

**In The United States District Court
For The Southern District of Ohio
Eastern Division**

Brian Moore, et al.,

Plaintiffs,

vs.

Case No. 2:08-cv-224

Jennifer Brunner,

Judge Sargus

Defendant.

**DEFENDANT SECRETARY OF STATE JENIFER BRUNNER'S MEMORANDUM
CONTRA PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION**

Defendant, Ohio Secretary of State Jennifer Brunner, respectfully asks the Court to deny the second Motion for Preliminary Injunction filed by plaintiff Brian Moore. The second request for injunctive relief is premised upon the recent decision in *Libertarian Party of Ohio v. Brunner*, Case No. C2-08-555, in which this Court struck down Directive 2007-09. However, as explained in the accompanying Memorandum of Law, the Moore plaintiffs are not similarly situated to the Libertarian Party plaintiffs, in significant ways which preclude injunctive relief.

MEMORANDUM OF LAW

I. Background: The Procedural Posture of the Moore and Libertarian Party Cases

A. The Secretary Promulgates Directive 2007-09

The roots of this case go back to the Sixth Circuit's decision in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), in which the Court of Appeals struck down Ohio's minor party ballot access laws as unconstitutional. Following that decision, the General Assembly passed no new legislation to cure the state law's constitutional deficiency. This inaction by the legislature left Ohio without any statutory rules for regulating ballot access.

Under the version of the law at issue in the 2006 case, R.C. 3517.01(A)(1), a minor party seeking to secure a spot on the ballot had to file a petition no later than 120 days before the primary election, and the petition had to contain signatures in an amount equal to one percent of the total vote cast in the previous election. These requirements were meant to ensure that candidates and parties had a sufficient base of support. When that statute was declared unconstitutional, Ohio was left without any standards by which to gauge whether a minor party has the “requisite community support” to justify a place on the ballot.

In attempting to administer the state’s election laws amidst this unusual and untenable situation, Secretary Brunner utilized her authority under R.C. 3501.05, as the state’s chief elections officer, to issue Directive 2007-09 to fill the void and provide some structure and consistency to the process. The Directive increased the time for filing petitions (by moving the deadline up to 100 days before the primary) and cut the number of required signatures in half. It was the Secretary’s hope that these new guidelines would balance the competing interests of allowing ballot access to minor parties without “clogging” the ballots with a host of minor parties that lacked sufficient community support.

B. The Second Libertarian Suit

On June 6, 2008, the Libertarian Party of Ohio and five other plaintiffs filed suit against the Ohio Secretary of State challenging the constitutionality of Secretary Brunner’s Directive 2007-09 (“*Libertarian Party II*”). On July 17, 2008, this Court struck down Directive 2007-09, finding that under the United States Constitution, Articles I and II, the Secretary of State could not create a structure for minor party ballot access, at least with regard to candidates for federal office, in the absence of an express delegation of authority from the Ohio General Assembly to do so. In the alternative, applying the Sixth Circuit’s analysis in the first *Libertarian Party* case,

this Court also found that even if the Secretary of State had the power to issue Directive 2007-09, the ballot access rules contained in the Directive still unduly burdened First Amendment rights. This Court issued a preliminary injunction and ordered Secretary Brunner to place the named plaintiffs on the November 2008 ballot with the Libertarian Party of Ohio party designation.

C. The First Moore Preliminary Injunction Petition

Plaintiff, Brian Moore, presidential candidate of the Socialist Party USA, filed a complaint alleging that he intended to run as an independent candidate. Mr. Moore and his co-plaintiffs sought a declaration that the restrictions on circulators of part-petitions in R.C. 3503.06(A) were unconstitutional.¹ On June 2, 2008, Judge Frost issued a preliminary injunction barring the Secretary from applying R.C. 3503.06(A) to disqualify petitions circulated by unregistered voters and/or non-residents. That decision still left Mr. Moore and his supporters with the burden of collecting sufficient valid petition signatures in order to secure a place on the November ballot.

However, after this Court issued its decision in *Libertarian Party*, the *Moore* plaintiffs sought leave to amend their complaint to add a challenge to Directive 2007-09. In the proposed Second Motion for Preliminary Injunction, Mr. Moore and his Vice-Presidential candidate, Stewart Alexander, argue that they no longer need to circulate petitions, and instead seek automatic placement on the ballot, as well as identification on the ballot as the Socialist Party candidates (abandoning their prior professed intention to run as independents). Thus, although initially brought to establish a different legal principle, the *Moore* case now squarely raises an issue identical to that raised in *Libertarian Party II*.

Although Judge Frost heard the original *Moore* injunction petition, the Secretary if State filed a motion (which was unopposed) to have the case transferred to Judge Sargus, so as to

¹ R.C. §3503.06(A) requires that petition circulators be both Ohio residents and Ohio registered voters.

ensure legally consistent outcomes for parties seeking to appear on the November ballot. Based upon this Court’s recent decision, it is clear that although Directive 2007-09 is no longer operative, it does not follow that the Moore plaintiffs are automatically entitled to have their names appear on the ballot.

II. Legal Argument

A. A Minor Party Must Still Demonstrate That It Has “The Requisite Community Support”

At the present time, Ohio has no statutory or administrative guidelines for determining how minor parties and candidates qualify for the ballot. In *Libertarian Party (II)*, this Court correctly recognized that the State’s compelling interest in avoiding “laundry list” ballots meant there had to be some limitation on access, even in the absence of a statute. Citing *Goldman-Frankie v. Austin*, 727 F.2d 603 (6th Cir. 1984) and *McCarthy v. Briscoe*, 429 U.S. 1317 (1976), this Court held that it is proper to consider whether the available evidence indicates that “there is reason to assume the ‘requisite community support.’”

The need to show the “requisite community support” is thus a substantive requirement for ballot access. In *Libertarian Party II*, this Court determined that the plaintiffs had shown the requisite support, but declined to set forth rigid guidelines for assessing community support. In reaching its conclusion, the Court relied on three facts: (1) the Libertarian Party was founded in 1972; the Party has qualified for the Ohio ballot in previous years; and (3) its candidate, Bob Barr, is on the November ballot in 31 other states. Using these factors for guidance, the Secretary respectfully suggests that the Moore plaintiffs have not made the same showing of “requisite community support.”

B. The Socialist Party USA Does Not Have The Minimal Popular Support

The Secretary of State is seeking clarification from this Court as to some standard to apply or course of action to take to determine minor political party ballot access. While this Court may be hesitant to set forth explicit rules, the Secretary would suggest that the situation of the Socialist Party differs from that of the Libertarian Party. The Secretary respectfully seeks from this Court either 1) guidance that each and every minor political party request to appear on the ballot be submitted to this Court for a case-by-case determination, or 2) clarification of the Court's earlier decision that will provide the Secretary with some general principles that should be generally applied to determine requisite community support and therefore ballot access for minor political parties in the absence of a constitutional statutory scheme. After carefully examining this Court's opinion in *Libertarian Party*, the Secretary of State believes the Socialist Party USA is unable to demonstrate a similar, requisite community support as that of the Libertarian Party. If this Court, however, is of a different opinion, the Secretary will promptly grant ballot access as required by this Court.

The two parties – Libertarian and Socialist – are situated quite differently. Unlike the Libertarian Party, the Socialist Party USA has never had ballot access in Ohio, as even plaintiffs concede. Its predecessor, the Socialist Labor Party, last appeared on Ohio's ballot in 1946, more than a half century ago. Unlike the Libertarian Party, the Socialist Party USA appears not to have held a State convention in 2008. The pleadings only mention a 2007 national convention.

In addition, the Socialist Party USA may not have an "active" Ohio party. Apparently, the Ohio chapter was last headquartered in Yellow Springs from 2005-06. The Libertarian Party, by contrast, has had an active history of maintaining a presence in Ohio. While the Libertarian Party has been able to claim that its Presidential candidate will be on the ballot in thirty-one

states, the Socialist Party USA candidates are only ballot qualified in two states. The Libertarian Party claimed to have filed 6,545 signatures with the Ohio Secretary of State in order to gain ballot access. The Socialist Party USA failed to submit any signatures either to the Secretary or this Court. Finally, the Libertarian Party sought to run candidates for multiple offices, not just President, which proves that it independently exists in Ohio as a political *party*. The Socialist Party USA simply seeks ballot access for its Presidential candidate with a party identifier tag.

The Court of Appeals has already ruled that independent candidates do not have a right to have a political party next to their name. *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001). Because Moore has failed to show sufficient community support in Ohio for the Socialist Party USA and does not have any other candidates who wish to appear with him on the ballot for other positions, it appears that he is simply asking this Court to ignore the Circuit's decision in *Schrader*. Although the Secretary had previously made attempts to allow independent Presidential candidates to appear with a party label, this Court previously ruled she did not have the legal authority to do so for federal elections, without enabling legislation. It would appear, then, that simply placing the Presidential candidate of the Socialist Party USA on the ballot with an identifier would violate the *Schrader* decision. The Secretary seeks this Court's guidance on the issue.

III. Conclusion

Applying the criteria this Court articulated in *Libertarian Party II*, the Secretary respectfully suggests that Moore and the Socialist Party USA lack the requisite community support necessary to secure a spot on the ballot with a minor party identifier. The Secretary suggests that plaintiffs cannot show a substantial likelihood of success on the merits, and therefore the Motion for Preliminary Injunction should be denied.

Respectfully submitted,

NANCY H. ROGERS
ATTORNEY GENERAL

Richard N. Coglianesse

Richard N. Coglianesse (0066830) Trial Attorney

Damian W. Sikora (0075224)

Aaron D. Epstein (0063286)

Assistant Attorneys General

Constitutional Offices

30 East Broad Street, 16th Floor

Columbus, Ohio 43215-3400

aepstein@ag.state.oh.us

(614) 466-2872 – phone

(614) 728-7592 – fax

Attorneys for Defendant

Jennifer Brunner

Ohio Secretary of State

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing Memorandum In Opposition To Plaintiffs' Second Motion For Preliminary Injunction was served upon all counsel of record by means of the Court's electronic filing system on this 13th day of August, 2008.

/s Richard N. Coglianesi