

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs,

Case No. 2:13-cv-00953

v.

JUDGE WATSON
MAGISTRATE JUDGE KEMP

JON HUSTED, et al.,

Defendants.

ELECTION LAW MATTER
EMERGENCY RELIEF REQUESTED

PLAINTIFFS' OMNIBUS MOTION TO SUPPLEMENT RECORD

Pursuant to this Court's July 6, 2015 Order, Doc. No. 305, Plaintiffs respectfully move to supplement the record with: (1) the attached Exhibits numbered 2 through 12; (2) documents previously submitted by Matt Borges on September 17, 2015 in the above-styled case, *see* Doc. No. 327; and (3) a citation to the Supreme Court's decision on June 29, 2015 in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S Ct. 2652 (2015).

In support of this Motion, Plaintiffs include a Memorandum of Law, marked as Exhibit 1, and proffer the following evidentiary Exhibits:

Exhibit 2: Deposition of Terry Casey, dated Sept. 16, 2015 (hereinafter "Casey Dep.");

Exhibit 3: Plaintiffs' Deposition Exhibits for Casey Deposition, dated Sept. 16, 2015, marked Plaintiffs' Deposition Exhibits 1 and 2 (hereinafter "Casey Dep.Ex.1" and "Casey Dep.Ex.2") with pages referenced by their Bates-stamped identifications;

Exhibit 4: Deposition of Intervenor-Defendant-Felsoci, dated Sept. 16, 2015 (hereinafter "Felsoci Dep.");

Exhibit 5: Terry Casey's Motion to Dismiss and Response filed in the matter of *Earl v. Casey*, No. 2015G-004 (Ohio Elections Commission 2015);

Exhibit 6: The Kasich Campaign's Motion to Dismiss filed in the matter of *Earl v. Casey*, No. 2015G-004 (Ohio Elections Commission 2015);

Exhibit 7: E-mail from Jan Strickland to John Zeiger, dated Feb. 24, 2015.

Exhibit 8: Chapter written by Todd Donovan & Daniel A. Smith, *Identifying and Preventing Signature Fraud on Ballot Measure Petitions*, in R. M. ALVAREZ, ET AL., ELECTION FRAUD: DETECTING AND DETERRING ELECTORAL MANIPULATION 137, 138-39 (Brookings Institution Press 2008).

Exhibit 9: Letter from Hamilton County Board of Elections to LPO candidate Jerald Robertson, dated August 3, 2015, informing that he had been "decertified" as the LPO candidate at the 2015 general election for mayor of Village of Elmwood Place and letter from Hamilton County Prosecutor's Office to Sherry Poland, dated July 27, 2015, advising her to remove Robertson from 2015 general election ballot.

Exhibit 10: Documents produced by Terry Casey on Oct. 6, 2015 pursuant to Court Order, Doc. No. 334 (hereinafter "Casey Docs."), and referenced by their Bates-stamped identifications;¹

Exhibit 11: Deposition of Matt Borges, dated Oct. 7, 2015 (hereinafter "Borges Dep.");

Exhibit 12: Plaintiffs' Deposition Exhibit for Borges Deposition, dated Oct. 7, 2015, including documents produced by Casey on Oct. 6, 2015² (hereinafter "Borges Dep. Ex.1") marked Plaintiffs' Deposition Exhibit 1(hereinafter "Borges Ex.1") with pages referenced by their Bates-stamped identifications.

A previous filing by Matt Borges in the above-styled case on September 17, 2015, *see* Doc. No.327, includes communications between the law firm of Zeiger, Tigges & Little ("the Zeiger firm") and the campaign committee of Mike DeWine indicating that the Ohio Republican Party had agreed to pay the DeWine Campaign's legal bill owed to the Zeiger firm. *See* Doc. No. 327-1; Doc. No. 327-4. Plaintiffs also respectfully proffer those documents.

Exhibits 2, 3, 4, 5, 6, 7, 10, 11 and 12, together with the documents previously filed by Borges, are relevant to Count Seven in Plaintiffs' Third Amended Complaint. That Count alleges

¹ Counsel for Casey and Felsoci has stipulated to the authenticity and admissibility of these documents, while reserving the right to challenge their relevance.

² Counsel for Casey and Felsoci has stipulated to the authenticity and admissibility of these documents, while reserving the right to challenge their relevance.

that Felsoci, Defendant-Secretary, the Kasich Campaign, and their agents (which Plaintiffs now know also include agents working in the Governor's Office) separately and together engineered Plaintiff-Earl's removal from the Libertarian Party of Ohio's 2014 primary ballot in violation of the First and Fourteenth Amendments to the United States Constitution. *See* Plaintiffs' Third Amended Complaint, Doc. No. 188, at PAGEID # 3811 to PAGEID # 3836, ¶¶ 98 - 308; PAGE ID # 3845 to PAGEID # 3846, ¶¶ 359-65.

Felsoci, *id.* at PAGEID # 3838 to PAGEID # 3839, ¶¶ 319-322, Defendant-Secretary, *id.* at PAGEID # 3838, ¶ 315, and the ORP and its agents (including Casey, Borges, the Kasich Campaign, as well as employees of the Governor's Office), *id.* at PAGEID # 3839 to PAGEID # 3840, ¶¶ 324-325, were alleged at all relevant times to be state actors within the meaning of the First and Fourteenth Amendments to the Constitution and were acting "under color of" state law within the meaning of 42 U.S.C. § 1983. Under Count Seven of Plaintiffs' Third Amended Complaint (which incorporates all prior allegations in Plaintiffs' Third Amended Complaint), Felsoci's, Defendant-Secretary's, the ORP's, the Kasich Campaign's, and their agents', actions separately and together violated the First and Fourteenth Amendments to the United States Constitution.

Exhibit 8 is a study authored by Professors Donovan and Smith that is relevant to Plaintiffs' facial challenge to Ohio's "employer statement rule," O.R.C. § 3501.38(E)(1), under Count Six of Plaintiffs' Third Amended Complaint. It concludes that there is no clear pattern demonstrating that paying for signatures increases invalidity rates and that "[i]f ink-stamped [circulators' signatures on] petitions are assumed to come from paid circulators, it suggests this class of paid circulators ... was less likely to have their signatures invalidated." *See* Exhibit 8 at 137, 138-39.

Exhibit 9 is relevant to Plaintiffs' continuing request for **EMERGENCY RELIEF** restoring the Libertarian Party of Ohio (LPO) and its candidates to the ballot in time for both the November 2015 general election and the December 2015 qualifying deadline for the 2016 primary. Plaintiffs filed previous motions for emergency relief that have not yet been resolved on November 10, 2013, *see* Doc. No. 17 at PAGEID # 134-39 (challenging in Count Five of their Complaint S.B. 193 under Ohio's Constitution),³ and again on February 27, 2015, *see* Doc. No. 284 at PAGEID # 7460 (requesting that status quo and Plaintiff-LPO's qualified status be maintained pending conclusion of case).⁴ Both motions have been fully briefed and remain pending.

The Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S Ct. 2652 (2015), is relevant to Count Five in Plaintiffs' Third Amended Complaint, which alleges that the Ohio Constitution overrides S.B. 193. The Supreme Court' decision establishes that state constitutional provisions override state legislative regulations of federal elections.

Plaintiffs respectfully request **EXPEDITED BRIEFING**.

³ In its Order granting preliminary relief, dated January 7, 2014, the Court observed that Plaintiffs' request for preliminary and permanent relief under the Ohio Constitution need not be resolved "at this juncture." *See* Doc. No. 47 at PAGEID #836.

⁴ Defendant-Secretary opposed that motion and informed the Court that it no longer considered the Libertarian Party of Ohio (LPO) a qualified political party. *See* Doc. No. 286. That motion remains pending, and the Secretary recently reiterated to Plaintiffs on September 29, 2015 that he no longer considers the LPO a qualified political party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Motion, supporting Memorandum of Law, and Attached Exhibits 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