

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**LIBERTARIAN PARTY OF OHIO, et al.  
Plaintiffs,**

**and**

**ROBERT HART, et al.,  
Intervenor-Plaintiffs,**

**Case No. 2:13-cv-00953**

**v.**

**JUDGE WATSON  
MAGISTRATE JUDGE KEMP**

**JON HUSTED,  
in his Official Capacity as Ohio  
Secretary of State,**

**Defendant,**

**STATE OF OHIO,  
Intervenor-Defendant,**

**and**

**GREGORY FELSOCI,  
Intervenor-Defendant.**

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' FIRST MOTION FOR  
TEMPORARY RESTRAINING ORDER**

Plaintiffs pursuant to Federal Rule of Civil Procedure 65(b) move the Court to enter a temporary restraining order directing Defendants to place the name of Plaintiff-Earl, his running mate, and that of the Plaintiff-Libertarian Party of Ohio's candidate, Steven Linnabary, on Ohio's

overseas and early-voting ballots until such time as this Court can resolve Plaintiffs' Fourth Motion for Preliminary Injunction.

The Secretary today notified the Court that the Sixth Circuit in *NAACP v. Husted*, No. 14-404 (S.D. Ohio 2014), *stay denied*, No. 14-3877 (6th Cir., Sept. 12, 2014), refused to stay the District Court's order that early voting for all voters commence on September 30, 2014 in Ohio. *See* Doc. No. 193. This Court on Friday, September 12, 2014 issued a scheduling Order setting an evidentiary hearing on Plaintiffs' Fourth Motion for Preliminary Injunction to begin on September 29, 2014. *See* Doc. No. 189. That hearing will not conclude until October 1, 2014, the day after early voting begins.

In order to preserve Plaintiffs' rights and to facilitate the Secretary's obligation to commence early voting pursuant to the District Court's order, Plaintiffs respectfully request a temporary restraining order directing the Secretary to place Earl's and Linnabary's names as Libertarian Party of Ohio candidates on the early voting, absentee and overseas ballots. Should Plaintiffs ultimately prevail, their rights will have been preserved. Should Defendants prevail at the preliminary injunction hearing, Earl's and Linnabary's names can be removed and their votes discarded.

Federal Rule of Civil Procedure 65(b)(1) states that a temporary restraining order may be issued without notice only if "(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Here, the movant's attorney has stated in writing that the Defendants have been notified. Further, specific facts in Plaintiffs'

verified Third Amended Complaint, as well as the documentary and testimonial evidence in possession of the Court, clearly show that Plaintiffs will experience immediate and irreparable injury if the order is not granted.

Plaintiffs are threatened with irreparable injury and time is of the essence. The general election is scheduled for November 4, 2014, and early voting will now, because of this Court's and the Sixth Circuit's decision in *NAACP v. Husted*, No. 14-404, commence on September 30, 2014. Any impediment to First Amendment activities, even for brief periods, causes irreparable harm. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Defendant, meanwhile, will suffer no injury should the Court order Earl and Linnabary placed on early voting ballots and all other ballots that being sent out before resolution of Plaintiffs' Fourth Motion for Preliminary Injunction. Should Defendants prevail, the names can be removed from future ballots. Any votes cast for Earl and/or Linnabary can be ignored. Ohio law, moreover, recognizes that candidates can and should be restored whenever possible to ballots -- even up until the day of the election. See *State ex rel. Scott v. Franklin County Board of Elections*, 139 Ohio St. 3d 171, 173 (2014) ("this court has held that an election case is moot once voting is *over*. But an election case does not become moot when early voting *begins*. To so hold would be illogical and would make it nearly impossible for some candidates who are denied ballot access to seek relief in court.") (citation omitted).

### **CONCLUSION**

For these reasons, Plaintiffs' First Motion for Temporary Restraining Order should be **GRANTED**. Earl and Linnabary should be placed on Ohio's early-voting ballots until such time

as this Court resolves the Plaintiffs' Fourth Motion for Preliminary Injunction.

Respectfully submitted,

s/ Mark R. Brown

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Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I certify that copies of this Motion, accompanying Memorandum in Support and attached Proposed Order were 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

Mark R. Brown