UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.
Plaintiffs,

v.

CASE NO. 13-953
JUDGE WATSON
MAGISTRATE JUDGE KEMP

JON HUSTED, et al.,
Defendants.
____/

PLAINTIFFS' POST-HEARING BRIEF

Introduction

Having failed to retroactively remove the Libertarian Party (LPO) from Ohio politics through S.B. 193, the Reelection Campaign of Ohio's incumbent Republican Governor secretly conspired to knock Charlie Earl off the ballot through the first-time enforcement of an obscure and vague employer-statement requirement. This was done in an effort to win more votes and embarrass his Democratic rivals in the 2014 gubernatorial election. Kasich's point-man for this "research project" was Terry Casey, his longtime ally, political appointee, and advisor. But Casey knew through his many years on the Franklin County Board of Elections that one political party cannot legally protest the candidacy of another. So he set about, with the help of the "Governor's folks," to scour the state for a disaffected LPO voter who might be duped into being their surrogate.

After much searching, Casey found such a "guileless dupe" in Gregory Felsoci. Armed with his surrogate, Casey hired a team of lawyers to doggedly pursue the "Governor's protest of Charlie Earl" at all costs. These costs would, according to Casey, eventually be borne by

"interested parties that are supportive." Obviously, the costs were to be paid by those behind the effort—the Kasich Campaign.

Casey first made sure that his high priced lawyers understood that his identity was to remain confidential because of his close ties to Governor Kasich. His ties with Kasich would make his motivation too "obvious." And so the "Governor's [formal] protest of Charlie Earl" began with a filing with the Secretary of State on Friday, February 21, 2014.

Of course, the protest was no surprise to Secretary Husted, whose officers were intimately aware that Casey was bringing a surrogate protest of Charlie Earl on behalf of the Governor. As early as February 17, 2014, Matt Damschroder (Director of Elections), using personal e-mail accounts, informed Jack Christopher (General Counsel) and Halle Pelger (Chief of Staff) about all aspects regarding the Governor's protest, including issues of standing, Form 14 allegations and the incomplete "special box on the p-petitions."

Anxious that the "Governor's protest of Charlie Earl" might come too late, Damschroder advised his staff to accept any protest that might be filed, "even if it is after 4 pm," the statutory deadline. Damschroder, like Casey, was determined to see that the Governor's ambitions were achieved and his position within Secretary Husted's office made him uniquely capable of achieving them.

Brad Smith was chosen by Damschroder as the hearing officer. His national reputation as an elections expert made him a compelling choice. But, as the parties would later learn, he was also representing Attorney General DeWine in an amicus brief before the Supreme Court of the United States. Christopher would undertake the role of facilitator with respect to the protest hearing, which was ultimately held on March 4, 2014.

Because Secretary Husted had to certify statewide candidates by Friday, March 7, 2014, Smith had to issue his report and recommendation to Secretary Husted in a matter of days. Smith informed Christopher that he was "done" and had reached a decision dismissing the protests in a late-evening e-mail on March 6, 2014. Smith was committed to his decision even though he knew it would "anger and disappoint a bunch of people."

Christopher was blindsided by Smith's decision to dismiss the protests. He would stay at his office all night contemplating what to do. Desperate, and without having seen the report that was the basis for Smith's dismissal, Christopher undertook his first and only substantive involvement in the protest by writing a lengthy analysis of the *Evans* case that was favorable to the protestors in an e-mail to Smith at 3:30 AM on March 7—the certification deadline.

Smith replied a short while later at 4:56 AM to call or text as soon as Christopher was up, not knowing of course that Christopher was at his office the entire night. Christopher would eventually touch base with Smith later that morning at approximately 10:00 AM. Smith understood the subtext of Christopher's e-mail and had made a complete about face on the protest's outcome. Pleased with the news, Christopher didn't think it necessary to have any further discussion of the *Evan*s case with Smith. Smith, meanwhile, began rewriting his earlier decision under unlikely circumstances at Chicago's airport. The Secretary quickly adopted the report and recommendation later that day *in toto*.

Governor Kasich's objections had been fully achieved: Charlie Earl was knocked off the ballot on the basis of a never-before enforced and highly ambiguous part-petition employment disclosure statute. And his longtime ally and political appointee, Terry Casey, had managed to do it all without disclosing either of their identities or involvement.

Earl immediately moved to amend his pending lawsuit against the Secretary to include new claims regarding the protest. A hearing was held days later on Earl's motion for preliminary injunction. A YouTube video surfaced during the hearing in which Ohio Republican Party Chairman Matt Borges stated to a reporter that his Party was behind the protest. He corrected himself moments later that his party was, in fact, not part of the protest to the extent Republicans did not have standing.

Given the significance of these comments, the Court ordered Borges before it *sua sponte* to explain his involvement. Borges denied flatly under oath that he and the Republican Party were behind the protests. Borges understood what Casey did: that the public could not know the true origins of the Governor's protest against Charlie Earl and he dutifully threw himself on the sword to protect his party. But his startling denials would become the first of many that continued through the hearing of this matter in a hard-fought and protracted litigation that would ultimately uncover sordid text messages, e-mails and documents that leave little doubt that the enforcement of the part-petition employment disclosure statute was motivated entirely by political animus.

The Secretary and Felsoci resisted discovery from the very outset. They refused to commit to a scheduling order and questioned how Plaintiffs could even be engaged in discovery when the Court had not yet ruled on its then-pending Third Amended Complaint. They would not allow their clients to be deposed and they would not produce meaningful responses to Plaintiffs' document requests absent several Court Orders requiring them to do so.

To be sure, it was only when Plaintiffs were finally able to depose their clients that Defendants began producing documents that were responsive to their requests. In the end, Secretary Husted took over three months to respond to a request for production of documents

that was initially served on him on May 21, 2014. And he did so in 17 separate discovery supplements, many of which were divulged on the eve of Plaintiffs' depositions of his officers.

As for Felsoci, the most crucial documents tying the Governor's Campaign to Terry Casey were not disclosed until last Friday, September 26, 2014. And even then, Felsoci had the gall to argue that they should be excluded from the hearing!

Incredibly, Defendants are now trying to lift themselves by their own bootstraps by arguing that their own obstructive and dilatory behavior avails them of the defense of *laches*—an equitable remedy to which these Defendants, with dirty hands, can lay no claim. Should the Court allow this defense, Plaintiffs will not have their case decided on the merits but instead on a contrived defense that Defendants kept in motion all along.

Legal Argument

I. Documented Facts Supporting Count Seven Based on Selective Enforcement.

The evidence adduced at the hearing clearly demonstrates that Terry Casey, Chair and Republican Member of Ohio's Personnel Review Board, either: (1) used "innocent agents" in the Secretary's office to have Earl selectively removed from Ohio's ballot; or (2) acted jointly with agents in the Secretary's office to have Earl selectively removed from Ohio's ballot. In either case, his actions violate the First and Fourteenth Amendments to the United States Constitution.

Casey's motive, by his own admission, was political. He wanted to remove Earl to harvest his votes for Governor Kasich and to punish and embarrass the Democrats. He did not challenge any other candidate. He did not consider challenging any other candidate, whether the Green Party candidate, Kasich, or even Fitzgerald. His objective was not to somehow properly police Ohio law; it was to remove a nettlesome competitor from Ohio's gubernatorial in order to facilitate Governor Kasich's re-election.

A. Combination with Agents in Secretary's Office.

The documentary evidence of Casey's combination with agents in the Secretary's office is overwhelming. Casey was in constant contact with Matthew Damschroder, Deputy Assistant Secretary of State and Director of Elections. On Monday, February 17, 2014, at roughly 8:07 PM, Casey and Damschroder exchanged text messages involving Democratic efforts to launder money "plus other issues and questions." *See* Plaintiffs' Exhibit 57 at page 0076. Damschroder ended the exchange by texting "I'll call after class." *Id.* at 0077.

On Monday, February 17, 2014 at 11:15 PM, Damschroder wrote to Halle Pelger, Secretary Husted's personal assistant, that he "got a call tonight that a protest is likely to come by Friday against Earl ...." Plaintiffs' Exhibit 49. Damshroder would also relate the substantive issues that would be the basis for the protest. Jack Christopher, the Secretary's General Counsel and Deputy Assistant Secretary of State, received this message by 7:58 AM on Tuesday, February 18, 2014. *Id.*

On Friday, February 21, 2014, at 1:34 PM, Damschroder e-mailed Pat Wolfe, and others, that "if we get a protest filed with us today, even if it is after 4 pm, please accept it, date/timestamp it, and give it to Sally to disseminate." Plaintiffs' Exhibit 52. At 3:32 PM later that day, Damschroder texted Melanie Poole, "If any protests are filed, please let me know as soon as they come in." Plaintiffs' Exhibit 51. The statutory deadline, which had to be met for the protests to go forward, was 4 PM on this day.

Damschroder, Christopher, and Pelger had to have known before the protest was filed that it was being filed on the behalf of Casey and the Kasich Campaign. On December 16, 2014, Damschroder was in contact with Dave Luketic, a former political director of the Ohio Republican Party and by that time an agent with the Kasich Campaign for Governor. *See* Plaintiffs' Exhibit 56 at page 0148. Luketic questioned whether there was "any petitions

gathering from the (sic) Charlie Earl the LIB candidate?" *Id.* Damschroder responded that he would "keep ear to ground." *Id.* After the candidates filed their part-petitions in early February 2014, Luketic texted Damschroder: "Any filing from Charlie Earl - libertarian running for Gov." *Id.* at 0146. Damschroder reported Earl had filed. *Id.* at 0147. Luketic then stated that "ORP is sending a records request to you via email for all of them." *Id.*[1]

Further evidence of the Secretary's agents' knowledge that Republican were behind the protests of Earl and Linnabary is found in Plaintiffs' Exhibit 66 at page 0775-0076. There, Christopher Shea reports to Damschroder and Christopher by e-mail at 11:26 AM on February 18, 2014 that Chris Schrimpf and Avi Zaffini had filed records requests. Schrimpf's request was for the part-petitions of Earl. *Id.* at 0075. On February 21, 2014, at 3:50 PM, just after Earl had been protested and just before Linnabary was protested, Avi Zaffini texted Damschroder, Pelger and Christopher to "Be ready looks like AG campaign, Preisse and co. are coming over with a protest for libertarian." Plaintiffs' Exhibit 56 at page 0149. Damschroder responded "AG just filed. Time stamp <u>3:57</u>." *Id.* (emphasis original).

Damschroder's communications, by text, e-mail, phone, and in-person, continued throughout the protest hearing. *See* Plaintiffs' Exhibit 57 at pages 0080-0089. During this time-frame, Damschroder and Christopher both learned, if they did not know before, that Casey was tied to the Zeiger law firm, which they both knew represented Felsoci. This is established by BCCs sent from Casey to Damschroder (forwarded to Christopher) on February 27, 2014, *see* Plaintiffs' Exhibit 6, and February 28, 2014. *See* Plaintiffs' Exhibit 7. That both Damschroder and Casey shared animus against Democrats is reflected in the e-mail Damschroder sent to Casey on March 4, 2014, during the protest hearing. *See* Plaintiffs' Exhibit 8.

[1] That Luketic was at this time involved with Kasich is established by this same text; he and Damschroder discuss "JRK," the Governor.

In addition to contacting Casey during the actual protest hearing on March 4, 2014, Damschroder was in contact with Christopher. These texts demonstrate that both Damschroder and Christopher favored the protestors over the candidates. For example, Christopher texted to Damschroder sometime before 11:58 AM on March 4, 2014, from the hearing room that "Zeiger just won't bend, will he?" Plaintiffs' Exhibit 56 at page 0154. Damschroder responded, "I like unbending." Id. Christopher went on: "I think I felt the ground shake. Yeah. Not a bad idea to have Zeiger in court!" *Id*. at page 0155. Christopher stated: "You're missing some fireworks. :)" *Id*. at page 0156. Damschroder responded "Damn. In mtg." *Id.*

Perhaps most telling of Christopher's knowledge of Casey's and the Kasich Campaign's involvement in the protest was his next comment on March 4, 2014, sometime between 2:04 PM and 4:23 PM: "I hope nobody asks Zeiger who is paying them to do this!! ;)" *Id*. at page 0156. Damschroder responded, "It's a pretty penny I'm sure." *Id.*

Adickes v. S.H. Kress Co., 398 U.S. 144 (1970), held that a joint "understanding" between a restaurant and local police to remove civil rights protestors from the restaurant converted the restaurant into a state actor. The Sixth Circuit has recognized this point: "To act under color of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Tahfs v. Proctor,* 316 F.3d 584, 590 (6th Cir. 2003) (citing *Adickes*).

The documentary evidence of a concerted effort between Casey, Christopher and Damschroder to selectively apply Ohio's employer-statement rule to Earl on Kasich's behalf is substantial. Christopher's evasive responses and incredulous lack of "recollection" of important and damaging facts throughout the hearing further demonstrates that he knew Casey and the Kasich Campaign were behind the Felsoci protest all along. He had received e-mails the week

before connecting Casey to Zeiger and was in constant contact with Damschroder, who must have known of Casey's involvement given their many pre-protest conversations. Most compelling is that Christopher knew that Felsoci was not paying for his lawyers—something he only could have known if he had a far deeper understanding of the Felsoci surrogacy. Christopher knew then what we know now: that Casey was orchestrating "the Governor's protest of Charlie Earl" with the assistance of the "Governor's folks."

Given this joint action, each of the agents is responsible for the actions and animus of the others. Casey without doubt had as his sole purpose directed towards removal of Earl to benefit Kasich. Both Damschroder and Christopher exhibit a general agreement with this objective; at least to the extent it would hurt the Democrats. Such a combination between state agents for the political gain of another, here Governor Kasich, cannot be squared with the First and Fourteenth Amendments.

B. Christopher's Manipulation of Smith.

Jack Christopher worked extensively with the hearing officer, Professor Bradley Smith, on the protest process. Christopher testified that he had only one substantive exchange with Smith, and that came after Smith announced that he was "done" and ruling for the candidates. This exchange was over the meaning of the most critical component of the case against Earl, the *In re Protest of Evans,* 2006 WL 2590613 (Ohio App. 2006), case.

On Thursday, March 6, 2014, at 5:53 PM, Christopher and Smith had a 33 minute phone call. *See* Plaintiffs' Exhibit 55 (Damschroder's phone log). Smith was in West Virginia and Christopher was in Damschroder's office. Later that evening, at 9:06 PM, Smith sent to Christopher an e-mail stating: "Done. I know this will anger and disappoint a bunch of people but I am recommending that the protests be dismiss[ed]. Let me do a bit of clean up and spell check and I'll get it to you shortly." Plaintiffs' Exhibit 31.

The report and recommendation that Smith had prepared was in favor of Earl and Linnnabary. *See* Plaintiffs' Exhibit 17. In this draft (which was identified by Smith at the hearing and had been produced by the Secretary in response to Plaintiffs' request), Smith concluded that the *Evans* case's

> actual holding appears to be much more limited -- only employees, and not independent contractors, are required to complete the employer disclosure information. And while it is true that excluding independent contractors creates a hole in the disclosure scheme, *Evans* seemed to believe that that was required by the plain language of the statute.

Id. at pages 16-17.

Smith went even further. He concluded that the Secretary's own Directives created confusion over whether the employer-statement rule would even be enforced:

> an Ohio citizen searching out guidance on the Secretary's web page, and finding these Directives, might be unduly surprised to then find signatures invalidated on these grounds. "Election law precedent should not be construed as an elaborate trap for the unwary."

Id. at page 17 (citation omitted).

On Friday March 7, 2014, at 3:30 AM, while working at the office all night, Christopher sent Smith an e-mail extensively describing his contrary interpretation of the *Evans* case. *See* Plaintiffs' Exhibit 32. Much of this reasoning can be found in Smith's final report delivered to Christopher on March 7, 2014 at 10:55 AM (whether Central or Eastern Time is not exactly clear). The subtext of Christopher's e-mail was clear: do not rule for the candidates. Smith reversed himself in response. *Evans* no longer supported the candidates, it favored the protestors:

> the clear underlying assumption of *Evans* was that paid circulators would disclose *some* person as the employer. To exempt independent contractors from the disclosure would allow disclosure of paid petitioning to be avoided by the simple expedient of using independent contractors rather than employees.

Id. at 15 (unpaginated).

Christopher's confrontation with Smith about his interpretation of the *Evans* case had worked and he now had the outcome he desired. The only logical explanation for Christopher's lone foray into the substantive issues of the protest was the he did not want the candidates to prevail. And his attempt to mitigate his heavy handed eleventh hour involvement is unpersuasive. If he was interested in future precedent, as he claimed, he would have discussed the *Evans* case with Smith in their subsequent 10:00 AM phone call. But they did not—once Christopher learned that Smith had changed his mind, there was no need to discuss *Evans* further.

Moreover, Christopher could have advised the Secretary to reject Smith's recommendation if future precedent was at stake without regard to the obvious political fallout that might ensue. The cleaner approach, however, was to have the hearing officer's recommendation in accord with the outcome that Christopher and Damschroder desired.

Perhaps because Smith was involved with DeWine in the *Susan B. Anthony* litigation,[2] or because he saw his initial report as angering and disappointing Christopher, the Secretary and others prevailed on Smith to reverse himself. It may have been that Smith, following his discussions with Christopher, decided his initial report was futile. For whatever reason, Smith

[2] Plaintiffs added Count Nine under the Due Process Clause because of Smith's conflict of interest. Plaintiffs concede that Smith could not have known at the time of the hearing that he was governed by the Due Process Clause's restrictions on conflicts of interest. Simply put, Smith was not at fault. Indeed, Plaintiffs themselves did not discover (and could not have discovered this) this until July 14, 2014, when the Secretary finally argued that Smith was immune from deposition because he was acting in a judicial capacity, and Magistrate Judge Kemp accepted the claim. Of course, the Secretary cannot have it both ways. If a hearing officer is shielded by the privileges and immunities that surround judges, that hearing officer must also fulfill the responsibilities of judge -- he cannot hear a case where he has a patent conflict. Fault is not required under § 1983. *See Daniels v. Williams,* 474 U.S. 327 (1986). Now that it has been established that Smith was judicial, his conduct must be judged by Due Process.

adopted Christopher's interpretation of *Evans* completely only after having interpreted the case in an entirely different light hours earlier.

C. Casey's Possible Use of Innocent Agents.

Even assuming that Damschroder and Christopher had no knowledge of Casey's surreptitious activities – that is, even if they were both wholly innocent – Casey himself is a state actor. He presently chairs Ohio's Personnel Board of Review. Notwithstanding that his actions are not formally part of job description – and are even illegal – his conduct can be considered state action under color of law for purposes of 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167 (1961) (holding that even illegal conduct on part of police is state action under color of law).

The Sixth Circuit, for example, in *United States v. Lanier,* 33 F.3d 639 (6th Cir. 1994), *reversed on other grounds*, 73 F.3d 1380 (6th Cir. 1996) (en banc), *reversed*, 520 U.S. 259 (1997), ruled that a state judge's sexual improprieties with women constituted state action under color of law for purposes of 18 U.S.C. § 242, § 1983's criminal counterpart. That a state agent strays from his job description, violating state law, does not mean he is no longer a state actor.

The question is whether Casey's official position "facilitated" his wrongdoing. *See Hensley v. Gassman*, 693 F.3d 681, 694 (6th Cir. 2012) ("Although the determination of whether a police officer's involvement in a repossession or eviction is sufficiently active to amount to state action 'is particularly fact-sensitive,' this is not a close case: the Deputies' active involvement facilitated the repossession.").

Here, Casey's position in Ohio government surely facilitated his efforts against Earl. Damschroder knew of Casey's position, as did Christopher. They were quite likely more willing to lend a hand given Casey's governmental credentials. The same goes for the Zeiger firm. Casey's chairmanship of the Personnel Review Board – as a Kasich appointee confirmed by the

Senate – surely added to his prestige and persuasion. In addition to helping prove the connection with the Kasich Campaign, like a police officer's badge, it smoothed the way for his efforts against Earl. He would not have obtained a law firm like Zeiger's without his official prestige and connection with the Kasich Campaign.

Assuming innocence on the part of the Secretary's agents – i.e., that they did not know that Casey was subverting justice to his own ends – Casey and the Kasich Campaign are still responsible for the constitutional violation that followed. In *Staub v. Proctor Hospital,* 131 S. Ct. 1186 (2011),[3] the Supreme Court ruled that the fact that an innocent agent is tricked or duped into taking action does not relieve the principal of liability. The "cat" here (Casey) is still responsible for his improper purpose.

Either way then, Casey's actions in seeing that Earl and Linnabary were removed are illegal. Casey violated the First Amendment by himself using innocent agents, or he joined with them to do so. Both violate the Constitution.

D. The Kasich Campaign's Involvement.

Even more importantly, Casey was doing the bidding of the Kasich Campaign. Whether he initiated the contact or not is irrelevant. The fact is that the documentary evidence leaves little doubt that Casey was deeply involved with Matt Carle, Kasich's Campaign Manager, Jeff

[3] The Supreme Court ruled in *Staub,* 131 S. Ct. at 1192, that "it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." Thus, under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Court ruled, a supervisor's discriminatory animus is still actionable even though that supervisor duped an innocent superior into firing the plaintiff. Casey's conduct here, assuming Damschroder is innocent, mirrors the behavior of the supervisor in *Staub.*

Polesovsky, Kasich's Deputy Campaign Manager, Dave Luketic (mentioned above), John Zeiger, and Dan Meade. *See* Plaintiffs' Supplemental Exhibit D.[4]

The e-mails contained in Exhibit D reveal that Dan Meade, a lawyer with the Zeiger firm, was involved in researching Oscar Hatchett as early as February 17, 2014. *See id.* at 000001. On that same day, Casey e-mailed Richard Lumpe that he was "doing an high priority research project for the Governor's folks ...." *Id.* at 000005. Luketic, too, joined in the search for evidence to disqualify Earl. See id. at 000034. On February 19, 2014, Luketic e-mailed Casey, Meade, Zeiger, Polesoovsky, and Carle, stating: "Team. Our numbers may have been a little of (sic) (in a good way." *Id.* at 000042. Casey wrote on February 21, 2014 to the "Team" and others that the filing against Linnabary "seemed kind of close to the filings by attorney Zeiger in the Governor's Charlie Earl protest." *Id.* at page 000084.

Matt Carle took an even more direct role. On February 19, 2014, while attending the funeral of Lt. Gov. Taylor's mother in Akron, he was "on the phone lining up those other needs for this process." *Id.* at 000055. These "other needs" included the need of a Libertarian, whom was found in Cuyahoga County. *Id.* This Libertarian was Felsoci.

Kasich is the Governor of Ohio. He is a state actor. His Campaign is his agent. Its activities are charged to him. Thus, a state actor, the Governor of Ohio, is directly implicated in Earl's protest. Casey is an agent of both the Campaign and Kasich. His actions are charged to the Campaign and Kasich. They are all state actors. They are all under color of law.

Even in the absence of these direct connections, the Kasich Campaign's and Casey's manipulation of the Libertarian Party of Ohio ballot constitutes a public function.

[4] These documents were added as supplements because they were not disclosed by the Zeiger law firm until late afternoon on Friday, September 26, 2014, well-after the Exhibit List was due. Plaintiffs had been demanding these documents since May 27, 2014, when they first requested documents. *See infra*.

Smith v. Allwright, 321 U.S. 649 (1944), makes this clear. In *Allwright*, the Democratic Party of Texas forbade African-Americans from voting in its primaries. The Supreme Court ruled that this constituted impermissible state action: “[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state.” *Id.* at 660.

Nine years later, the Court ruled in *Terry v. Adams*, 345 U.S. 461 (1953), that a subset of a major party -- the Jaybird Democratic Association -- acted in the Democratic Party's stead in Texas's primary electoral arena. It, too, was a state actor. Together, these cases mean that the major parties' state machineries, including their subsets, agents and provocateurs, are state actors.

The Supreme Court's most recent pronouncement came in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), a plurality opinion. There, the plurality opinion (Stevens, J.) borrowed *Smith* and *Terry* to hold that § 5 of the federal Voting Rights Act applies to state party conventions as well as primaries. Thus, the Virginia Republican Party's use of registration fees for delegates to its Virginia state convention was subject to the preclearance requirements of § 5.

Lower courts have read the plurality holding in *Morse* to stand for the proposition that "the conduct of party primary elections under the auspices of the State is subject to preclearance under the Voting Rights Act.” *Mississippi State Democratic Party v. Barbour,* 529 F.3d 538, 542 n.4 (5th Cir. 2008); *Lulac of Texas v. Texas Democratic Party*, 651 F. Supp.2d 700, 708 (W.D. Tex. 2009). The assumption behind these rulings is that major-party state organizations and affiliates are state actors for purposes of the Constitution when they regulate elections.

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998), is perhaps the seminal case in this regard. There, Lyndon LaRouche complained that he had been unconstitutionally excluded from

the national Democratic Party's convention. The DC Circuit ruled against him, distinguishing a national political party from state political organizations. The latter, it observed, are state actors.

The DC Circuit also drew a distinction "internal" party operations -- like a national party's selection of delegates -- from the regulation of ballots. The former is itself protected by the First Amendment. *Id.* at 986. The latter, at least when practiced by a major party's state organization, constitutes state action. *Id. See also Alabama Republican Party v. McGinley,* 893 So. 2d 337, 342-43 n.3 (Ala. 2004) ("the Party assumes, without admitting, that it was acting as a 'state actor' when it disqualified McGinley.").

LaRouche, Smith, Terry, and *Morse* establish that a major-party's regulation of voting rights and ballot access constitute state action. The point is so clear that is what not even considered debatable in *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 589 n. 9 (5th Cir. 2006), where the Texas Republican Party attempted a "friendly" removal of Tom Delay's name from the state's general election ballot in 2006. Finding that the removal was unconstitutional, the Fifth Circuit noted that state action was not even in dispute. *Id.* at 589 n.9.

Kasich, the Governor of Ohio, is responsible for his Campaign's actions. The Kasich Campaign's infiltration of the Libertarian Party of Ohio's primary is reprehensible. It goes well beyond Kasich's regulation of his own primary ballot, which would clearly be state action. It is sabotage of another party's ballot. It is unconstitutional state action.

II. Retroactive Application of A Novel Interpretation of the Employer-Statement Rule Violates Due Process.

Count Eight of Plaintiffs' Third Amended Complaint argues that the retroactive application of the Secretary's new interpretation of the employer-statement rule violates Due Process. Here, Professor Smith in his initial decision, before changing his mind, wrote that the *Evans* case meant that "only employees, and not independent contractors, are required to

complete the employer disclosure information. And while it is true that excluding independent contractors creates a hole in the disclosure scheme, *Evans* seemed to believe that that was required by the plain language of the statute." Plaintiffs' Exhibit 17 at pages 16-17.

Smith then went further to add that the Secretary's own Directives created confusion over whether the employer-statement rule would even be enforced: "an Ohio citizen searching out guidance on the Secretary's web page, and finding these Directives, might be unduly surprised to then find signatures invalidated on these grounds. 'Election law precedent should not be construed as an elaborate trap for the unwary.'" *Id*. at page 17 (citation omitted).

Given Professor Smith's apparent confusion over the meaning of Ohio's employer-statement rule and the impact of Ohio's non-enforcement Directives, it is patently unfair of the Secretary to expect Plaintiffs to have a better understanding.

The Supreme Court in *Federal Communications Commission v. Fox Television Stations,* 132 S. Ct. 2307 (2012), reiterated the First Amendment's strong aversion to the retroactive application of vague rules and novel interpretations. *Fox* involved a new FCC policy punishing even fleeting expletives on the airwaves. The FCC's prior policy had tolerated occasional vulgarity, even though it was technically prohibited. Notwithstanding that its new policy was announced <u>after</u> these fleeting vulgarities, the FCC chose to punish two television stations.

The Supreme Court ruled that the FCC could not apply its new zero-tolerance rule to the television stations:

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.*

Id. at 2317 (emphasis added).

No one knew when Oscar Hatchett was circulating petitions that § 3501.38(E)(1) applied to independent contractors. Professor Smith, whose academic credentials are impeccable, on March 6, 2014, in his first report and recommendation, concluded that the employer-statement rule does not apply to independent contractors. It was only after communications with Christopher that he changed his mind. Can non-lawyers like Earl and Hatchett be reasonably expected to know what that O.R.C. § 3501.38(E)(1) applies to independent contractors when an election-law expert like Professor Smith does not?

Even had a court independently reached the same result eventually tendered by Professor Smith – and this did not happen here, as the Ohio Supreme Court deferred to the Secretary's (and Professor Smith's) conclusion – Due Process would not allow § 3501.38(E)(1)'s retroactive application. The Supreme Court in *Bouie v. City of Columbia,* 378 U.S. 347, 352 (1964), made this clear. There, the South Carolina Supreme Court broadened the state's definition of criminal trespass after several protestors were arrested. The Supreme Court ruled that in the context of speech, this was not permitted: "[w]hen a statute on its face is narrow and precise, ... it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."

III. Smith's Conflict of Interest Violates Due Process.

Plaintiffs added Count Nine based on Smith's conflict of interest when they amended their Complaint on September 11, 2014. *See* Doc. No. 188. The Court expressed concern that this count had been added late, especially given that Plaintiffs admitted they knew of Smith's representation of DeWine as early as March 13, 2014.

Plaintiffs explained in subsequent filings with the Court, and at the evidentiary hearing, that the reason they waited to add Count Nine was that they did not know until July 14, 2014, when Magistrate Judge Kemp ruled that Professor Smith was acting in a judicial capacity, *see* Doc. No. 134, that a potential Due Process challenge even existed. Plaintiffs' lawyer, Brown, responded to an inquiry from Linnabary on March 13, 2014 about the conflict that "[i]n administrative settings, courts allow hearing officer to be advocates, too." Plaintiffs' Supplemental Exhibit B.

Plaintiffs throughout the discovery battle over Smith's deposition argued that Smith was acting in an executive capacity. Brown's own book takes the position that the Secretary's ballot access decisions are executive. *See* Plaintiffs' Supplemental Exhibit C at page 413 & n.27 (stating that Judge Sargus in *Blankenship v. Blackwell,* 341 F. Supp.2d 911 (S.D. Ohio 2004), ruled that "the Secretary's decision was an executive one notwithstanding its quasi-judicial attributes").

Although Professor Smith could not have reasonably known that he was acting in a judicial capacity,[5] the law of this case now is that he was. Consequently, his actions must be judged by the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Carey v. Wolnitzek*, 614 F.3d 189, 198 (6th Cir. 2010).

Smith accepted an appointment to represent DeWine in a case before the Supreme Court of the United States at the very time he accepted an appointment from Jon Husted to decide whether Earl and Linnabary should remain on the ballot. The LPO's candidate, Linnabary, was running for Attorney General against DeWine. DeWine's personal, pro bono, lawyer, then, was

[5] Qualified immunity does not apply to equitable actions.

charged with deciding whether DeWine's opponent would remain on the ballot. This presented a serious risk of prejudice under the Due Process Clause.

Smith did not know he should consider this potential conflict of interest because no one in the Secretary's office told him he was acting in a judicial capacity. That decision came later, when the Secretary decided it was useful to fight discovery. Having made that decision, the Secretary is now bound by it. With the benefits of the judicial process – privilege from discovery and immunity from damages – comes the responsibilities found in the Due Process Clause.

IV. Felsoci's Evidentiary Objections.

Felsoci levels numerous evidentiary objections. He attempted this same argument before the Sixth Circuit in the earlier appeal from this Court's denial of Plaintiffs' third motion for preliminary injunction. That argument was roundly rejected, with the Sixth Circuit even striking Felsoci's superfluous Appendix. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 404 n.1 (6th Cir. 2014).

With preliminary injunction hearings, the Rules of Evidence do not apply; "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). Hearsay objections are meaningless, *see, e.g.*, *Mullins v. City of New York,* 626 F.3d 47, 52 (2d Cir.2010) (concluding "that hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction."), as are boilerplate objections like "lack of foundation." *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2949 (3d ed. 2001) ("[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be

allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had.").

The Sixth Circuit in *Ohio State Conference of NAACP v. Husted*, 2014 WL 4724703 (6th Cir. 2014) at *7 n.2, stay granted, No. 14A336 (U.S., Sept. 29, 2014), recently endorsed Wright & Miller's view. This Court, too, as well as all of its Sister Districts, have recognized this reasoning. *See Damon's Restaurants, Inc. v. Eileen K. Inc.*, 461 F. Supp. 2d 607, 620 (S.D. Ohio 2006) (Watson, J.) (holding that hearsay may be properly considered when deciding a motion for preliminary injunction); *Fid. Brokerage Servs. LLC v. Clemens*, 2013 WL 5936671 (E.D. Tenn. Nov. 4, 2013) ("Generally speaking, district courts within this circuit have not required stringent adherence to rules of evidence when reviewing petitions for injunctive relief and have considered such evidence.").

Felsoci's baseless objections aside, and out of an abundance of caution, Plaintiffs introduced, identified, and authenticated the following Exhibits for the following witnesses:

1. Terry Casey. Plaintiffs' Exhibits 4, 5 (SOS76-82, 93, 96-98, 100), 6, 7, 8, 57 (SOS84),[6] 59, 63, 64, 65, 66, 67, 74, 75, and 76; Plaintiffs' Supplemental Exhibit D (TC1, TC5, TC11, TC16, TC47, TC54, TC55, TC84); Deposition of Terry Casey.

2. Brandi Seskes. Plaintiffs' Exhibits 19, 20, 21.

3. Steven Linnabary. Plaintiffs' Exhibits 21, 75, 76; Plaintiffs' Supplemental Exhibit B.

4. Matthew Damschroder. Plaintiffs' Exhibits 2, 3, 7, 8 (SOS 45), 17, 18, 31, 47, 49, 50 (SOS0012), 51, 52, 53 (SOS 0033), 54, 55, 56 (SOS 145- 48, 153-155), 57 (SOS 78-79, 80, 92-93, 99), 59, 63 (SOS 70), 64, 65, and 67 (SOS0763).

5. Bradley Smith. Plaintiffs' Exhibits 14, 15, 17, 18; Deposition of Bradley Smith.

6. Jack Christopher. Plaintiffs' Exhibits 4, 6, 7, 13, 30, 31, 32, 33, 55, 56 (SOS 152-156).

[6] Exhibits 5 and 57 are duplicates.

Plaintiffs duly moved that all of these Exhibits be introduced into the hearing's record. Plaintiffs also respectfully moved that the remainder of the Exhibits submitted in Plaintiffs' Binders marked Plaintiffs' Exhibits and Plaintiffs' Supplemental Exhibits be introduced and afforded the weight the Court chooses to give them.

V. Plaintiffs Have Diligently and Expeditiously Litigated this Case.

The Secretary has argued that Plaintiffs were dilatory and that laches bars their claims under Counts Seven, Eight and Nine. The charge is utterly false.

On May 15, 2014, following the Supreme Court's denial of a stay in this case, this Court scheduled a status conference for June 5, 2014. On May 21 and 27, 2014, *see* Docs. No. 108 & 109, Plaintiffs served on Defendant-Secretary and Intervenor-Defendant-Felsoci, respectively, requests for productions of documents. On June 5, 2014, at the status conference, Plaintiffs represented to the Court that they would complete discovery by August 1, 2014 and have the case poised for dispositive motions shortly thereafter.

On June 8, 2014, Plaintiffs filed a renewed Motion to file a Third Amended Complaint specifically stating a selective enforcement claim and demanding that Earl be restored to the general election ballot. *See* Docs. No. 110 & 111. On June 13, 2014, Plaintiffs noticed the depositions of Christopher, Smith and Felsoci. *See* Docs. No. 113, 114 & 115. The Secretary and Felosci objected to the depositions, forcing Plaintiffs on June 16, 2014 to file motions to compel. Plaintiffs immediately contacted Magistrate Judge Kemp and arranged a phone conference for June 20, 2014 to expedite briefing and discovery. Magistrate Judge Kemp ordered expedited briefing on June 23, 2014. *See* Doc. No. 119.

Plaintiffs won their relief on July 11, 2014 (Felsoci) and July 14, 2014 (Christopher and Smith). *See* Docs. No. 133 & 134. Felsoci objected to Magistrate Judge Kemp's report, and this

Court overruled the objection on July 24, 2014. *See* Doc. No. 150. The Secretary also objected and his objection was overruled on July 24, 2014. *See* Doc. No. 152.

Meanwhile, the Secretary and Felsoci objected to Plaintiffs' motion to amend the complaint and refused to produce documents. On July 8, 2014, following the Secretary's and Felsoci's failure to timely produce documents, Plaintiffs filed motions to compel the production of documents from Felsoci and the Secretary. *See* Docs. No. 129 & 130. Plaintiffs again immediately arranged a conference before Magistrate Judge Kemp on July 9, 2014. On that same day Magistrate Judge Kemp ordered Felsoci and the Secretary to expedite briefing. See Doc. No. 131. Plaintiffs won the motion to compel against Felsoci on August 12, 2014. *See* Doc. No. 162.

At both conferences and in all three orders compelling discovery, Magistrate Judge Kemp, per the Plaintiffs' request, emphasized the need for speed. Magistrate Judge Kemp truncated all temporal periods for briefing, objections, and actual production. He ordered on August 12, 2014, for example, that Casey's identity be revealed by August 15, 2014. *See* Doc. No. 162. During the discovery period, Defendants refused all attempts at a negotiated schedule.

Perhaps most egregious was the Zeiger law firm's failure to produce the proverbial 'smoking gun' evidence linking Casey to the Kasich Campaign for Governor. The e-mails establishing the link were not delivered to Plaintiffs until Friday, September 26, 2014, on the eve of the evidentiary hearing. Plaintiffs first requested these very documents on May 27, 2014. Only four months later were they delivered.

A reverse chronology is helpful. The Zeiger law firm produced the documents on behalf of Casey ostensibly in response to a subpoena served by Plaintiffs on Casey on Sunday, September 21, 2014.The documents demanded were precisely the same documents Plaintiffs

requested of Felsoci and the Zeiger law firm (since Felsoci is in "control" of his file in the Zeiger firm's possession, *see* Order, Doc. No. 162), in their Rule 34 Request of August 28, 2014. Felsoci conceded in his attempt to avoid this discovery filed on September 17, 2014, *see* Doc. No. 200, that the documents requested on August 28, 2014 were the same as those requested on May 27, 2014: "it seeks essentially the same documents the LPO Plaintiffs sought in their first document request." Doc. No. 200 at PAGEID # 3944.

Making matters worse, Casey at his August 28, 2014 deposition was specifically asked whether he had been in contact with the Kasich Campaign:

> Q. Since January 1st, 2014, have you communicated with anybody in the John Kasich for Governor campaign?
>
> A. I've seen people around at social events, I've sometimes sent out general e-mails about political issues, or in doing TV shows, might have asked for background information.

Doc. No. 241-1 PAGEID #6223 (Casey Deposition at 16).

He did not say, "I have been in communication with Matt Carle, Dave Luketic and Jeff Polesovsky," which would have been a truthful and forthright response.

At another point, Casey was asked:

> Q. Was there anybody else that was helping you, assisting you in finding a Libertarian protestor?
>
> A. I reached out to a bunch of political people, like I mentioned, Lucas County, Cuyahoga County, Summit County, there might have been some other counties, looking for Libertarians who might be potential folks.

Doc. No. 241-1 PAGEID # 6366 (Casey Deposition at 159).

Casey again never mentioned Matt Carle, Dave Luketic or Jeff Polesovsky, even though the records finally produced on September 26, 2014 prove they were all prominent recipients of Casey's e-mails.

And at the end of the deposition, Casey was asked:

Q. Did the leadership in the Ohio Republican Party know you were doing this?

A. I'm not sure what they knew or didn't know.

Q. Did Matt Borges know you were doing this?

A. I don't know.

Q. Who else might have known you were doing this?

Mr. Tigges: Objection. Calls for speculation.

A. I mean I know --

Q. To your knowledge, of course. To your knowledge.

A. Right. Right. Right. What ---

Mr. Tigges: Wait a minute. Stop. What's the question?

Mr. Brown: Can you read back the question?

Mr. Tigges: You said might and then you said to his knowledge, and the two are fundamentally inconsistent.

Mr. Brown: Why don't you read back the question. Go ahead, Carolyn.

(Record read.)

Mr. Brown: I was trying to respond to Steve's objection on speculation. I only want Mr. Casey to answer to what he knows.

Mr. Tigges: So what's the question? Are you asking him who he knows?

Mr. Brown: Carolyn, can you read the question?

Mr. Tigges: Fine. Go ahead. I don't care.

(Record read.)

Mr. Tigges: The question's objectionable. Same objection. Calls for speculation.

A. I'm not sure who else would have known because I was spreading the network out in terms of both kind of sharing my surprise over the whole Oscar Hatchett, Democratic

> Party stuff, because I thought it was pretty amazing that the Democratic Party would be that involved in trying to literally manipulate, prop up, run, almost, the Libertarian Party. So I mean I shared with a lot of people how shocked and surprised I was.

Doc. No. 241-1 PAGEID # 6367-6369 (Casey Deposition at 160-62).

The truthful answer to this question, of course, was Matt Carle, Dave Luketic and Jeff Polesovsky. Casey's lawyer did his best to confuse the question, but the question put to Casey was whether, to his knowledge, anyone else knew of his efforts to protest Earl. Casey never mentioned Carle, Luketic and Polesovsky. The documents delivered on September 26, 2014 prove that Casey was in constant contact with Carle, Luketic and Polesovsky.

Felsoci, Casey and the Zeiger firm spent four months suppressing the most critical information in this case. Had this information not been suppressed, Plaintiffs would have been prepared to seek immediate relief as planned and presented to the Court on June 5, 2014. Without the evidence, Plaintiffs had no choice but to press discovery and fend off frivolous objections.

VI. Defendants Lack Clean Hands.

Laches is an equitable doctrine. It demands clean hands. *See Keystone Driller Co. v. General Excavator Co*., 290 U.S. 240, 244(1933). The clean hands requirement extends to equity throughout litigation. "No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim." *Roof Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 435-35 (3d Cir. 1948). *See also The Livingstone*, 104 F. 918, 924 (W.D.N.Y. 1900) ("An intervener proceeding to recover for cargo loss must come into court with clean hands.").

As demonstrated above, Felsoci and Casey do not have clean hands. The e-mail trail between Kasich's Campaign and Casey proves that Felsoci's lawyers knew of Casey's connections with the Kasich Campaign. They knew when Casey was deposed that he was not being truthful. If Felsoci's claim that a lawyer's knowledge belongs to his client is correct, *see* Doc. No. 209 at PAGEID # 4407 n.8, Felsoci knew all along that the Kasich Campaign was behind his protest. He knew that Casey actively remained secret and suppressed the involvement of Kasich's Campaign. Felsoci is responsible. His hands are as dirty as Casey's. *See Blankenship v. Blackwell,* 341 F. Supp.2d 911, 924 (S.D. Ohio 2004) (applying doctrine to Nader campaign).

The Secretary, meanwhile, refused to cooperate in any way with the Plaintiffs during discovery. Plaintiffs had to resort to filing two motions to compel against the Secretary, one of which was granted. Although the second was not granted, the Secretary produced many of the requested documents after it was filed. More documents were produced because of the ordered depositions. They came sporadically in 17 separate supplements, with the last production arriving only after this Court granted Plaintiffs' motion to expedite. But they did come.

Without the Court's involvement, of course, Plaintiffs would never have uncovered the wrongdoing they did. The Secretary's dilatory tactics were obviously designed to facilitate his defense of laches should the matter ever approach trial. Here, neither Defendant has clean hands.

VII. Correcting Ballots Can Still Be Accomplished.

UOCAVA presents no legal obstacle to correcting ballots. To the extent UOCAVA ballots have physically been mailed, there is no need to recall them. Local election boards can simply post on their web pages the corrected ballots. Soldiers can use FWABs. Votes under either can be legally counted. It is clearly not impossible.

The Secretary's own expert, Dana Welch, testified that it is not impossible to correct any ballot. He conceded that UOCAVA ballots can be prospectively corrected using FWABs. He testified that paper absentee ballots, about 75,000 of them, are not due to be postmarked until October 7, 2014. Most importantly, he contradicted Damschroder (who has a obvious stake in the outcome) and stated that they could be corrected before being mailed in just a few days. Even if they cannot, Plaintiffs have no objection to Earl's not being included on those ballots. Plaintiffs do not ask to delay their mailing. If there is not enough time to correct them, so be it.

Early voting, set to begin on October 7, 2014, can also be corrected according to Welch. Welch testified that touch-screen voting can be corrected in a matter of days. Even if it cannot be corrected by the start of early voting, it can be corrected at some point before November 4. Again, Plaintiffs have no objection to ballots that are cast before corrections can be made being counted. Plaintiffs seek only prospective relief as soon as possible.

As for the November 4, 2014 election itself, Welch testified that machines can ordinarily be readied in four to five weeks. If directed by a court, it can be done faster. It appears reasonably clear that machines can be corrected by November 4, 2014. Again, Plaintiffs seek only prospective relief.

Practices in other states prove that Welch is correct. In West Virginia, for example, the state high court on October 1, 2014 ordered that ballots be corrected in a state legislative race to include a Republican who was illegally omitted. *See State ex rel. McDavid v. Tennant,* No. 14-0939 (W. Va., Oct. 1, 2014) , at *10 (copy attached as Exhibit 1).

In Kansas, an odd case developed where the Democratic Party refused to name a candidate for the United States Senate (a state-wide race). *See* Doc. No. 246. On September 29,

2014, the Kansas Secretary filed papers explaining that there was not only time to correct all ballots, but even the UOCAVA ballots that had already been sent out could be corrected.

The Ohio Supreme Court ruled as a matter of Ohio law that a candidate must be added to the ballot at any time before voting is complete. *See State ex rel. Scott v. Franklin County Board of Elections,* 139 Ohio St. 3d 171, 173 (2014). In the *Scott* case, the candidate (Scott) was added to the ballot by the Ohio Supreme Court just two weeks before the May 6, 2014 primary election, well after early voting and overseas ballots had been sent out. The Secretary's expert, Welch, testified that the Ohio Supreme Court instructed his board to prospectively apply the changes, so that the 10% of the vote already cast was not affected in the least.

Democracy is not free. To the extent there is added cost, the fault lies at the feet of Defendants. The Fourth Circuit Court of Appeals on October 1, 2014, *League of Women Voters of North Carolina v. North Carolina,* No. 14-1845 (4th Cir., Oct. 1, 2014), *see* Doc. No. 254-1, made this clear:

> The district court failed to recognize ... the problem of sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing. After all, Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote. The district court thus abused its discretion when it held that "[i]t is sufficient for the State to voice concern that [same-day registration] burdened [county boards of elections] and left inadequate time for elections officials to properly verify voters."

See Doc. No. 254-1, at page 45 (citations omitted). Likewise, the First Amendment does not "prescribe a balancing test under which the State can pit its desire for administrative ease against its minority [-party] citizens' right to vote."

Courts across the country, including the Supreme Court, have regularly restored candidates to ballots to redress constitutional violations within 45 days of an election. *See, e.g., McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (placing Eugene McCarthy's name on Texas

presidential ballot on September 27); *Norman v. Reed*, 502 U.S. 279 (1992) (Stevens, J.) (ordering ballots changed on October 25); *Williams v. Rhodes*, 393 U.S. 23 (1968) (finalizing George Wallace's presence on Ohio's ballot on October 15); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (correcting ballots 35 days before primary election).

Conclusion

Plaintiffs Motion for Emergency Relief should be **GRANTED.**

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief was filed using the Court's electronic filing system and will thereby be electronically delivered to all parties through their counsel of record.

s/ Mark R. Brown