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

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

Plaintiffs,

v.

JON HUSTED, OHIO SECRETARY OF STATE,

Defendant.

Case No. 2:13-cv-935-MHW-TPK

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

Proposed *Amici* Judicial Watch, Inc. ("Judicial Watch") and the Allied Educational Foundation ("AEF") believe that Ohio's law banning out-of-state initiative petition circulators represents an unlawful intrusion of the General Assembly onto rights that have been properly reserved to the people. Ohio's law infringes not only on the rights of Plaintiffs, but also on the protected rights of all citizens of the United States, and therefore should be overturned.

Interests of the Proposed _Amici_

Amici are concerned that the decision by the Ohio legislature unlawfully limits the right of the people to make and influence laws, and are concerned about the effect of that decision on the principles of separation of powers in Ohio and elsewhere. Specifically, Ohio's law intrudes on a separation of power not always emphasized – citizens' right to place additional checks on the power of their elected representatives. Among the harms caused by Ohio's law are an unlawful expansion of power by state governments over the people, and a resulting erosion of

democratic self-governance. For these and other reasons, a*mici* urge the Court to adopt a permanent injunction against Ohio's law.

ARGUMENT

Judicial Watch and AEF agree with Plaintiffs' arguments – and the Court's Preliminary Injunction ruling – that Ohio's law preventing out-of-state citizens from circulating initiative petitions unlawfully infringes on Plaintiffs' First Amendment rights under *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) and *Nader v. Blackwell*, 545 F.3d 459 (2008). *Amici* further agree that Ohio's law does not bear a substantial relation to the state's given objectives sufficient to justify the curtailment of liberties under even moderate scrutiny. *Amici* file this brief only to note that an additional constitutional ground exists on which the Ohio circulator law is unconstitutional, and that is the Privileges and Immunities clause of the Fourteenth Amendment. Even if the Ohio law did not violate the First Amendment rights of Plaintiffs, it is unconstitutional under the Privileges and Immunities clause because Ohio's law violates a fundamental right of citizens of the several states to fully participate in policy advocacy anywhere in their country such debates take place.[1]

Specifically, the right to participate in initiative advocacy as a circulator is precisely the kind of fundamental right that belongs to a citizen of every state, and which the Privileges and Immunities clause specifically protects. The Privileges and Immunities clause protects basic rights bearing upon the vitality of the nation as a single entity. As the Third Circuit observed:

> No state is an island – at least in the figurative sense – and some events which take place in an individual state may be relevant to and have an impact upon the policies of not only the national government but also of the states. Accordingly,

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[1] A similar Privileges and Immunities argument was advanced previously against an Oklahoma law prohibiting out-of-state petition circulators; however, the Tenth Circuit decided to strike Oklahoma's law on First Amendment grounds, declining to reach the merits of the Privileges and Immunities clause issue. *Yes on Term Limits v. Savage*, 550 F.3d 1023, 1031 (2008).

> political advocacy regarding matters of national interest or interests common between the states play an important role in furthering a vital national economy and vindicating individual rights.

Lee v. Minner, 458 F.3d 194, 199-200 (3d Cir. 2006). The Privileges and Immunities clause was intended to "fuse into one Nation a collection of independent, sovereign States." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985), *quoting Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Similarly, in *Baldwin v. Fish and Game Commission of Montana,* the Supreme Court held that the Privileges and Immunities clause protects those rights "bearing upon the vitality of the Nation as a single entity," the denial of which tend to "hinder the formation, the purpose, or the development of a single Union of those States." 436 U.S. 371, 383 (1978). States may not adopt laws discriminating against out-of-state citizens unless the different treatment bears a "substantial relation" to the state's objectives. *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64 (1988). As explained herein, Ohio's law infringes on precisely the kind of right the Privileges and Immunities clause has historically been held to protect.

I. The Privileges and Immunities Clause Protects all Americans' Right to Circulate an Initiative Petition in Order to Protect Unpopular Viewpoints

The decision in *Supreme Court of New Hampshire v. Piper* is highly relevant to the present case. *Piper* concerned New Hampshire's law prohibiting citizens residing outside the state from admittance to the bar to practice law, an activity directly analogous to Ohio's ban of out-of-state petition circulators. 470 U.S. 274. The *Piper* court recognized that practicing law had an important noncommercial purpose, and prohibiting participation in that activity to citizens of other states frustrated the primary purpose of the Privileges and Immunities clause:

> We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may – and often do – represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of

> federal rights. *The lawyer who champions unpopular causes surely is as important to the maintenance or well-being of the Union*.

Id. at 281 (internal citations omitted) (italics added). In other words, the court recognized that sometimes only nonresidents will challenge unpopular policy decisions or activities of state governments, and therefore out-of-state law practice served a sufficiently important national interest.

Ohio's law will limit participation in matters of public policy on precisely those issues which most need the help of out-of-state advocates. By their very nature, initiatives and referendums often advocate for positions that are unpopular with state government officials, as they frequently involve measures which elected representatives are unwilling to adopt themselves. Ohio's citizens may support these initiatives, but may hesitate to become involved too prominently for fear of retribution by a government that opposes them.

Equally importantly, the Supreme Court in *Piper* was careful to note that the activity in question need not be commercial to be considered a fundamental right explaining that it has "has never held that the Privileges and Immunities Clause protects only economic interests." *Piper*, 470 U.S. at 281. It is therefore immaterial whether Ohio's law prevents paid out-of-state petition circulators, or volunteers who circulate petitions out of devotion to a particular cause. Similarly, the *Piper* court never held that practicing law in a neighboring state was a First Amendment right, nor did it rule that such a finding would be necessary before holding that New Hampshire's law violated the Privileges and Immunities clause. Rather, it was sufficient that the court viewed practicing law as a fundamental right or privilege of the kind contemplated by the clause. *Id*. at 280-281. Accordingly, the Court can rule in favor of Plaintiffs on Privileges and Immunities grounds even if it finds against Plaintiffs' First Amendment arguments.

II. The Right to Participate in Initiatives as Circulators in the Several States is a Fundamental Right of All Citizens Which Bears Upon the Entire Nation

Generally, "fundamental" rights of citizens under the Privileges and Immunities clause are those that "bear upon the vitality of the Nation as a single entity," and vice versa. *United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984). However, in this case, Ohio's law violates the Privileges and Immunities clause whether one views the harm as one to individual out-of-state citizens or to the nation as a whole.

A. Ohio's Law Violates the People's Fundamental Right to Check the Power of Elected Representatives

The right to initiative and referendum is a fundamental one for all citizens' interest in self-governance. *Strauss v. Horton*, 46 Cal. 4th 364, 420 (2009) ("The initiative was viewed as one means of restoring the people's rightful control over their government…"). The political processes of initiative and referendum were originally introduced into the states to give the people greater control over their governments.[2] These direct democracy measures were adopted in many states during the progressive era of the early 1900s to reign in legislatures that had become unresponsive to citizen concerns.[3] These laws enable the people to reserve a "larger share of legislative power" for themselves in a republican government. *Kadderly v. Portland*, 44

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[2] Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall*, p. 53 (Harvard University Press 1999) (initiative processes were designed to reduce corruption in the legislatures and make legislators more attentive to public opinion).

[3] *See* Jack Benoit Gohn, *Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution – Bayne v. Secretary of State*, 39 Md. L. Rev. 558, 572 (1980) ("The period during which the [Maryland] referendum amendment was being formulated and ratified, 1914 to 1915, was the heyday of the Progressive movement. One of the principal programs of the Progressives was so-called direct legislation, lawmaking by the electorate. The theory - and indeed the reality in those times - was that laws passed by legislatures were likely to reflect the will of political bosses rather than that of the electorate. The vehicles of direct legislation, the initiative and the referendum, were designed to wrest control of the processes of legislation from the distrusted legislatures. . . .").

Ore. 118, 145 (1903). By invoking their right to direct democracy, the people function as a "third house" of the legislature with the power to pass or reject legislation themselves.[4]

Many courts have recognized the fundamental importance of initiatives and referendums to citizens and their representative democracies. *James v. Valtierra*, 402 U.S. 137, 141 (1971) ("California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy."); *Lemons v. Bradbury*, 538 F.3d 1098, 1101 (9th Cir. 2008) ("[S]tate regulations on the initiative and referendum process implicate the fundamental right to vote…"); *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 328 (2009) (internal citations omitted) ("The constitutional right of citizens to referendum is of paramount importance. The referendum is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies."); *Fairness & Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 584 (1994) ("Initiative and referendum procedures are a fundamental part of Arizona's scheme of government."); *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297, 302 (Colo. Sup. Ct. 1981) ("[W]e view recall, as well as initiative and referendum, as fundamental rights of a republican form of government which the people have reserved unto themselves...") (internal quotations omitted); *United Labor Committee v. Kirkpatrick*, 572 S.W.2d 449, 454 (Missouri Sup. Ct. 1978) ("Previous decisions of this court have discussed the importance of the initiative and referendum, emphasizing that procedures designed to effectuate these democratic concepts should be liberally construed to avail the voters with every opportunity to exercise these rights. The ability of the voters to get before their fellow voters issues they deem significant should not be thwarted in

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[4] *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 581-582 (1922) (describing the adoption of direct democracy in Ohio: "[T]he people became the third house, and declared and safeguarded in the constitution their right of referendum upon [the Ohio General Assembly's] laws…").

preference for technical formalities."); *Fire Prot. Dist. v. City of Moses Lake*, 145 Wn.2d 702, 733 (Wash. Sup. Ct. 2002) ("Washington has long recognized the importance of the right of people to petition the government. [N]o government has ever remained free unless the right of petition has been kept inviolate.") (internal quotations omitted).[5]

The people's right to direct democracy is "the ultimate check upon one of th[e] branches of government: the people's constitutional right to legitimately strike down legislation with which they might strongly disagree." *State ex rel. Riffe v. Brown*, 51 Ohio St.2d 149, 168 (1977) (Herbert, J., dissenting). The act of circulating a petition for a public law – an act which "involves the type of interactive communication concerning political change" – is properly viewed as a fundamental right of all Americans. *Meyer v. Grant*, 486 U.S. 414, 421-422 (1988).

B. Ohio's Law Diminishes the Vitality of the Union

By discriminating against out-of-state citizens, Ohio's law weakens direct democracy in the state, an issue "which bears upon the vitality of the nation as a single entity." The right to direct democracy is essential to the preservation of vibrant democracies in the many states. The ability of states to function as "laboratories of democracy" is paramount to the health and vitality of the nation and its federal system. *Smith v. Howerton*, 509 Fed. Appx. 476, 482 (6th Cir. 2012); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, dissenting).

In practice, direct democracy initiatives often seek to implement or reject laws that are unpopular with certain government officials, since they essentially take a certain amount of

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[5] *See also* Maimon Schwarzschild, *Voter Initiatives and American Federalism: Putting Direct Democracy in its Place*, Public Law and Legal Theory Research Paper Series, University of San Diego School of Law, pp. 2-3 (Fall 2003) ("Support for direct democracy draws on the idea that popular self-rule is an important part of what it means for a society to be free... Direct democracy is also associated with the hope or expectation that voters will be more active, informed, and responsible – as citizens and as people – when important decisions are in their hands.").

legislative power away from elected officials.[6] The derogation of that right by the Ohio General Assembly, if not remedied by this Court, could "mark[] the beginning of the demise of constitutional government in Ohio." *Id.* (Brown, J. dissenting).[7] To use the language of *Piper*, an initiative petition circulator "who champions unpopular causes surely is as important to the maintenance or well-being of the Union" as a circulator who advocates for popular causes. 470 U.S. at 281.

The freedom to fully support and advocate for unpopular measures becomes especially important when one considers that initiatives and referendums in any single state can have substantial influence on other state policies, as well as on the nation as a whole. To provide just one example, California's 1978 tax limitation initiative was quickly replicated throughout the country, demonstrating that the full exercise of direct democracy in one state can easily impact

[6] *See e.g.* Marta H. Mossburg, *O'Malley's thuggish side: Governor wants the world to see a kind and inclusive Maryland — but don't you dare disagree with him*, Baltimore Sun, Jan. 3, 2013 ("...Governor O'Malley told WBAL that it is 'a little too easy' to petition a law to referendum . . . 'We've been best served in our state over the 200 or more years of our history by a representative democracy, rather than plebiscites,' he said. How clever of him to use the language of democracy to undermine it."), available at http://www.baltimoresun.com/news/opinion/oped/bs-ed-mossburg-omalley-20130102,0,2173154.column.

[7] It should be noted that it took 16 years of grassroots effort to obtain the right to direct democracy in Ohio. The people's right to popular initiative in Ohio was not granted by the legislature in the first place – rather, the legislature initially succeeded in defeating the measure. *See* M. Dane Waters, *The Initiative and Referendum Almanac*, p. 381 (Carolina Academic Press 2003). Ultimately Ohio's initiative law was adopted by its constitutional convention of 1912, which submitted the initiative and referendum amendment to a popular vote for approval. *Id.* The Ohio legislature's efforts to restrict initiatives and referendums now should be viewed as suspect, since it was not the Ohio legislature that granted citizens this right in the first place.

the entire nation.[8] In fact, citizen use of initiatives at the state level have contributed to some of the most significant changes to U.S. politics over the past century, including granting women the right to vote, creating the eight hour work day, and ending the use of racial preferences in government. [9] This trend has continued through the present, as initiatives on marijuana legalization and same-sex marriage frequently shape and dominate the national policy debate.

Ohio's initiatives and referendums do not exist on an island. The direct democracy decisions of Ohio citizens contributes to the national dialogue on issues of critical importance to all Americans. For Ohio to try to prevent citizens of other states from contributing to these debates by putting initiatives on the ballot critically denies them participation in an event which can and often will affect them directly. Americans in every state are entitled, as Americans, to circulate petitions urging their fellow Americans to reject or approve policies no matter the time nor place.

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[8] Stephen Moore, *Proposition 13 Then, Now and Forever*, (July 30, 1998) ("Proposition 13 was a political earthquake whose jolt was felt not just in Sacramento but all across the nation, including Washington, D.C. Jarvis's initiative to cut California's notoriously high property taxes by 30 percent and then cap the rate of increase in the future was the prelude to the Reagan income tax cuts in 1981. It also incited a nationwide tax revolt at the state and local levels. Within five years of Proposition 13's passage, nearly half the states strapped a similar straitjacket on politicians' tax-raising capabilities. Almost all of those tax limitation measures remain the law of the land today."), available at http://www.cato.org/publications/commentary/proposition-13-then-now-forever.

[9] Initiative and Referendum Institute of the University of Southern California, *A Brief History of the Initiative and Referendum Process in the United States*, available at http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/History%20of%20I&R.pdf.

Conclusion

For all the foregoing reasons, *amici* respectfully urge the court to grant Plaintiffs' motion and permanently enjoin Ohio's law.

Dated: March 10, 2014

Respectfully submitted,

s/ Chris Fedeli
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Thomas W. Kidd, Jr.

Thomas W. Kidd, Jr.