights of potential petition circulators are restricted.[54]

Additionally, the Seventh Circuit has held that an in-district residency requirement, which operated as an in-state residency requirement for a candidate for the U.S. Senate, severely burdened candidates' rights to association and ballot access.[55] Thus, the Fourth, Sixth, Seventh, Ninth, and Tenth circuits have all applied strict scrutiny when analyzing the constitutionality of residency requirements for candidate or initiative petition circulators. And given the burdens on speech and association, and lack of narrowly-tailoring associated with an all-out prohibition on a clearly-protected brand of speech and association, each of those courts invalidated the residency requirements before them.

iv. There was no "circuit split" preventing the law from being "clearly established."

While the state continuously relies upon the Eighth Circuit's decision in *Initiative & Referendum Institute v Jaeger,*[56] all other circuits, and even courts within the Eight Circuit, now ignore *Jaeger.* In 2011, the District of Nebraska, in the Eighth Circuit, adjudicated the constitutionality of a prohibition essentially identical to Ohio's.

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54 *Id.* at 1241–42 (internal quotation marks and citation omitted) (quoting *Campbell v. Buckley,* 203 F.3d 738, 745 (10th Cir.2000)) (strict scrutiny must be " 'employed where the quantum of speech is limited due to restrictions on ... the available pool of circulators or other supporters of a candidate or initiative, as in [*Buckley*] and *Meyer.*")

55 226 F.3d at 855–56, 857, 860–62.

56 241 F.2d 614 (8th Cir. 2001).

The prohibition provided that "only an elector of the State of Nebraska may qualify as a valid circulator of a petition and may circulate petitions under the Election Act,"[57] and defined "elector" as "a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age and will attain the age of eighteen years on or before the first Tuesday after the first Monday in November of the then current calendar year."[58]

The Court found that "a nonresident may: (1) solicit signatures from Nebraska residents, (2) talk to Nebraska residents about the nature and benefits of particular petition efforts, (3) carry petitions with them, (4) advise petition proponents who are from Nebraska about the best way to carry out their duties, and (5) perform any other duties in connection with petition circulation."[59] Relying on *Buckley* and *Meyer*, the court found that the residency restriction for petition circulators is subject to strict scrutiny.[60] The court held that Plaintiffs "right to associate for political purposes is violated":

> The out-of-state ban imposes a heavy burden on the plaintiff-intervenors efforts to promote their political views in Nebraska. The defendant has not met its burden in this regard. As stated previously herein, the defendant offered very

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57 *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 918 (D. Neb. 2011); Neb.Rev.Stat. § 32–629(2).

58 Id., citing Neb.Rev.Stat. § 32–110.

59 Id. at 919.

60 Id. at 925.

> few instances of fraud. Further, there are less restrictive alternatives for bringing petition circulators into the subpoena jurisdiction of this court.[61]

While the State of Nebraska argued that *Jaeger* was dispositive, the court disagreed, holding that "*Jaeger* does not control on this issue" since "[t]he Eighth Circuit in *Jaeger* specifically stated that there was '*no evidence in the record'* of the alleged burden associated with the ban."[62] Likewise here, there is a real, demonstrated, and further demonstrable burden on Plaintiffs' speech and associational rights. Consequently, *Jaeger* is ignored, even within the Eight Circuit.

Further, the Ohio Attorney General's Office has twice tried, and twice failed, to prove its "*Jaeger* creates a circuit split" argument to the United States Supreme Court. When a *genuine* circuit split exists, the high court is likely to accept review. To this end, Supreme Court Rule Ten provides that "A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter * * *."

In 2008, after Arizona's residency requirement was struck down by the Ninth Circuit in *Nader v. Brewer*, Arizona sought review on the basis of a circuit split created by *Jaeger.*

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61 Id. *(citing Nader v. Blackwell,* 545 F.3d 459 (6th Cir. 2008); *Nader v. Brewer,* 531 F.3d 1028 (9th Cir. 2008); *Yes on Term Limits v. Savage,* 550 F.3d 1023 (10th Cir. 2008); *Daien v. Ysursa,* 711 F.Supp.2d 1215 (D. Idaho 2010). At this time, *Libertarian Party of Virginia v. Judd* had not been decided.

62 Id., *at 926.*

The Ohio Attorney General signed on to an *amicus brief* in support of review, making the same argument it now makes before this Court.[63] The Supreme Court made its disagreement with this position clear by denying review, thus signaling the absence of a genuine circuit split.[64]

As if this were not enough, again, in May of 2013, the Fourth Circuit struck down the state of Virginia's residency requirement in *Libertarian Party of Virginia v. Judd*. And again, the State sought review by the United States Supreme Court. However, the Court again unanimously denied review, again signaling the abject absence of any legitimate circuit split.[65] Further, in doing so, the Supreme Court rejected the exact same argument that the State posits here: that the Eight Circuit's decision in *Jaeger* somehow creates a legitimate circuit split. It is clear that the Court rejected such an argument, and that the State should already know this, since the Ohio Attorney General signed on to an amicus brief making that argument in support of *Cert.*[66] Thus, any reasonable official, especially one with a team of lawyers and time to do legal research, would have known that there was no

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63 See December 17, 2008 Brief of Amicus Curiae States, available at *http://www.scotusblog.com/wp-content/uploads/2009/02/08-648_cert_amicus_states.pdf.*

64 556 U.S. 1104 (2009).

65 See 134 S.Ct. 681 (2013).

66 See September 13, 2013 Brief of the States as Amicus Curiae, at p. 7, available at *http://sblog.s3.amazonaws.com/wp-content/uploads/2013/10/Judd-et-al.-v.-Libertarian-Party-of-Virginia-et-al.-No.13-231.pdf.* Last checked August 1, 2015.

legitimate circuit split.[67] Accordingly, the United States Supreme Court has dispelled the myth that *Jaeger* creates any legitimate Circuit Split - - several times since this Circuit's decision in *Nader v. Blackwell.* Thus, is no legitimate circuit split. As a final point on this front, *Jaeger* is now older than each of the cases invalidating residency requirements, and no newer case upholds such requirements. For each of the foregoing reasons, no reasonable public official could rely on *Jaeger* as the basis for enforcing a residency requirement against Ohioans.

v. The Residency Requirement violated the Dormant Commerce Clause.

As a useful aside, the Plaintiffs' right were clearly established not just due to First and Fourteenth Amendment precedent: the residency requirement, on its face, violated the Dormant Commerce Clause. Preventing Ohioans from hiring outsiders to advance their cause violates the Dormant Commerce Clause. **"State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'"[68]** The Supreme Court opined that such statutes must "pass the strictest scrutiny" and will only be upheld if the statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[69] Further, the Supreme Court stated that the "clearest

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[67] See December 17, 2008 Brief of Amicus Curiae States, available at *http://www.scotusblog.com/wp-content/uploads/2009/02/08-648_cert_amicus_states.pdf.*

[68] *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

[69] *Or. Waste Sys.*, 511 U.S. at 101.

example of [per se invalid action] is a law that overtly blocks the flow of interstate commerce at a State's borders."[70]

Thus, there is no legitimate interest in "keeping outsiders out," even when the commerce relates to elections. Had the plaintiffs proceeded under this theory, they would have easily prevailed. And the reality that the residency requirement was flagrantly unconstitutional under two entirely separate theories serves to further reinforce its clearly established unconstitutionality.

For each of the foregoing reasons, the unconstitutionality of residency requirements and the freedom to speak through and associate with Americans not residing in Ohio when circulating initiative petitions was clearly established in June of 2013. Accordingly, qualified immunity cannot apply here.

C. The mere enforcement of a legislative enactment does not give rise to immunity.

The State complains "Plaintiffs seek to penalize the Secretary of State personally just because the statute he is charged with enforcing was subsequently ruled unconstitutional. Qualified immunity prohibits this result."[71] Further, the state claims that "laws passed by the legislature are presumed constitutional,"[72] and therefore the unconstitutionality of the residency requirement was not "clearly established" in June of 2013.

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70 *Philadelphia,* supra., 437 U.S. at 624.

71 State's Brief., at p. 4.

72 Id., at p. 20

However, the reality is that a public official may not claim a blind allegiance to a legislative enactment while entirely ignoring (1) the First Amendment to the United States Constitution; and (2) clearly applicable precedent interpreting the Constitution. The United States is a constitutional Republic, rather than a "majority rule" absolute democracy, and the Secretary's conduct toward citizens must reflect this.

As an initial matter, the bulk of the Defendant's protests can be dismissed without complex analysis: qualified immunity does not arise merely because the Defendant was simply enforcing the law enacted by the General Assembly. As the United States Supreme Court has ardently explained, "[t]here has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability."[73] The point of this passage is simple: if the Ohio General Assembly enacted involuntary servitude or separate but equal racial accommodations, he would not be excused from liability for inflicting these harms upon Ohioans simply because "the Secretary must enforce the laws enacted by the General Assembly."

Second, the United States Supreme Court has held, when determining whether to impose liability on public officials, that legislative enactments that merely cosmetically differ from already-invalidated enactments are *not* entitled to a presumption of

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[73] *United States v. Lanier*, 520 U.S. 259, 271 (1997) ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow thatif such a case arose, the officials would be immune from damages [or criminal] liability." (alteration in original).

constitutionality. In *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco,* the Supreme Court thoroughly explained state and local taxpayers' right to a refund of unlawful state and local taxes.[74] The Court specifically addressed the type of defense that the State attempts to raise here. The Court took account of the State of Florida's argument, essentially identical to that of the Secretary here, that "the tax preference scheme [was] implemented by the [Division of Alcoholic Beverages and Tobacco] in good faith reliance on a presumptively valid statute."[75] The Court then concluded, however, that the legislative enactment was entitled to no such presumption, and the there was no "good faith reliance" supporting its enforcement:

> [E]ven were we to assume that the State's reliance on a "presumptively valid statute" was a relevant consideration to Florida's obligation to provide relief for its unconstitutional deprivation of property, we would disagree with the Florida court's characterization of the Liquor Tax as such a statute. The Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias*. . . The State can hardly claim surprise at the Florida courts' invalidation of the scheme.[76]

Here, the Ohio General Assembly merely made cosmetic changes to the residency requirement, doing nothing more than adding language that exempted only petition circulation associated with Presidential campaigns. Accordingly, the Secretary can hardly be surprised by the restriction's unconstitutionality. This is all the more reason to find that the

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74 496 U.S. 18 (1990), citing *O'Connor*, 223 U.S., at 285, 32 S.Ct., at 217

75 Id.

76 Id., at 47, 48.

plaintiffs' rights were clearly established and liability should be born by the Secretary rather than by the Ohioans injured by the Secretary.

Third, Courts within this Circuit have directly addressed and articulately explained why the State's "presumption of constitutionality" defense is misguided. In *F. Buddie Contracting v. Cuyahoga Community College District,* the District Court for the Northern District of Ohio explained the guiding principles when weighing such a defense:

> [T]he existence of an authorizing state law does not alter the qualified immunity analysis. A law which is clearly established by Supreme Court and/or Circuit court decisions does not become less clear by reason of conflicting state statutes . . . Qualified immunity is intended to allow officials to render intelligent decisions even though they may, upon further reflection, be deemed to have been erroneous. It is not intended to allow individual officers to abdicate their decision-making obligations in blind reliance on state statutes. This is especially true in this instance where the officers involved, unlike police officers who frequently have little rule-making authority, are endowed with independent policy-making authority and have an obligation to make reasoned decisions with respect to programs and policies which they promulgate, regardless of whether those programs and policies are promulgated in accordance with State law. This is particularly so where the state statute [due to the substance of the enactment] enjoys no presumption of constitutionality.[77]

The Court then held "[a]pplication of these principles to the present case leads to the conclusion that Defendants are not protected by their adherence to state law,"[78] since the prohibition on racial references that the defendants had sought to enforce was "clearly established." Likewise here, the Secretary cannot hide behind in the shadow of a clearly unconstitutional enactment.

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[77] *F. Buddie Contracting v. Cuyahoga Community College District*, 31. F.Supp.2d 584, at 589, 590 (1998).

[78] Id.

Finally, again, "State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'"[79] Legislative enactments that violate the Dormant Commerce Clause are presumptively *unconstitutional.*

In other words, the mere existence of a statute authorizing an unconstitutional restriction does not provide a defense for the public official who enforces that statute - - were that the case, *qualified* immunity would become *de facto absolute* immunity, for public officials who deprive citizens of their constitutional rights will nearly always be operating under the auspices of one legislative enactment or another.

When given the time and resources to choose, a public official may not give preference to the enforcement of an unconstitutional statute, over clearly established precedent on the same topic. Yet this is precisely what the Secretary did here. And he did so despite, being given the time and resources to choose, i.e. (1) overseeing a $21 million annual budget and a team of lawyers whom he could consult; (2) being given time to deliberate and respond; and (3) first being supplied with the applicable law by the very citizens he proceeded to victimize. In light of such resources, blind adherence to a legislative enactment cannot suffice.

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[79] *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

D. The State seeks to convert *qualified* immunity to *absolute* immunity.

The State further contends that under Ohio law, the Secretary has "no jurisdiction to determine judicial questions dealing with the constitutionality of any law."[80] The State adds its unsubstantiated fear that the Secretary would be required to "conduct legislative balancing before enforcing the statute."[81]

The State's "legislative balancing" arguments are an objection to anything short of *absolute* immunity. This is a *policy* objection to liability in and of itself. This would be a strident public policy change: "absolute immunity" applies only to those functions of government "intimately associated with the judicial phase of the criminal process," such as the judicial and prosecutorial functions.[82] It does not apply, no matter how much the State would like, to all public officials enforcing all statutes and ordinances. Instead, the Supreme Court has confirmed that high level state executive officials are subject to liability.[83] And this liability would be illusory were it to entirely disappear on the vast majority of occasions where it has application: when officials are presuming to act under an existing statute or ordinance.

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80 Id., at 23.

81 Id., at 22.

82 *Imbler v. Pachtman* (1974), 424 U.S. 409, 96 S.Ct. 984; *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447.

83 *Scheuer v. Rhodes*, 416 U.S. 232, 243, 94 S.Ct. 1683, 1686 (1974).

Moreover, the State's policy objections are objections to the very policy chosen by the United States Congress and enforced by Courts for decades: Section 1983. Title 42 U.S.C. s 1983 explicitly provides relief to those who are deprived of their rights *under color of any statute or ordinance:*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

It is immediately apparent how the plain text of Section 1983 has direct application here. As does its underlying purpose, for as the language itself makes clear, the central purpose of s 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an Official's abuse of his position."[84] To extend immunity to far to any type of state official would be to negate the very remedy which it appears Congress sought to create. In any event, this is a role for Congress, rather than for the courts.

Moreover, to the extent that this Court were to entertain public policy considerations, it cannot ignore that (1) the ultimate "public policy" is the United States Constitution, which includes the First Amendment, and in instances of doubt, it is this policy that must be adhered to; and (2) it is far more fair for the aggressing public official who violates constitutional rights to bear the cost of his unlawful conduct than it is to saddle the innocent citizen, who has already been victimized, with these costs. Were this Court to approve of the

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[84] *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476 (1961).

State's policy arguments, Section 1983 would have little meaning, and public officials would have little incentive to avoid violating citizens' constitutional rights, much less to consult *applicable precedent* prior to taking action.

E. The Secretary of State is not equivalent to a Police Officer.

It is highly revealing that State focuses on cases (aside from those which have no binding effect within this Circuit), that all involve the conduct of police officers in the heat of a criminal investigation - - *DeFillippo, Feathers, and Leonard* are all such cases. And each is intensely focused on the peculiarities of police work[85] - - peculiarities with little application here.

Nevertheless, the State argues "the enactment of a law forecloses speculation by enforcement officers concerning its constitutionality - - with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws,"[86] "when a city council has enacted an ordinance, police officers on the street are ordinarily entitled to rely on the assumption that council . . . concluded the

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[85] Notably, *DeFillippo* is not even a qualified immunity case. Meanwhile, the Defendants in *Leonard* were found to not be entitled to qualified immunity. The State focuses on Judge Sutton's dissent in that case, which is intensely focused on factors unique to criminal policing ("To my knowledge, the Supreme Court has never rejected a claim of qualified immunity to a police officer who enforced a statute that had not been declared unconstitutional at the time of the citizen-police encounter. . . ")

[86] Id., at p. 20.

ordinance is valid . . .," and "absent extraordinary circumstance, liability will not attach for executing the statutory duties one was appointed to perform."[87]

However, Courts within the Circuit have observed the clear distinctions between police and public officials such as the Secretary: "[Qualified immunity] is not intended to allow individual officers to abdicate their decision-making obligations in blind reliance on state statutes. This is especially true in this instance, where the officers involved, unlike police officers, who frequently have little rule-making authority, are endowed with independent policymaking authority and have an obligation to make reasoned decisions with respect to the programs and policies they promulgate."[88]

These distinction apply here. The Secretary of State is nothing like a police officer; and was not confronted with the same challenges in this circumstance. He did not find himself in the type of exigent circumstance that often results in a police officer claiming qualified immunity. The Secretary did not need to make an on-the-spot decision while staring down a potentially dangerous criminal: he took seven days to deliberate and decide his course of action. The Secretary was not out on the street without legal precedent: he oversees a $21 million budget and could consult with a team of lawyers before making a decision. The Secretary has public policymaking authority and would not be "fired for dereliction of duty" if he had chosen the constitutional course of action here: the Secretary's

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87 Id., at p. 21.

88 *F. Buddie Contracting v. Cuyahoga Community College District*, 31. F.Supp.2d 584, at 589, 590 (1998).

predecessor proved this by issuing Advisory 2009-04, holding the residency requirement to be unenforceable.

Accordingly, the State's precedents highlighting qualified immunity for police in the field have no application to *what actually happened here.*

Likewise, the State likens the challenge confronting the Secretary of State to that of navigating between "Scylla and Charybdis," whereby he faced the risk of dereliction of duties for the failure to enforce the statute.[89] But the Secretary does not get "fired" when he exercises his discretion. Ultimately, the Secretary's enforcement of the residency requirement against Plaintiff CPR must be evaluated in light of these circumstances, rather than in light of the exigencies police officers confront.

CONCLUSION

For the foregoing reasons, the State's appeal should be denied, so that the District Court may determine (1) whether the Secretary caused the plaintiffs damages; and (2) the extent of those damages.

Respectfully submitted,

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[89] Id., at p. 4, 5, 23.

CERTIFICATE OF COMPLIANCE – FED. R. APP. 32(A)(7)

I hereby certify that, pursuant to Fed. R. App. 32(A)(7), that the foregoing Appellees' Brief contains less than 13,899 words and is otherwise in compliance with Fed. R. App. 32(A)(7).

_/s/ Maurice A. Thompson_____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon all counsel of record via the Court's electronic filing system on the date of filing.

/s/ Maurice A. Thompson

DESIGNATION OF DISTRICT COURT RECORD

Pursuant to Sixth Circuit Rule 30(g), Plaintiff-Appellees designated the following filings from the district court's electronic record:

Document 1: **September 20, 2013 Verified Complaint**

Document 1-3: **Plaintiffs' Exhibits to September 20, 2013 Verified Complaint**

Document 13: **November 13, 2013 Opinion and Order granting Preliminary Injunction**

Document 43: **March 16, 2015 Opinion and Order and Permanent Injunction**