IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTOCUT

SHAWN WILMOTH,

Plaintiff,

v.

DENISE MERRILL,

Defendant.

CIVIL ACTION No. 3:16-cv-0223

Hon. Judge Hall

PLAINTIFF'S REPLY BRIEF

FEBRUARY 24, 2016

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I. SUMMARY OF ARGUMENT

Plaintiff is a lawfully registered and dues paid member of the Michigan Democratic Party and a professional circulator of election nomination petitions who has been contracted by Rocky De La Fuente, a registered California Democrat, who is seeking the nomination of the Democratic Party for the office of President of the United States to circulate election nomination petition in Connecticut to Connecticut Democrats seeking their signatures to place Rocky De La Fuente in the 2016 Connecticut Presidential Preference Primary Election. To be clear, plaintiff respectfully requests this Court to grant a temporary restraining order enjoining defendant's enforcement only for that portion of Conn. Gen. Stat. §9-410(c) the prohibits out-of-state residents from freely circulating election nomination petitions in the State of Connecticut (i.e., facial relief), or, in the alternative, plaintiff requests a temporary restraining order fashioned to prohibit defendant's enforcement of Conn. Gen. Stat §9-410(c) to the extent that it prohibits out-of-state Democrats from freely circulating Presidential election nomination petitions in Connecticut seeking registered and enrolled Connecticut Democrats to sign election nomination petitions for the 2016 Connecticut Democratic Presidential Preference Primary (i.e., as-applied relief).

The Second Circuit has expressly extended *Buckly* to candidate nomination petitions. The prohibition on out-of-state residents from circulating election nomination petitions in Connecticut is a severe restriction on core-political speech which is not narrowly drawn to advance a compelling governmental interest. Accordingly, strict scrutiny must be applied and the prohibition enjoined. In fact, the restrictions placed on circulators of major party election nomination petitions is more severe, because it excludes an even larger pool of political speech, than the prohibition on out-of-state

circulators for Libertarian Party candidates that this Court has already granted injunctive relief, because no party enrollment restriction is placed on in-state or out-of-state circulators of minor political parties.

Frankly, to the extent that opposing counsel argues that this Court must save the out-of-state circulator restriction by boot-strapping it via the enrolled party voter registration requirement, the voter registration requirement itself impairs core political speech to an even greater extent than the out-of-state circulator requirement and is a restriction expressly held unconstitutional by the United States Supreme Court in *Buckley* and adopted and extended to candidate election petitions by the Second Circuit in *Lerman*. Opposing counsel's resort to the alleged state interest against "party raiding" is clearly misplaced because "party raiding" is only a state interest to prohibit voters, by instituting a reasonable registration cut-off date, from re-registering in a political party to interfere or cause mischief in the selection of another party's candidates. The Supreme Court has never recognized the interest against "party raiding" as prohibiting non-party members from presenting a petition to enrolled members of a political party seeking their operative signatures to place one of their fellow party members on their party's primary election ballot. Furthermore, as applied to plaintiff, a dues paid registered Democrat seeking to circulate nomination petitions for a Democrat in a national Presidential election contest, the resort to the "party raiding" doctrine is simply not applicable for as-applied relief. Further, defendant has offered no evidence, as defendant is required to present, of the existence of the alleged evil of "party raiding" in the context of election nomination petitions in Connecticut.

II. ARGUMENT

A. Strict Scrutiny Applies to the In-State Circulator Requirement of Conn. Gen. Stat. § 9-410(c)

While defendant's brief has properly stated the standard under which this Court must properly address plaintiff's instant motion for a temporary restraining order, including that plaintiff must show "a likelihood of [ultimate] success" defendant, remarkably, fails to address the standard under which plaintiff's "likelihood of [ultimate] success" must be judged – which is strict scrutiny. Def. Brief at p.2-3. Defendant full well understands that application of strict scrutiny to Conn. Gen. Stat. §9-410(c) strongly militates that plaintiff should be granted the requested injunctive relief. In *Lerman v. Board of Elections in City of New York*, 232 F.3d 135 (2000), the Second Circuit, has cexpressly applied strict scrutiny to the review of restrictions placed on the circulation of nomination papers (extending *Buckley v. American Constitutioal Law Found., Inc.*, 525 U.S. 182 (1999) which held voter registration requirements for initiative and referenda petitions unconstitutional to candidate election petitions) The *Lerman* Court explained the proper application of strict scrutiny in the following manner:

> Ordinarily, policing this distinction between legitimate ballot access regulations and improper restrictions on interactive political speech does not lend itself to a bright line or "litmus-paper test," *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *see also American Constitutional Law Found.*, 119 S.Ct. at 642, but instead requires a particularized assessment of the nature of the restriction and the degree to which it burdens those who challenge it. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059; *Schulz*, 44 F.3d at 56. However, in those cases in which the regulation clearly and directly restricts "core political speech," as opposed to the " 'mechanics of the electoral process,' " it may make "little difference whether we determine burden first," since "restrictions on core political speech so plainly impose a 'severe burden' " that application of strict scrutiny clearly will be necessary. *American Constitutional Law Found.*, 119 S.Ct. at 650 (Thomas, J., concurring) (internal citations omitted); *see id.* at 642 n. 12 (opinion of the court); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (declining to apply severe/lesser burdens

balancing test to direct regulation of "pure speech").

Lerman 135 at 145-46. The Second Circuit continues that under a strict scrutiny analysis, state restrictions that impose a limit on the circulation of candidate nomination petition to residents of a particular jurisdiction are facially unconstitutional explaining that:

> The petition circulation activity at issue in this case, while part of the ballot access process, clearly constituted core political speech subject to exacting scrutiny. *See* *American Constitutional Law Found.*, 119 S.Ct. at 651 (Thomas, J., concurring) (applying strict scrutiny to voter registration requirement for initiative petition circulators); *Meyer v. Grant*, 486 U.S. 414, 421–22, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' "); *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir.2000) (stating that "circulating nominating petitions [for political candidates] necessarily entails political speech"). As the Supreme Court held in *Grant*, petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421, 108 S.Ct. 1886. It should be clear, however, that even if one characterizes this restriction on petition circulation as being more directly concerned with the "mechanics of the electoral process" than with speech, requiring us to evaluate the severity of the burdens on political speech and association posed by that regulation before determining the level of scrutiny to be applied, the witness residence requirement severely burdens political speech by "drastically reduc [ing] the number of persons ... available to circulate petitions." *American Constitutional Law Found.*, 119 S.Ct. at 643; *see id.* at 651 (Thomas, J., concurring) (restriction on petition circulation severely burdens speech if it "reduces the voices available to convey political messages"); *Grant*, 486 U.S. at 422–23, 108 S.Ct. 1886 (prohibition on paid petition circulators restricts political speech by "limit[ing] the number of voices who will convey appellees' message and ... mak[ing] it less likely that appellees will garner the number of signatures necessary" to gain access to ballot, thereby limiting their ability to influence public political discussion); *Krislov*, 226 F.3d at 860 (statute limiting petition circulators to residents of the political subdivision for which the office is to be voted substantially burdens political speech by "preclud[ing] the candidate from utilizing a large class of potential solicitors to convey his message"); *Molinari*, 82 F.Supp.2d at 76 (witness residence requirement in section 6–132(2) substantially burdens political speech because it reduces the number of individuals available to circulate designating petitions and, therefore, "reduces the chances that those supporting the candidates will gather signatures sufficient to qualify for the ballot"). Moreover, petition circulation bears

> an intimate relationship to the right to political or expressive association. The right to political association also "is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect." *Krislov,* 226 F.3d at 860 (quoting *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir.1996)) (internal quotation marks omitted). Obviously, the section 6–132(2) witness residence requirement does not ban association between candidates and non-residents of the electoral district altogether—but the statute need not go that far in order to substantially burden the right to political association. "[B]y preventing the candidates from using signatures gathered by [non-resident] circulators ..., the law inhibits the expressive utility of associating with these individuals because these potential circulators cannot invite voters to sign the candidates' petitions in an effort to gain ballot access." *Krislov,* 226 F.3d at 861.

Lerman at 146-48. Accordingly, under clearly established Supreme Court and Second Circuit precedent, the in-state witness restriction at issue in this case is subject to strict scrutiny and for the all the reasons stated in plaintiff's main brief impairs plaintiff's rights guaranteed under the First and Fourteenth Amendments and is not narrowly tailored to advance a compelling governmental interest. Furthermore, as explained in plaintiff's main brief success on the "likelihood of success" prong of the standard for granting temporary injunctive relief is the determinative factor in meeting the other three prongs of the test necessary for this Court to grant the emergency relief requested by plaintiff.

B. Alleged State Interest Against "Party Raiding" is Not Applicable to Instant Case

Defendant's raise the alleged state interest against "party raiding" as a basis to deny plaintiff's requested relief alleging that in furtherance of the state's interest against "party raiding" the enrolled party member requirement necessarily prevents the in-state witness restriction from being stuck as unconstitutional – all without having to refute the volumes of Supreme Court and other precedent that have found in-state witness restrictions unconstitutional. Def. Br. at 3-7. First, a state's interest against "party raiding" as explained by the United States Supreme Court, only implicates the state's

right to place a reasonable deadline on the ability of members of one party to switch to another political party. *See* Rosario v. Rockefeller, 410 U.S. 752. The Supreme Court has never articulated any rational that would permit this Court to characterize a citizen of another state presenting an election nomination petition to an enrolled party member of Connecticut to give the opportunity to allow that enrolled party member to decide for his or herself as to whether (or not) he or she wanted to support a candidate of the same party to be placed on their party's primary election ballot as an example of "party raiding" sufficient to prohibit out-of-state circulators through the boot-strapping of an in-state enrolled party registration requirement. The only operative signatures on an election nomination petition is that of the enrolled party member – not the person who presented the petition to them on a clipboard.

Furthermore, as applied to the plaintiff, even if this Court adopts defendant's grossly expanded definition of "party raiding" plaintiff is a dues paid member of the Michigan Democratic Party and seeks to circulate nomination petitions in Connecticut for a Democrat candidate for President of the United States seeking to present nomination petition only to enrolled members of Connecticut's Democratic Party. *See* "First Declaration of Shawn Wilmoth" ¶¶1, 3, 4, 5, 7 (attached hereto as "Exhibit A"). As a Michigan Democrat, plaintiff cannot be characterized as attempting to "raid" his own party. Therefore, as applied to plaintiff, raising the alleged state interest in preventing "party raiding" is simply not applicable to this case. If this is not the case, it would seem that Hillary Clinton, who is a New York Democrat is herself engaged in "party raiding" of the Connecticut Democratic Party by seeking to be placed on the 2016 Primary Election Ballot, an act far more intimate than plaintiff's mere circulation of a nomination

petitions. "Party raiding" has never been employed to cloister state political parties from affiliations with members of affiliated member of other state parties. Furthermore, the Connecticut Democrat Party has never instituted any by-laws which would prohibit Democrats from other states from circulating nomination petition in Connecticut.

Under strict scrutiny analysis, the government has the burden to prove that the challenged law is constitutional. *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 450-51 (2007). To withstand strict scrutiny, the government must prove that the law is necessary to achieve a compelling governmental interest and to meet this burden of proof, the government "must do something more than merely posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994). In other words, the government must factually prove the existence of the evil and that the asserted interest is necessary and narrowly tailored to remedy the evil. Here, defendant has completely failed to offer any evidence that circulation of nomination petitions by unenrolled or enrolled members of the same political party from other states is "party raiding" or how the enrolled party requirement is narrowly tailored to prevent the evil proven to exist through evidence on the record.

C. *Maslow* Does Not Control

The Second Circuit's decision in *Maslow v. Board of Elections in City of New York*, 658 F.3d 291 (2011), is distinguishable in important ways from the instant case and does not control and it does not displace the Second Circuit's decision in *Lerman*. The Second Circuit's decision in *Maslow* did not implicate First Amendment analysis with respect to out-of-state circulators. *Maslow's* analysis is limited by the facts to an analysis of exclusions at the local level, and not on the national level when considering in-state

circulator requirements in connection with enrolled party requirements. Accordingly, the ratio of excluded "voices" to non-excluded "voices" is not so stark at the local level as it is when the entire nation is considered as required under in-state circulator and enrolled party restriction under the analysis required under *Buckley* and *Lerman*. The sheer size of the pool of excluded core political speech implicated by Connecticut's in-state circulator and enrolled party restrictions implicated in the instant case and the proper First Amendment analysis required was not addressed by the *Maslow* Court. And the *Maslow* Court certainly does not implicate any analysis or controlling precedent as to out-of-state enrolled members of the political party for which the nomination papers are sought to be circulated as is the case in this action.

Furthermore, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the United States Supreme Court made clear that:

> [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus, in a Presidential election, a State's enforcement of more stringent ballot access requirements…has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than state-wide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries….The pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State.

Anderson at 794-795. The decision in *Maslow*, implicating only rules governing local elections, was not decided under the same factual circumstances, not had the occasion to do the proper analysis required for State restriction placed on the circulation of election nomination petition for the President of the United States. Only *Lerman* and *Buckley*,

and the cases cited in plaintiff's main brief, have the necessary factual scope to guide this Court in the proper application of binding precedent with respect to Connecticut's in-state circulator restriction (and the boot-strapped party enrollment requirement) as codified at Conn. Gen. Stat. §9-410(c).

D. Plaintiff is a Lawfully Registered Voter and Enrolled Member of the Michigan Democratic Party

Defendant's vague suggestion that plaintiff may not be lawfully entitled to circulate nomination petitions in Connecticut because of his guilty plea in Virginia in 2011 is factually incorrect, and a bit surprising coming from a lawyer from the Attorney General's Office. First, the circumstances of the Virginia arrest and plea deal for allegedly knowingly hiring convicted felons to circulate nomination petitions in Virginia is set forth and explained in plaintiff's attached affidavit. *See* "First Declaration of Shawn Wilmoth" ¶10 (attached hereto as "Exhibit A"). Second, under the plea agreement, plaintiff was not incarcerated for the underlying charge. More importantly for purposes of this action, the 4 years, 8 month suspended sentence imposed pending completion of the 3 years of supervised probation began to clock as of his initial arrest on March 28, 2011, as he was given credit for the 6 months served in county jail as a result of the high $100,000 cash bail imposed at that time. Therefore contrary to defendant's assertion, that plaintiff's "conviction runs until later in 2016" is factually incorrect. Def. Br. at p.2. Plaintiff was released from his sentence early by a new presiding judge in his case, and as a matter of counting the calendar, at worst the "conviction" ended on November 11, 2015. Accordingly, aside from defendant's attempt to smear plaintiff in the eyes of the Court, the plea deal agreed to by plaintiff to secure his freedom from an outrageous $100,000 cash bail (after 6 months languishing in a county jail due to the

serial continuances granted as evidenced by the docket sheet attached to defendant's brief) has no impact or relevance to the adjudication of the instant request for an emergency temporary restraining order.

E. First Amendment Rights of Party Not Implicated

Lastly, none of the cases cited by defendant articulating the First Amendment rights properly enjoyed by political parties implicates the circulation of candidate election petitions. Def. Br. at 4-5. Plaintiff agrees that political parties enjoy important rights under the First and Fourteenth Amendments. However, nothing in these cases support a regime under the First Amendment whereby political parties, through the exercise of the State's police powers, have a First Amendment right to prevent anyone from presenting a piece of paper to one of their enrolled party members seeking their signature to place one of their own party members on the State's primary election ballot. Only on Orwell's *Animal Farm* could concepts of freedom of speech and association take on such a bastardize form.

The First Amendment right of political parties are lodged with the "basic function of selecting the Party's candidates." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986). Political parties have no First Amendment right to curtail the circulation of election petition, which occupy, at best the extreme curtilages of the election process. In fact, *Tashjian* rejects the state's interest in protecting against "party raiding" *Id.* at 219.

CONCLUSION

Accordingly, for all the foregoing reasons and the arguments set forth in plaintiff's main brief, the requested temporary restraining order should be granted.

By: _____/s/ *Paul A. Rossi*_____

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on February 24, 2016, he personally caused to be served upon all counsel of record a true and correct copy of the foregoing "Plaintiff's Reply Brief" via the Court's ECF filing system:

Dated: February 24, 2016

/s/ *Paul A. Rossi*

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