UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,	:	
	:	
Plaintiffs,	:	Case No. 2:13-cv-00953
	:	
-vs-	:	Judge Watson
	:	
JON HUSTED, Ohio Secretary of State,	:	Magistrate Judge Kemp
	:	
Defendant,	:	
-and-	:	
	:	
STATE OF OHIO, et al.,	:	
	:	
Intervening Defendants.	:	
	:	

POST-HEARING BRIEF OF
INTERVENING DEFENDANT GREGORY FELSOCI

I. Plaintiffs Failed To Prove Any Improper Influence On Hearing Officer Smith's Recommendation Or Secretary Husted's Decision

In their third amended complaint, Plaintiffs allege that Terry Casey and other Republican interests "factually caused" and "proximately caused" the removal of Charlie Earl and Steven Linnabary from the ballot. [Doc. No. 188 at ¶ 300, 301] That is what Plaintiffs needed to prove by clear and convincing evidence to prevail, but they utterly failed to do so.

This record admits of no doubt: No one – not Casey, not the Kasich or DeWine campaigns, not the Ohio or Franklin County Republican Parties – influenced or interfered with hearing officer Smith's recommendation or Secretary Husted's decision to adopt it. *Compare Nader v. McAuliffe*, 593 F. Supp.2d, 95, 102 (D.D.C. 2009) ("merely filing, and winning, a lawsuit does not give rise to a constitutional claim unless the plaintiff alleges that

the judge presiding over the lawsuit was a co-conspirator or a joint actor with a private party.") Professor Smith testified:

> Q. Did anyone at the Secretary of State's office tell you how to decide this case?
>
> A. No.
>
> Q. Did anyone at the Secretary of State's office try to influence you or your decision?
>
> A. I can't speak to any motives anybody else had but I never had any sense that anybody was trying to influence me. In fact, … one of the things I think was fairly remarkable was the scrupulosity of the folks in the Secretary of State's office. And Mr. Christopher in particular was always, it's up to you, whatever you want to do. He was very, very scrupulous about making suggestions even on procedural matters.
>
> * * *
>
> Q. Did you have at any time any communications with Terry Casey?
>
> A. No.
>
> Q. Do you know Terry Casey?
>
> A. No, I do not.
>
> * * *
>
> Q. Did anyone, not just Mr. Casey now, but anyone anywhere attempt to influence you in any way in making your recommendation in this matter?
>
> A. Outside of the hearing itself, no.
>
> Q. Certainly. The advocacy at the hearing itself?
>
> A. Yes.
>
> Q. But aside from the advocacy at the hearing itself, no one tried to influence you, correct, sir?
>
> A. No.
>
> Q. Is that correct what I said?

A. That is correct. No one attempted to influence me.

[9/30/14 Hrg. Tr. (Doc. No. 252)
at 253-254, 257-258 (Smith)]

Secretary Husted was equally clear that the final decision on the protests was his alone and no one influenced him. He testified: "I don't recall ever communicating with . . . [Terry Casey] during … [the] period" of the protests. [Husted Dep. (Doc. No. 203) at 32-33] He never spoke with Governor Kasich about the protests. [Id. at 70] He did not speak with any members of the Kasich campaign. [Id.] Secretary Husted further emphasized that he – not the hearing officer and not his staff – was "the final decision-maker." "I am the decider. My staff, on the other hand, are not the deciders. . . . I am not bound under the law to follow the recommendation of the hearing officer. . . . I, as the Secretary of State, am in charge of making these decisions, not the hearing officer, not my staff. . . . I make the decision on this. I'm the decider of the issue, not the hearing officer. The hearing officer's report is a guide, but I'm not bound to it in any way." [Id. at 8, 33, 41-42, 52] He also testified that there was nothing inappropriate about his staff communicating with Casey or anyone else regarding the protests and other public matters:

> It is common that all parties communicate with the staff at the Secretary of State's office about what the rules are, and it is our job to be helpful in explaining those rules, which they -- which would be appropriate for them to do.
>
> * * *
>
> It's appropriate for my staff in our role in administering election law to explain the process, timelines, the rules to any and all who call and ask. It is the culture in our office to be helpful to people in making sure that they are complying with the election laws of the State of Ohio; so communicating with any and all parties on those matters is appropriate for my staff to do.
>
> * * *

> I know that my staff, including Mr. Christopher, were instructed to follow the rules and follow the law, and I told them that I was indifferent as to the outcome, and they were instructed that on numerous occasions.
>
> [Husted Dep. (Doc. No. 203) at 34, 35, 49]

Secretary Husted could not have been more clear that he made an independent, unbiased judgment based on the facts and the law: "I feel then, as I do now, that I had the necessary information to make a sound judgment based on the law and the facts, and I believe that's exactly what I did." [Id. at 77] Notably, immediately after Secretary Husted made this statement, Plaintiffs' counsel stated to him: "**Of course, Mr. Secretary, we are not attempting to cast any shadow of a doubt on your particular decision.**" [Id. at 77 (emphasis added)]

Plaintiffs' "conspiracy" theory required them to prove that there was, in fact, a conspiracy (more on this later) and it proximately caused their injuries. *Northern Kentucky Right to Life Committee, Inc.v. Kentucky Registry of Election Finance*, 1998 WL 13405 at *5 (6th Cir. 1998) ("a valid § 1983 claim requires that the defendant be the proximate cause of some constitutional injury"); *Arnold v. IBM,* 637 F.2d 1350, 1355 (9th Cir. 1981) ("[t]he causation requirement of section[] 1983 … is not satisfied by a showing of mere causation in fact" but "[r]ather, the plaintiff must establish proximate or legal causation"). In order to establish proximate cause, Plaintiffs had to prove more than the mere fact that Casey and Felsoci *initiated* a legal process. *Northern Kentucky Right to Life Committee, supra* at *5 ("[s]imply filing a complaint … does not make [defendant] the proximate cause of any constitutional infringement").[1] Nor is it sufficient for Plaintiffs merely to show that

[1] *Accord*: *Fisk v. Letterman*, 401 F. Supp. 2d 362, 378 (S.D.N.Y. 2005) ("the mere institution of [legal] proceedings by private citizens, without more, is not the proximate cause of a violation of due process during [such] proceedings"); *Arnold, supra* at 1355 (when a litigant challenges judicial action under § 1983 as resulting

Defendants were *involved* in the process. *Arnold, supra*, at 1357. Instead, in order to satisfy the proximate cause element of their claim, Plaintiffs must prove that Felsoci or Casey (or someone allegedly working with them) **"exerted control over the decision making" of the state actor**. *Id.* at 1357 (emphasis added). *See also Nader, supra* at 102 (plaintiffs must prove that "the judge … was a co-conspirator or a joint actor with a private party").

Arnold v. IBM, supra, illustrates the difference between private actors' involvement in a legal proceeding and control over the decision making. There, IBM initiated a legal process that prompted the creation of a police task force that ultimately resulted in the allegedly unconstitutional arrest and indictment of plaintiff Arnold. While the court noted that IBM had "involvement" in initiating and facilitating the investigation – indeed, "[t]he Task Force would not have existed but for IBM," "[a]n IBM employee … was a member of the Task Force[;]" the Task Force relied heavily, if not exclusively, on information that IBM supplied, and IBM even rented a plane for the Task Force's use – both the District Court and the Ninth Circuit agreed that Arnold's § 1983 claims could not survive summary judgment because "**[t]here [was] nothing in the record, however, to indicate that [IBM] exerted any <u>control</u> <u>over</u> <u>the</u> <u>decision</u> <u>making</u> of the Task Force.**" *Id.* at 1357 (emphasis added). Nor were there "**any facts to show**" that "**IBM in fact influenced the decision[s]**" of the Task Force. *Id*. (emphasis added). Instead, the undisputed evidence was that "the decision to arrest Arnold was made solely by the police" and that the district attorney "had made the decision to take the case to the grand jury based on his professional judgment." *Id.* (emphasis added). Thus, despite IBM's high level of involvement, "**[t]he undisputed facts concerning [IBM's] involvement in the arrest and indictment of Arnold … established**

in injury to constitutionally protected rights, "the proximate cause of the plaintiff's injury would ordinarily be the court order, and not the various steps preliminary to the court order").

that [IBM's] involvement with the Task Force did not proximately cause Arnold's injuries." *Id*. (emphasis added).

There is no evidence that Casey or Felsoci (or anyone else) had any influence or control over hearing officer Smith or Secretary Husted. At most, Plaintiffs presented evidence of Felsoci's and Casey's *involvement* in the process, but, absent actual influence or control over decision making, that's not enough to prove proximate causation.

II. Alleged Republican Conspiracy

In a § 1983 case, an actionable conspiracy requires "state action." *Moore v. Paducah*, 890 F.2d 831, 833 (6th Cir. 1989) ("Section 1983 does not reach purely private conduct, but is aimed at action taken under color of state law"). To satisfy this element, Plaintiffs offer two theories: (1) Casey supposedly acted in concert with Matt Damschroder or other state actors in the Secretary of State's office; and (2) the Ohio Republican Party, the Franklin County Republican Party, and/or the Kasich and DeWine campaigns (and their alleged "agents," Casey and Felsoci) are themselves state actors. Each of Plaintiffs' theories falls short.[2]

A. No Concerted Action Between Casey and Damschroder

The Sixth Circuit applies the test for "civil conspiracy" to determine whether a private actor has acted in concert with a state actor. *Moore, supra* at 833; *Wilkerson v. Warner*, 545 Fed. Appx. 413, 421 (6th Cir. 2013). "A civil conspiracy is an agreement between two or more persons to injure another by unlawful action." *Moore, supra* at 834. In

[2] Plaintiffs' "conspiracy theory" is not new; this same claim was before the Court at the March 2014 preliminary injunction hearing. There, the Court actually drew an inference that Republican interests were behind Felsoci's protest, but the Court characterized this as simply "color commentary," not a ground for relief. [Doc. No. 80 at 3-4] Admittedly, now, there is more "color" from the discovery that has taken place since the last hearing, but this still remains as nothing more than "color commentary," inasmuch as there is absolutely no evidence that Casey or any other Republican operative influenced either hearing officer Smith or Secretary Husted.

order to prove a civil conspiracy, Plaintiffs must prove "that there was a single plan, that the alleged co-conspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant." *Id*. In *Moore*, the District Court and Sixth Circuit agreed that the private actor defendant was entitled to a directed verdict on plaintiff's § 1983 claim because "there [was] no evidence beyond mere conjecture and speculation that an agreement existed" between private and state actors. *Id*. at 834.

Here, as in *Moore*, Plaintiffs rely solely on conjecture and speculation in the effort to establish a conspiracy between private actor Casey and Damschroder or other state actors within the Secretary of State's office. The Court is left to guess at who Plaintiffs believe were the co-conspirators, what the supposed "single plan" was between the co-conspirators, and when they formed the plan. And, even if they could have proven the existence of a plan between private and state actors, there is no evidence that "an overt act was committed" by any supposed co-conspirator "that caused injury to [Plaintiffs]," because the evidence is one-sided that hearing officer Smith and Secretary Husted reached their own independent decisions on the protests and were not influenced by anyone else.

Plaintiffs apparently contend that there "must have been" a conspiracy between Casey and Damschroder because they communicated with each other. But, "mere communications, **even regular ones**, between a private and a state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make the private party a state actor." *Missere v. Gross*, 826 F. Supp. 2d 542, 569 note 18 (S.D.N.Y. 2011) (emphasis added). Courts routinely dismiss § 1983 claims when plaintiffs allege a conspiracy but point to nothing more than communications between private and state actors:

> At most, Plaintiff has alleged that certain individual Defendants had communications with state actors…. **However, [c]ommunications between a private and state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make a private party a state actor.** Moreover, even if the Court were to accept, as Plaintiff appears to assert, that certain individual Defendants had regular contact with the state actors, **[a]lleging merely that a private party regularly interacts with a state actor does not create an inference of agreement to violate a plaintiff's rights.**
>
> [*Morpurgo v. Incorporated Village of Sag Harbor*, 697 F. Supp. 2d 309, 338 (E.D.N.Y. 2010) (emphasis added)][3]

Casey's communications with Damschroder thus are not probative of the existence of any alleged conspiracy. When we strip away the thunder and fury of Plaintiffs' rhetoric, that's all Plaintiffs have to offer; there's no proof of a plan, and there's no proof of any overt act by state employees pursuant to such a plan, much less an overt act that proximately caused Plaintiffs any harm. This is simply not enough to carry Plaintiffs' burden.

B. No State Action

Lacking evidence of concerted action, Plaintiffs alternatively try to show state action by arguing that the Ohio Republican Party, the Franklin County Republican Party and/or the Kasich and DeWine campaigns (along with their alleged "agents," Casey and Felsoci) are "state actors."[4] Here again, Plaintiffs miss the mark.[5]

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[3] *Accord*: *Fisk v. Letterman*, 401 F. Supp. 2d 362, 377 (S.D.N.Y. 2005) (granting motion to dismiss: "All the plaintiff has alleged is that there were 'dialogues,' 'communications,' or 'interactions' between [private actors] and the state actors…. Communications between a private and a state actor, without facts supporting a concerted effort or plan between the parties, are insufficient to make the private party a state actor.").

[4] Plaintiffs also allege that Casey is supposedly a state actor by virtue of his employment as chairman of the Ohio Personnel Board of Review. But the mere fact that Casey is a state actor when acting in his capacity as state employee does not transform all of his other actions into state action. *See*, *e.g.*, *Waters v. City of Morristown, Tenn.*, 242 F.3d 353, 359 (6th Cir. 2001) ("[N]ot every action undertaken by a person who happens to be a state actor is attributable to the state…. [T]he acts of state officials in the ambit of their personal pursuits do not constitute state action…. [T]here can be no pretense of acting under color of state law if the challenged conduct is not related in some meaningful way either to the actor's governmental status or to the performance of his duties."); *McNeese v. Vandercook*, 1999 WL 133266 at *2 (6th Cir. 1999) ("A person acts under color of state law when he exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the state"); *Burris v. Thorpe*, 166 Fed. Appx. 799, 802

The crux of Plaintiffs' argument is that major political parties and their sub-organizations "are governmental actors in the context of elections," [Doc. No. 192-1 at 5]. Plaintiffs badly overstate the law.[6] It is true that under certain, limited circumstances – such as where the state delegates to a political party the state function of operating a primary election – the political party could be considered a state actor for purposes of the election process itself, but that does not mean that political parties are always state actors in every election-related matter. *See*, *e.g.*, *Max v. Republican Committee of Lancaster County*, 587 F.3d 198, 201-02 (3d Cir. 2009) (rejecting a litigant's "blanket assertion … that political parties are state actors during primary elections").

The "white primary" cases on which Plaintiffs rely simply stand for the unremarkable proposition that where the state delegates an essential state duty to a private actor, that person's performance of **that state function** constitutes state action. Thus, in *Smith v. Allwright*, 321 U.S. 649 (1944), the Court held that, because "fix[ing] the qualifications of primary elections is **delegation of a state function**," the Democratic Party's policy of excluding non-whites from voting in its primary election was considered to be state action.

(6th Cir. 2006) ("a defendant's private conduct, outside the course or scope of his duties and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law").

[5] Notably, Plaintiffs do not offer any authority for the proposition that an election campaign, such as Kasich's or DeWine's campaign, is a state actor in this context, and it is doubtful they ever could be. *See Federer v. Gephardt*, 363 F.3d 754, 759 (8th Cir. 2004) (defendants who "acted on behalf of [Congressman] *as a political candidate and private person*" were not state actors) (emphasis added).

[6] Plaintiffs cite to dicta in *Lynch v. Torquato*, 343 F.2d 370 (3d Cir. 1965) for the proposition that "the two major parties' state organizations (and sub-organizations) are governmental actors in the context of elections." [Doc. 192-1 at 5] But Plaintiffs fail to mention that the Third Circuit rejected a litigant's "blanket assertion … that political parties are state actors during primary elections" and specifically rejected that litigant's reliance on *Lynch* as "inapt." *Max v. Republican Committee of Lancaster County*, 587 F.3d 198, 201-02 (3d Cir. 2009).

Id. at 660 (emphasis added). In other words, "[T]he [private] party takes its character as a state agency from the duties imposed on it by statute. *Id.* at 663.[7]

The Sixth Circuit has been quite clear that these "white primary" cases are limited to situations in which a party is performing the state function of actually conducting an election. In *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), plaintiffs alleged that the Hamilton County Republican Party had engaged in state action by denying them the right to participate in the election of the Party's ward chairman. As here, plaintiffs in *Banchy* relied upon *Smith v. Allwright* and *Terry v. Adams*, for their state action theory. The Sixth Circuit not only rejected this argument, the Court held that the plaintiffs' state action theory was "groundless." *Id.* at 1194, 1196.

> These cases are easily distinguishable from the case before us. The Supreme Court [in *Terry v. Adams*] did not assert that the Jaybirds had become a state actor for every purpose, only that the Jaybirds were state actors, acting under color of state law **insofar as they had been assigned an "integral part" in the election process, a governmental function**….
>
> The [white] primary election cases do not hold that a political party is part of the state, or that any action by a political party other than conducting an election is state action…. **The primary election cases merely hold that conducting an election is a governmental function and constitutes state action, no matter who actually conducts the election.**
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> [*Id.* at 1196 (emphasis added)]

In fact, Professor Brown represented Ralph Nader in a virtually identical case in which the court rejected the same "state actor" argument that Plaintiffs advance here. In *Nader v. McAuliffe*, *supra*, plaintiffs alleged that private supporters of the Kerry-Edwards 2004 presidential campaign "conspired" with the Democratic Party to file protests against Nader's candidacy. As here, Nader argued that the Democratic Party was a state actor under

[7] Plaintiffs' other "white primary" cases are to the same effect; the courts found state action based on an express delegation of state authority to perform a state function. *See, e.g., Terry v. Adams*, 345 U.S. 461, 469 (1953); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 197-98 (1996).

the "white primary" cases, but the court held: "The plaintiffs make much of the fact that the act of conducting and regulating an election has been held to be an exclusively public function … **but because the allegedly unconstitutional conduct here consisted of filing challenges to eligibility for office [i.e., protests] rather than actually conducting or regulating an election, that authority is not on point**." *Id.* at 102 note 5 (emphasis added). The court also held that even if the Democratic Party was involved in a conspiracy to bring election protests, that still did not amount to state action because the filing of an election protest is not a public function "exclusively reserved to the state":

> [I]t is well-settled that a public function is not simply one "traditionally employed by governments," but rather one "traditionally exclusively reserved to the state." … *Flagg Bros. v. Brooks,* 436 U.S. 149, 157, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). **The plaintiffs offer no facts that plausibly suggest that filing ballot access challenges is a function "traditionally exclusively reserved to the states."**
>
> **Moreover, the fact that private citizens may file challenges under the ballot access statutes is antithetical to the assertion that doing so is a function traditionally exclusively reserved to the states. As a result, the court rejects the plaintiffs' assertion that the defendants engaged in an exclusively public function by filing challenges under the state ballot access statutes.**
>
> [*Id.* at 102 (emphasis added)]

This reasoning is equally applicable here. Just as the Democratic Party was not a state actor in *Nader*, the Ohio and Franklin County Republican Parties, even if they were involved in the underlying protests, are also not state actors, because the state has not delegated to them any protest function that is exclusively reserved to the state. And, even if there was evidence that Casey and Felsoci were "agents" of the Ohio or Franklin County Republican Party, under *Nader*, they would not be state actors for purposes of their involvement in bringing the protest.

III. Plaintiffs Had Notice Of Professor Smith's Alleged Conflict Of Interest Before The Protest Hearing, But They Said Nothing About It For Six Months

The only truly new issue before the Court is Plaintiffs' due process claim based on Professor Smith's alleged conflict of interest. But even Plaintiffs' own lawyer, Professor Brown, now admits that Professor Smith did not have a conflict. [9/30/14 Hrg. Tr. (Doc No. 252) at 250-251][8] And, even if he did, Plaintiffs had notice of it before the protest hearing began on March 4 – and they knew everything about it by no later than March 13 – but they chose not to object, presumably because they thought Professor Smith might favor them because they had asked him to be their gubernatorial candidate in 2010. Plaintiffs never raised any claim about Professor Smith's alleged conflict of interest until six months after they were on notice of it, thereby waiving any objection they may have had.

The evidence is this: On March 4, 2014, Professor Smith presided over the protest hearing in this matter. The day before (March 3), he filed his amicus brief on behalf of Attorney General DeWine in the *Susan B. Anthony List* case. Later that same day (March 3), a Libertarian website known as "Ballot Access News" published a story on DeWine's brief. [FX 32] The story included a link to the brief itself, the first page of which prominently displayed Professor Smith's name as the author. [FX 32, 33]

LPO's attorney general candidate, Steven Linnabary, testified that he reviews Ballot Access News at least daily if not more often. [9/30/14 Hrg. Tr. (Doc. No. 252) at 282 (Linnabary)] In fact, he acknowledged that in early March he was visiting this website "several times a day" to look for news on the upcoming hearing on the protest against his candidacy. [Id.] So, on either March 3 or March 4, he looked at the story on Ballot Access

[8] During Jack Christopher's testimony, after Professor Brown admitted that Professor Smith did not have a conflict of interest, the Court called his co-counsel to sidebar and stated: "I'm pretty sure that when Mr. Smith was on the stand, your co-counsel indicated that Mr. Smith didn't have a conflict of interest. So why are you trying to re-raise that issue with Mr. Christopher?" [9/30/14 Hrg. Tr. (Doc. No. 252) at 305]

News about Smith's brief for DeWine. Although Linnabary tried to deny this, LPO's political director, Robert Bridges, testified that, in fact, Linnabary told Bridges about Smith's brief for DeWine before the March 4 protest hearing began:

> A. He [Smith] was representing DeWine. Mr. Linnabary brought it to my attention and asked me if it was a conflict of interest. And I said to my limited legal knowledge, I said it looks like one, but you may want to bring it up to our lawyers.
>
> Q. **When did this occur?**
>
> A. **Before the hearing.**
>
> Q. **Before the protest hearing – before Mr. Smith's hearing?**
>
> A. **Uh-huh.**
>
> Q. **Before the hearing over which Mr. Smith presided?**
>
> A. **Correct.**
>
> * * *
>
> Q. How did he [Linnabary] raise the issue with you, by e-mail, text, telephone, face to face?
>
> A. Face to face.
>
> Q. And what specifically did he say to you that first time **before the protest hearing** when Mr. Linnabary talked to you about Mr. Smith working for Attorney General DeWine?
>
> A. **He asked me if I thought it was a conflict of interest. And I said it appears to be, but I said you should probably bring it up with our attorney.**
>
> [Bridges Dep. (Doc. No. 201) at 100-102 (emphasis added)][9]

[9] LPO's candidate for Secretary of State, Aaron Harris, corroborated the fact that Bridges knew about Professor Smith's representation of Attorney General DeWine before the protest hearing. Harris testified that approximately six weeks ago, he received a telephone call from Bridges during which Bridges stated that he thought he had told Harris about Smith's representation of DeWine back at the protest hearing. [Harris Dep. (Doc. No. 237-2) at 34, 38-39]

Bridges and Linnabary were not the only ones who knew about Smith's representation of DeWine prior to commencement of the protest hearing. Plaintiffs' lawyer, Professor Brown, also knew. On the morning of the protest hearing, March 4, at 7:18 a.m., Brown sent an email to the faculty at Capital Law School, including Smith, reporting on DeWine's brief and including a link to the story that was posted on Ballot Access News the day before. [9/30/14 Hrg. Tr. (Doc. No. 252) at 259-260 (Smith)] [FX 31] As noted above, the Ballot Access News article, in turn, included a link to the brief itself, the first page of which showed Professor Smith as its author. [Id. at 260-261]

In fact, Professor Brown admits that during a break in the March 4 protest hearing, he had a hallway conversation with Professor Smith about the brief. As Brown put it in his question to Smith: "Do you remember telling me when we met in the hallway that you had participated in writing the *Susan B. Anthony* brief?" [9/30/14 Hrg. Tr. (Doc. No. 252) at 248]

This evidence admits of no doubt: By March 3-4, 2014, Plaintiffs were on notice of Professor Smith's representation of Attorney General DeWine. Plaintiffs clearly knew enough to have an obligation to inquire, but they did nothing.[10]

Moreover, by March 13, at the latest, Plaintiffs and their counsel knew everything there was to know about Smith's representation of DeWine. On March 13, Linnabary sent an email to Professor Brown, asking: "Brad Smith is DeWine's lawyer for this?" [PX B] Linnabary's email to Brown included a link directly to Smith's brief. [Id.] Professor Brown

[10] *Compare Finnerty v. RadioShack Corp.*, 390 Fed. Appx. 520, 524-25 (6th Cir. 2010) (claim dismissed where plaintiff and her counsel had enough information that "should have put [plaintiff] and her counsel on notice to investigate" but they delayed in doing so); *Lucent Technologies Inc. v. Tatung Co.*, 379 F.3d 24, 28-30 (2d Cir. 2004) (refusing to vacate arbitrator's award because litigant "could have inquired into [arbitrator's alleged conflict of interest] at any time" but instead "chose to remain ignorant"); *Snyder v. Viani*, 916 P.2d 170, 172 (Nev. 1996) ("if a party or his/her attorney has constructive notice of a judge's interest or relationship before a case is decided and does not object, that conflict or relationship will be waived").

responded on March 14 that Smith's conflict – if he had one at all – was "not debilitating." He wrote:

> In administrative settings, courts allowing hearing officers to be advocates, too. **So, this is not debilitating.**
>
> [Id. (emphasis added)]

March 13 was the first day of the three-day evidentiary hearing on Plaintiffs' third motion for preliminary injunction; Plaintiffs could have raised Professor Smith's alleged conflict of interest then, but they said nothing. They also could have raised it in Linnabary's mandamus action in the Ohio Supreme Court when they presented their evidence there on March 17, but, again, Plaintiffs said nothing. In this Court, on March 16 and again on June 8, Plaintiffs filed motions to amend their complaint, but neither proposed complaint said anything about Professor Smith's alleged conflict of interest. [Doc. Nos. 72, 111] In fact, Plaintiffs never asserted any claim for relief based on this alleged conflict until September 11, 2014, when they filed their latest amended complaint, six months after they knew all of the facts pertaining to this issue.

Why did Plaintiffs not raise Professor Smith's alleged conflict sooner? The answer is obvious: At the time of the protest hearing, Plaintiffs believed that Professor Smith might be favorable towards them because Plaintiffs themselves had asked him to be LPO's gubernatorial candidate in 2010. [9/30/14 Hrg. Tr. (Doc. No. 252) at 262-263 (Smith)]

The only excuse Plaintiffs have offered for their six-month delay in raising this issue is that their lawyer, Professor Brown, mistakenly thought that the protest hearing was merely an "executive" procedure to which due process requirements did not apply; he contends that he did not know that the protest hearing was actually "adjudicative" or "judicial" until Magistrate Judge Kemp's discovery order on July 14, 2014. [Doc. No. 234 at 2-4]

Plaintiffs' excuse is hard to buy. Ohio law has been well-settled for years that a protest hearing in an election matter is a quasi-judicial proceeding.[11] Indeed, this protest hearing had all the earmarks of an adjudication: right to counsel; right to present evidence, including right to examine and cross-examine witnesses; right to subpoena witnesses and evidence. [9/30/14 Hrg. Tr. (Doc. No. 252 at 256-257 (Smith)]

In fact, in another of Professor Brown's cases, *Nader v. Blackwell*, 2007 WL 2744357 (S.D. Ohio 2007), Judge Sargus expressly held that an election protest hearing is "quasi-judicial" and "adjudicative in nature" so as to confer absolute judicial immunity:

> Plaintiff also argues that this Court's earlier decision not to apply the *Younger* abstention doctrine was predicated on a finding that the hearing was not a quasi-judicial action.… **Plaintiff misinterprets this Court's earlier decision.** The Court's decision did not analyze the nature of the proceeding initiated by Defendant Blackwell. Rather, the Court concluded that, although there was a pending state court action challenging Blackwell's decision, because a federal constitutional violation was alleged, this Court had an obligation to adjudicate the claim asserted in federal court. Thus, the Court declined to apply the *Younger* abstention doctrine.
>
> **The Court concludes that the hearing held prior to the decision to remove [Nader's] name from the ballot was sufficiently adjudicative in nature to confer absolute immunity.** The hearing consisted of the presentation of evidence and cross-examination of witnesses; the parties were represented by counsel; the Hearing Officer issued a thirty-one page Findings of Fact and Conclusions of Law ruling; and Plaintiff sought a writ of mandamus in response to the Defendant's decision.
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> [*Id.* at *4 (emphasis added)][12]

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[11] *See, e.g., State ex rel. Harbarger v. Cuyahoga Cty. Bd. of Elections*, 75 Ohio St. 3d 44, 45 (1996) ("[a] protest hearing in election matters is a quasi-judicial proceeding"); *East Ohio Gas Co. v. Wood Cty. Bd. of Elections*, 83 Ohio St. 3d 298, 302 (1998) ("the board [of elections] … exercised quasi-judicial authority in ruling on [the] protest"); *Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St. 3d 35, 37 (1996) ("The board [of elections] exercised quasi-judicial authority by denying relators' protests").

[12] When Judge Sargus wrote that "Plaintiff [*i.e.*, Professor Brown's client] misinterprets this Court's earlier decision," the "earlier decision" Judge Sargus was referencing was *Blankenship v. Blackwell*, 341 F. Supp. 2d 911 (S.D. Ohio 2004). Thus, Judge Sargus told Professor Brown *seven years ago* that he was "misinterpret[ing]" the *Blankenship* case.

In view of Judge Sargus' decision in *Nader*, it is difficult to understand how Plaintiffs' counsel can profess any uncertainty about whether a protest hearing is adjudicative. In any event, his mistaken interpretation of the applicable law does not absolve his clients of their unreasonable delay or otherwise avoid the defense of laches.[13] By March 13, at the latest, Plaintiffs knew everything there was to know regarding Professor Smith's alleged conflict of interest, but they said nothing for six months, thereby waiving any objection they may have had.[14] Their lawyer's mistaken legal analysis of these facts does nothing to relieve them from the consequences of their delay.

IV. **Laches**

Plaintiffs' failure to raise Professor Smith's alleged conflict was not their only fatal delay in this case. They delayed more than four months before asking this Court for an expedited trial date, thereby making it extremely difficult if not impossible to enter relief (assuming any is due) without completely disrupting the November general election.

For example, in *Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751 (E.D. Mich. 2012), the Libertarians knew by early May that their candidate would be removed from the ballot for the November general election, but they waited until mid-August to seek an emergency injunction. The District Court denied relief, describing the Libertarians' three-month delay as **"reprehensible"** and **"vexatious."**

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[13] *Pro-Football, Inc. v. Harjo*, 284 F.Supp.2d 96, 141 (D.D.C. 2003) ("ignorance of one's legal rights is not a reasonable excuse in a laches case"); *Jones v. United States,* 6 Cl.Ct. 531, 532–33 (Cl.Ct.1984) ("Where laches is raised, knowledge of the law is imputed to all plaintiffs. Consequently, professed ignorance of one's legal rights does not justify delay").

[14] *See, e.g., State v. Were*, 118 Ohio St. 3d 448, 457, 890 N.E. 2d 263 (2008) ("[a] party may be considered to have waived its objection to the judge when the objection is not raised in a timely fashion and the facts underlying the objection have been known to the party for some time"), *quoting In re Disqualification of O'Grady*, 77 Ohio St. 3d 1240, 1241, 674 N.E. 2d 353 (1996). *Accord: Myers v. Garson*, 66 Ohio St. 3d, 610, 613, 614 N.E.2d 742 (1993) ("[A]ppellant raised no objections until after he had obtained an adverse decision…. Therefore, we reject Appellant's hollow assertions that Judge Reece's involvement with the decision below somehow prejudiced his reliability or impartiality").

> Plaintiffs' failure to act with any sense of urgency in this matter until August 19, 2012 is **reprehensible**. Plaintiffs were well aware, as early as May 3, 2012, that Johnson would be denied general election ballot access in Michigan, but waited until June 25, 2012 to file their complaint, further waited until July 18, 2012 to serve the Defendant, further waiting until August 2, 2012 to file their non-emergency motion for summary judgment, and **vexatiously** waited until August 19, 2012 to apprise the Court that their motion was of an urgent nature.
>
> [*Id.* at 754 note 2 (emphasis added)]

On appeal, the Sixth Circuit similarly declined to enter relief, holding: "[T]he entry of injunctive relief at this late date, when the Secretary's intentions have long been clear, would cause substantial harm to the orderly processing of the election and would not serve the public interest." *Libertarian Party of Michigan v. Johnson*, Case No. 12-2153 at pg. 2 (6th Cir. Sep. 12, 2012).[15]

These comments are equally dispositive here. On May 5, 2014, the United States Supreme Court denied Plaintiffs' application for stay and request for emergency relief. At that point, it should have been perfectly clear to Plaintiffs that their third motion for preliminary injunction was dead and their only recourse was an expedited adjudication of their remaining claims pursuant to a schedule that would allow enough time after the Court's decision for ballots to be finalized by the early voting deadline. Towards that end, Plaintiffs should have been before this Court by no later than mid-May to request an expedited trial by no later than mid-August. Inexplicably, however, Plaintiffs delayed nearly four months; they failed to ask for an expedited adjudication until August 31, 2014; even then, they only asked for a trial to begin on September 29; and they didn't actually move for a preliminary injunction until September 15.

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[15] In the Sixth Circuit, the Libertarians were represented Professor Brown. [Doc. No. 209-1] Also, see *Blankenship v. Blackwell*, 103 Ohio St. 3d 567 (2004), in which Professor Brown represented Ralph Nader; there, the Court held: "By waiting as long as he did . . . [Professor Brown's client] created a situation in which any remedial order would throw the state's preparation for the election into turmoil." *Id.* at 573.

At this late date, it would be extremely disruptive if not impossible to change the ballot on a statewide basis. In a few, technologically advanced counties, such as Franklin County, changing the ballot could probably still be done before Election Day, but it would still interrupt early in-person voting. [9/30/14 Hrg. Tr. (Doc. No. 252) at 365-365 (Walch)][16] But roughly half of Ohio's counties – including the county with the most registered voters, Cuyahoga – use paper ballots; these counties would have to compete with each other for time at the ballot printers, of which there are only four. [9/29/14 Hrg. Tr. (Doc. No. 247) at 190, 194, 203, 222 (Damschroder) ("state law requires that ballots be physically printed in the state of Ohio and there are only four printers who do that")] There is simply not enough time to print new ballots before early voting begins:

> Q. Could the four printers in the state accommodate a change to 7 million ballots before early voting is to start, even if it starts October 7th?
>
> A. No.
>
> [Id. at 194-195]

Changing the ballot at this late date is especially a problem in Ohio's rural Appalachian counties with limited technology and personnel:

> Q. Is it your expectation that there would be some counties, particularly the rural Appalachian counties, that simply could not get it done?
>
> A. I think that is very much a possibility, yes.
>
> [9/30/14 Hrg. Tr. (Doc. No. 252) at 379-380 (Walch)]

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[16] Even in Franklin County, with all of its technology, it remains uncertain whether necessary experts would be available to assist with recreating the election in the election management system. This is the first step in changing the ballot, but it requires assistance of ESS experts. These experts work not only for Franklin County, but for all the other Ohio counties as well as other states. Their time is not readily available either to Franklin County or other Ohio counties. In fact, "I would think that the folks that work for ESS would have multiple commitments and multiple counties at the same time." [9/30/14 Hrg. Tr. (Doc. No. 252) at 377-378 (Walsh)]

Damschroder, with fifteen years' experience in managing Ohio elections, corroborated Walch's observations:

> Q. If early voting were still to start on October 7th, would it be possible to electronically change ballots to include Charlie Earl and Steve Linnabary?
>
> A. No.
>
> * * *
>
> Q. Could ballots be changed by November 4th?
>
> A. I would say no.
>
> * * *
>
> Q. How long at this point do you think it would take to change the November general election ballot?
>
> A. My view is I don't think it could happen on a statewide basis. . . . I don't think we could change every ballot in the state of Ohio in time for Election Day.
>
> THE COURT: Not every county has the same level of technological savvy, correct?
>
> THE WITNESS: That's correct. . . . Morgan County is the example. They're under a court order from their Common Pleas Court where they only have two employees, a director and deputy director, and they're only allowed to work three days a week except for during the early voting when state law requires them to be open for early voting. . . . [Y]ou sit down with the calendar and you say, I have to be ready by this date. You count out all the different tasks and then you start working from there. It just becomes impossible at some point.
>
> [9/29/14 Hrg. Tr. (Doc. No. 247) at 176, 178, 199-200 (Damschroder)]

There is no excuse for Plaintiffs' delay. If they had approached the Court in May, as they should have, the Court could have set a schedule that allowed for expedited adjudication in August with sufficient time after the Court's ruling for ballots to be finalized.

> Q. If Plaintiffs, the LPO Plaintiffs in this case, if they had expedited this case in such fashion that this hearing occurred and this case was decisional by no later than mid August of 2014, would all of these timing problems that you're now thinking about have been avoided?
>
> A. If this decision, if there was some change in the ballot that would have occurred back in August, most of the counties would not yet have had their election drawn up in their election management system by that point. **So at that point, it would have been much more doable, yes**.
>
> [9/30/14 Hrg. Tr. (Doc. No. 252) at 380 (Walch) (emphasis added)]

In a markedly similar case, *Gelineau v. Johnson*, 896 F. Supp. 2d 680 (W.D. Mich. 2012), the Libertarian Party of Michigan knew by early May that its presidential candidate would be removed from the November ballot, but they waited until mid-September to move for ballot access for their candidate.[17] The Court denied relief, holding:

> **The question that baffles this court is why the instant claims were not filed much earlier.** Plaintiffs knew as early as May 2 that the Secretary would reject … Johnson's candidacy…. Yet Plaintiffs did not file suit to establish … Johnson's status until … just days before the Secretary was scheduled to send ballots to the printer….
>
> The prejudice to the Secretary here is abundantly clear…. Even assuming that … changes [to the ballot] are possible, the harm to the Secretary from having to act in such a short time frame is clear. This is true even if no reprinting is necessary and if the Secretary does not miss any legal deadlines as a result. The Secretary is tasked with administering Michigan's elections, and both state and federal laws acknowledge the time-sensitive nature of this process. The Secretary – and by extension the people of Michigan – have a strong interest in managing the election process in an orderly manner. The Sixth Circuit has recently recognized the importance of this interest … stating that entering injunctive relief at this time "would cause substantial harm to the orderly processing of the election and would not serve the public interest."…
>
> **Though they knew that legal deadlines were approaching rapidly, Plaintiffs showed no interest in ensuring that their claims could be timely considered.** Plaintiffs' … last-minute claims threaten to significantly prejudice the Secretary and undermine the orderly processing of the election,

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[17] It appears that the Libertarians in *Gelineau* waited until after they had lost in the Eastern District of Michigan in *Libertarian Party of Michigan v. Johnson, supra*, before asking the Western District of Michigan to intervene.

> including the timely mailing of ballots to members of the military serving overseas…. Plaintiffs' claims are, therefore, barred by the doctrine of laches.
>
> [*Id.* at 683-86 (emphasis added)]

This problem is solely of Plaintiffs' making. Like plaintiffs in *Gelineau*, LPO and its candidates "knew that legal deadlines [i.e., Ohio's early voting deadline] were approaching rapidly," but they "showed no interest in ensuring that their claims could be timely considered." Plaintiffs should have been before the Court by mid-May to seek an expedited adjudication by August. Their delay is inexplicable and inexcusable.

V. Plaintiffs Have No One But Themselves To Blame For Their Self-Inflicted Wound

Plaintiffs not only failed to prove that Defendants proximately caused them any harm, this record actually proves that Plaintiffs themselves were the cause of their predicament. Their candidates are not on the ballot because LPO itself mismanaged the collection of signatures for their candidates' petitions at every turn.

A. LPO Knew It Was Critically Important To Have A Candidate For Governor On The Ballot In Order To Maintain Ballot Access

At the outset, it's worth noting that LPO and its officers knew that having a candidate for governor on the ballot was absolutely essential in order for LPO to maintain its ballot access. LPO's executive director, Kevin Knedler, testified: "We know per Ohio law that we have to run at least somebody for governor for ballot retention." [Knedler Dep. (Doc. No. 237-1) at 13]

> Q. Would you say that the requirement of running a candidate for governor is the most critical requirement the party has to meet to maintain ballot status?
>
> A. Yes.
>
> [Id. at 62]

In fact, Knedler emphasized to LPO's political director, Bridges, that they had to get Earl on the ballot even if it was at the expense of LPO's other candidates: "[T]he other candidates were important … but Mr. Earl was critical." [Id. at 105] Knedler's message clearly got through; Bridges admitted: "I knew if we didn't have enough valid signatures to get Charlie on the ballot, then, yes, that would be the **death knell** to the Libertarian Party." [Bridges Dep. (Doc. No. 201) at 88 (emphasis added)]

In view of this potential "**death knell**," you would think that LPO would have been especially vigilant to make sure that its candidates' petitions were bullet-proof. But exactly the opposite proved to be true.

B. LPO Mismanages The Signature Collection Effort

Plaintiffs' first mistake was to entrust the management of its petition drive to someone who wasn't up to the task.

Originally, LPO's political director, Bridges, was responsible for managing LPO's signature drive. [Knedler Dep. (Doc. No. 237-1) at 59] But as soon as S.B. 193 was introduced, LPO's executive director, Knedler, pulled Bridges off the signature drive so that he could work exclusively on the legislation. [Knedler Dep. (Doc. No. 237-1) at 19-20] ("I wanted Bob Bridges, my political director, in the hearing rooms of the Ohio Senate or Ohio House")]

That left Nathan Eberly, LPO's field development director, in charge of managing the collection of signatures by LPO's volunteers. [Knedler Dep. (Doc. No. 237-1) at 60] [Bridges Dep. (Doc. No. 201 at 54-55] According to LPO's own witnesses, Eberly failed miserably. Bridges testified that Eberly failed "**100 percent**" to fulfill his responsibilities. [Bridges Dep. (Doc. No. 201) at 120 (emphasis added)] Aaron Harris thought Eberly was "all

talk" but no action; Harris could barely refrain from using profanities to describe Eberly's poor performance.[18] [Harris Dep. (Doc. No. 237-2) at 18] LPO's candidate for attorney general, Steven Linnabary, actually wondered whether Eberly was secretly working for the Republicans. [9/30/14 Hrg. Tr. (Doc. No. 252) at 270-271 (Linnabary)]

C. Bridges Refused To Raise Funds From Outside Sources

Because of Eberly's failings, by January 2014, LPO's only hope to qualify its candidates was to use paid circulators, but LPO needed at least $10,000 and it had nowhere near that kind of money. [Knedler Dep. (Doc. No. 237-1) Ex. 5 at pg. 3] [Bridges Dep. (Doc. No. 201) at 17, 28, 69, 78] So, Knedler instructed Bridges to seek "shadow funds" from sources outside the Libertarian Party – **but Bridges refused**. [Bridges Dep. (Doc. No. 201) at 111-113]

Q. Did you make any effort to determine if there were any shadow funds available to your cause?

A. I don't operate in the shadows. I like to operate in the light.

Q. Did you make any effort to determine if these other entities that you mentioned had any funding that they were willing to throw your way?

A. I never talked to them, no.

Q. Did Mr. Knedler want you to talk to them?

A. He did.

Q. And you didn't do so?

A. No.

Q. Why not?

A. I don't do everything Mr. Knedler tells me to do.

[18] In fact, it was because of Eberly's failure to obtain enough petition signatures from volunteers that Harris had to hire his own paid circulator at his personal expense. [Harris Dep. (Doc. No. 237-2) at 31]

Q. Apparently you didn't do this, did you?

A. Correct.

Q. Did you tell him you were not going to check on whether shadow funds were available?

A. No.

[Id. at 112-113]

To be fair to Bridges, he wasn't the only LPO officer who failed to take advantage of potential funding sources. Knedler himself knew that funding to hire paid circulators might be available from the national Libertarian Party. [Knedler Dep. (Doc. No. 237-1) at 86] But Knedler decided not to ask the national party because he was embarrassed and thought it would like "begging." [Id. at 89]

Ultimately, LPO's failure to raise funds was the death knell for its petition effort. Bridges ran out of money by mid-January 2014, at which point he had to terminate his paid circulator, Oscar Hatchett. [3/4/14 Protest Hrg. Tr. (FX 6) at 45 (Bridges)]

D. First, Bridges Overpaid Hatchett, And Then He Paid Hatchett For More Signatures That Hatchett Never Delivered

Even when Bridges still had money available to him, he mismanaged how he spent it on his circulator. First, Bridges overpaid Hatchett, and then, he paid him for 500 signatures that Hatchett never delivered.[19]

Bridges apparently never told Knedler or anyone else at LPO about his mistake. But he confided in his friend, James Winnett, that Bridges had paid Hatchett for an additional 500 signatures, but Hatchett stiffed him. On January 30, 2014, Bridges sent the following

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[19] Bridges' arrangement with Hatchett was to pay him $2.50 for each signature he obtained for Charlie Earl [Bridges Dep. (Doc. No. 201) at 75-76] But when Hatchett first invoiced Bridges for 232 signatures for Earl's candidacy, Hatchett charged $700, or $3.02 per signature. [FX 8] Bridges apparently never checked to see that Hatchett was overcharging him; he simply approved Hatchett's invoice for payment and had LPO's treasurer cut him a check for the full amount. [Bridges Dep. (Doc. No. 201) at 74-76]

Facebook message to Winnett: "I hired Oscar. He got me the first 500. I told him to get me another 500. He called me a week later saying he had them. **I remitted payment. They were supposed to be shipped. I don't have them**." [Winnett Dep. (Doc. No. 237-3) Ex. 1 at pg. 5 (emphasis added)]

By the end of January 2014, Winnett (a former division director of the Ohio Democratic Party) agreed to assist Bridges in collecting more signatures for Earl. [Winnett Dep. (Doc. No. 237-3) at 15][20] After Bridges told Winnett that Hatchett had stiffed him, Winnett tracked Hatchett down and confronted him. [Id. at 42-43] Hatchett gave him some lame excuse for why he hadn't delivered the promised signatures to Bridges. [Id. at 44] Winnett was ultimately able to obtain a few additional signatures from Hatchett, but nowhere near the 500 for which Bridges had already paid him. [Id. at 43]

E. Hatchett's Free Signatures For Linnabary

Another LPO misstep occurred with respect to the signatures for Linnabary's candidacy. Linnabary was the first LPO candidate to use Oscar Hatchett. But, initially, Hatchett was working for Linnabary for free, because Linnabary made a deal with Hatchett that if he qualified Linnabary for free, then Linnabary would try to get LPO's other candidates to hire Hatchett on a paid basis. Hatchett agreed, and he collected 300 to 400 free signatures for Linnabary. [9/30/14 Hrg. Tr. (Doc. No. 252) at 273 (Linnabary)]

Linnabary wanted to file his petitions by no later than Thanksgiving 2013, so shortly before then, he turned them over to Bridges, including the free petitions that Hatchett had obtained for him. [Id. at 273] Bridges responded that he did not think Linnabary had enough

[20] Winnett was paid for this work by his employer, The Strategy Network, a Democratic consulting firm. [Winnett Dep. (Doc. No. 237-3) at 12, 20] We also now know that the funds that The Strategy Network used to pay Winnett and others to collect signatures for Earl came from "Ohioans for Liberty," a 527 organization that is controlled by Democratic operatives. Ohioans for Liberty, in turn, received $828,000 from the Ohio Democratic Party.

signatures, so Bridges hired Hatchett to collect more signatures for Linnabary, this time with Hatchett being paid by LPO. [Id. at 274]

So, with respect to Linnabary's petitions, some were collected by Hatchett for free, and others were collected by him on a paid basis. [Id. at 275] **But this distinction was never explained at the protest hearing**. [Id. at 275] Obviously, the payor disclosure requirement did not apply to Hatchett's free signatures. But neither Linnabary nor his counsel said anything at the hearing about the fact that 300 to 400 of Hatchett's signatures for Linnabary were on a volunteer basis and thus not subject to the statute. [Id. at 275-76] If Linnabary had done so, Hatchett's free signatures would not have been disqualified and Linnabary would be on the ballot today.

F. Oscar Hatchett And The Employer Box Fiasco

That brings us to LPO's biggest mistake of all: Bridges' decision to let Hatchett decide whether or not to complete the employer box on his petitions.

By January 2014, Eberly had been pushed aside and Bridges was back in charge, so Hatchett sent his completed petitions to Bridges. When Bridges reviewed them, he noticed that not only had Hatchett failed to complete the employer box, he also had failed to sign the circulator signature line. [Bridges Dep. (Doc. No. 201) at 80] So Bridges called Hatchett to arrange for Hatchett to come to Columbus to sign the circulator line. [Id. at 81]

During this phone call, Hatchett brought up the employer box; he asked Bridges whether Bridges wanted him to complete it. [Id. at 81] Bridges responded that he didn't know, so he simply left it up to Hatchett. [Id. at 82]

By Bridges' own admission, he thought that Hatchett asking him what to do was "**curious**." [Id. at 89] Bridges even went so far as to say he thought it was a "**red flag**" for the professional circulator to ask Bridges, a novice, what to do. [Id. at 89]

So, what did Bridges do about this "red flag"? He called LPO's prior political director, Michael Johnson. Bridges admitted that he called Johnson because he was "**hesitant**" about Hatchett's question about the employer box. [Id. at 84-85] But Johnson is an IT worker, not a lawyer, so he had no more idea of what to do than Bridges did. Together, they decided simply to let Hatchett make the call. [Id. at 36, 85]

So, why didn't Bridges ask for legal advice? Bridges knew that Professor Brown was working for LPO – indeed, he knew that Brown was working for free – and Bridges even had Brown's phone number on his speed dial. [Id. at 87] But Bridges didn't call Brown about the employer box because Bridges thought it was too "**trivial**." [Id. at 86 (emphasis added)]

Bridges also didn't ask for advice from anyone at the Secretary of State's office. He testified that he spoke with Damschroder several times and always found him to be professional, friendly and helpful. But Bridges did not ask Damschroder what he should do about the employer box? [Id. at 87, 97][21]

In fact, Bridges didn't even ask his boss, Knedler, what he should do. As Knedler testified, "**I wish Bob Bridges had called me**," because Knedler would have had him "**double-check**" with the Secretary of State to make sure they did it right. [Knedler Dep. (Doc. No. 237-1) at 47, 63 (emphasis added)]

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[21] Bridges also spoke with another Secretary of State employee, Laura Pietenpol, on the day he filed Earl's petitions, but he also did not ask her what he should do. [Id. at 90]

As Knedler and Earl each admitted at the hearing in March, if Hatchett had simply filled out the employer box, Earl would be on the ballot today. [3/14/14 Hrg. Tr. (Doc. No. 211) at 11 (Knedler)] [Id. at 22 (Earl)]

G. LPO Could Have Put Write-In Candidates On The Ballot, But It Mishandled This As Well

Even after all of these mistakes, LPO still could have saved its candidates by filing as write-ins. The filing deadline for write-ins was February 24, 2014, three days after the protests were filed. But, even though LPO filed write-in candidates for auditor and secretary of state, they chose not to file for governor or attorney general, presumably because they thought they would win the protests.

Plaintiffs tried to excuse their failure to file write-in candidates for governor and attorney general by suggesting that they did not know about the protests until the Secretary of State sent the "official" notice of protest to them on February 25. But the fallacy of this argument came out during Linnabary's cross-examination, when he admitted that someone from LPO – either Knedler, Bridges or Harris – told him about the protests on Friday, February 21, the same day the protests were filed:

> Q. Let me ask you, sir, about when you learned about the protest.… If you would look at page 36 of the transcript of your deposition starting on line 20 going through to line 23. I asked you this question and you gave this answer:
>
> Question: So you learned on Friday, February 21 from someone within the Libertarian Party about the protest?
>
> Answer: Right.
>
> That was your testimony at your deposition, was it not, sir?
>
> A. Yeah.

Q. And you learned that from either Bob Bridges or Aaron Harris or Kevin Knedler. You weren't quite sure which one, correct?

A. Precisely.

[9/30/14 Hrg. Tr. (Doc. No. 252) at 278-279 (Linnabary)]

LPO's missteps at every turn are the real reason it's candidates are not on the ballot. In every sense, this was a self-inflicted wound.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2014, the foregoing document was filed electronically with the Clerk of Court using CM/ECF system, and notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ John W. Zeiger

John W. Zeiger (0010707)

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