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.
_____/

PLAINTIFFS' REPLY TO DEFENDANT-SECRETARY'S AND INTERVENOR-DEFENDANT-FELSOCI'S RESPONSES TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. Changing Ballots is Not Physically Impossible or Prohibitively Expensive.

Plaintiffs in their Response to the Secretary's Motion for Summary Judgment point to a number of Supreme Court cases and cases from lower courts ordering that candidates be placed on ballots within the 45-day window the Secretary now complains about. The Ohio Supreme

Court's decision in *State ex rel. Scott v. Franklin County Board of Elections,* 139 Ohio St. 3d 171, 173 (2014), which placed a candidate on Ohio's May 6, 2014 ballot on April 22, 2014, is perhaps the most recent. These cases all prove that ballots can physically be corrected within 45 days of the election. They can be corrected with two weeks of an election.

The Secretary now claims that it is "simply not possible to accomplish what Plaintiffs want." Defendant-Secretary's Memorandum in Opposition, Doc. No. 210, at PAGEID # 4423. Further, the Secretary claims that local boards are "physically unable to change the ballot before early voting starts on September 30, 2014." *Id*. The Secretary also asserts, however, that "it would be extremely burdensome and expensive for county boards to redo their ballots at this late date." Id. at PAGEID # 4428. He claims that it "could exceed four million dollars." *Id*.

The Secretary's charge that it is not possible to change ballots by September 30 is implausible. Even the Secretary admits that it can be done; it would simply (according to the Secretary) be "burdensome and expensive."

In regard to the Secretary's claim that the cost is prohibitive and the burden too large, the arguments previously made (and not made) by the Secretary, coupled with contemporaneous documentation from local boards of elections in the run-up to Ohio's May 6, 2014 primary, prove that neither is credible.

A. The Secretary Did Not Argue Before the Primary that Changing the Ballots Cost too Much or Could Not Be Accomplished.

Plaintiffs sought to regain access to the May 6, 2014 primary by amending their suit on March 7, 2014. They had been removed on that same day, March 7, 2014, by the Secretary. This was approximately 60 days before the primary election. At no time did the Secretary argue that changing the ballots was impossible or unduly expensive. Indeed, the Secretary conceded to

the Court that it could be readily accomplished because most counties used electronic ballots. (The Court later relied on this fact when it explained why it was denying a stay. *See* Doc. No. 85.)

The Court on March 19, 2014, see Doc. No. 80, denied preliminary relief. Plaintiffs immediately took an expedited appeal while seeking a stay from the District Court. *See* Docs. 81 and 82. The Secretary objected to preliminary relief and stays both before this Court and in front of the Sixth Circuit.

Still, even though time was even more pressing -- the 45-day deadline that the Secretary now claims is impossible to satisfy fell on March 22, 2014 -- the Secretary did not argue before this Court or the Sixth Circuit that it was physically impossible to timely change the ballots. *See* Brief for Appellee-Defendant Secretary of State, Sixth Circuit Doc. No. 31 (April 10, 2014); Ohio Secretary of State's Contra Plaintiffs' Motion for an Emergency Injunction and to Expedite Appeal (March 21, 2014) (attached as Doc. No. 207-8 to Plaintiffs' Motion Response to Secretary's Motion for Summary Judgment). Nor did the Secretary argue that it would cost millions of dollars.[1] *Id.* Indeed, he did not even argue that it would be prohibitively expensive. *Id.*

Were either physical capability or cost true problems, one would suspect the Secretary would have made those arguments in March and April of 2014 to prevent Plaintiffs from gaining access to the ballot or have their votes counted. He did not make those arguments because he knew they were not true, let alone credible.

[1] The Secretary also demands a bond from Plaintiffs to cover the four million dollar cost. Doc. No. 210, PAGEID # 4428. Plaintiffs are aware of no court ever requiring a bond of voters or candidates who were attempting to vindicate their constitutional rights under the First and Fourteenth Amendments -- let alone a bond of four million dollars. The Secretary does not cite any authority to support his demand.

B. Changing Ballots During the Primary Was Not Too Costly or Overly Burdensome for Local Election Boards.

The experiences of local election boards in the run-up to the May 6, 2014 primary prove that ballots can be corrected without undue expense and without disrupting elections. Through discovery conducted by Plaintiffs following the May 6, 2014 primary, Plaintiffs have uncovered a trove of e-mails between Matthew Damschroder, Pat Wolfe, and local election boards about the status of Earl's and Linnabary's names on local election ballots. A sample of these documents is attached as Exhibit 1. These documents prove that before, on and after March 22, 2014, which was within the 45-day deadline the Secretary now complains about, not one election board or official complained that it was physically impossible and/or unduly costly to correct their ballots by adding or removing Earl's and/or Linnabary's names. The Secretary for his part has failed to produce a single contemporaneous document suggesting that correcting ballots within the 45-day window is physically impossible or financially debilitating.

Hardin, Meigs and Clinton Counties offer examples. The Hardin County Board of Elections, through Sandy, sent an e-mail to Pat Wolfe at the Secretary's Office on March 22, stating: "Just wanted to let you know that we (Hardin County) changed our Libertarian layout. My IT came in Friday morning; his wedding day and did it for us." *See* Exhibit 1. Friday morning was March 21, 2014. Sandy did not report exorbitant costs or physical impossibility. Her technician was obviously able to make the changes in short order; after all, he was getting married later that day!

Becky Johnston from Meigs County queried of Wolfe on March 20, 2014: "Can we just put up a sign for the Libertarians or do we have to remove them?" *See* Exhibit 1. She said nothing about extreme hardship, impossibility or financial meltdown. And from Clinton County

that same day, the question was simply: "Who is changing their ballot or leaving as is at this late date?" *See* Exhibit 1. Clinton County did not complain about impossibility or cost.

Of course, this is not to say that local election boards did not grumble and groan. Johnston on March 14, 2014 complained to Wolfe:

> Libertarians on the ballot or off the ballot? Our ES&S ballot layout person says that most counties are leaving them on the ballot because there will not be enough time to reprogram to get new ballots. I have tried to call Carrie, but to no avail. Here we are again, stuck between a rock and a hard place. The e-mail we received from the Secretary did not really indicate for us to remove their names from the ballot or to leave them on. Any suggestions?

See Exhibit 1. But there is nothing indicating she felt the task absolutely could not be accomplished, either physically or because of financial concerns.

In the end, on March 19, 20 and again on March 24, 2014, Wolfe informed local election boards to use a form prepared by Matthew Damschroder: "Per Director Damschroder's e-mails of March 19 and 20: ..... all county boards of elections are further instructed to use the attached official form for the Libertarian Party's primary election on May 6." *See* Exhibit 1 (ellipsis original). This apparently solved any remaining problems. Neither Wolfe nor Damschroder said anything about physical impossibility or prohibitive expense. They sent a form to be used by local election boards. No financial crisis ensued; no computer meltdowns were reported. The primary was held without any apparent additional cost. No contemporaneous documentation to Plaintiffs' knowledge suggests there was an insurmountable problem. At least the Secretary has produced none.

C. Sufficient Time Remains to Add or Remove Names.

Today is September 19, 2014, which is still more than 45 days before the November 4,

2014 election. Already the Secretary claims that it is impossible to correct the ballots. The Secretary did not make this argument before this Court in March of this year nor did it attempt the argument before the Sixth Circuit in April. The reason is simple; the argument is not supported by the evidence. Ballots can legally, physically, and with little extra cost above-and-beyond overhead be corrected. Names can, in fact, be added and removed.

Because the Secretary argued at the status conference that adding names was difficult within the 45 day-window -- a point with which Plaintiffs do not agree -- Plaintiffs offered in their Motion for Temporary Restraining Order a ready solution; place the names of Earl and Linnabary on the ballots until the Preliminary Injunction hearing is concluded. If the Secretary prevails, their names can be removed, notices can be sent out, votes can be ignored. This is exactly what happened in many counties during the May 6, 2014 primary. It seems the preferable option.

Either way, whether Earl's and Linnabary's names are to be added or removed, there is no physical or financial impediment to do doing so. This is true today and it will be true on October1, 2014. Ballots can be corrected.

II. Plaintiffs' Did Not Know Smith was DeWine's Lawyer.

Felsoci argues that Bob Bridges knew at the time of the protest hearing that Smith represented DeWine. Laches, Felsoci, claims therefore defeats the Plaintiffs' claim under Count Nine. The evidence will show that Bridges did not know until after the protest was concluded on March 7, 2014 that Smith was DeWine's attorney.

Bridges testified at his deposition that he learned in a face to face meeting with Linnabary that Smith was somehow involved in the *Susan B. Anthony* litigation. Although Bridges testified at his deposition that it was during the protest hearing, he also testified that he could not recall the

specific date. Bridges Deposition at 103, Doc. No. 201. Linnabary, meanwhile, testified at his deposition that he did not know of Smith's involvement until after the decisions by Smith and the Secretary were handed down on March 7, 2014. See Linnabary Deposition at 41-44, Doc. No. 202-1. Linnabary testified that he notified his attorney, Brown, that same day, March 13, 2014. *Id.* Bridges could not have known until Linnabary knew, which was one week after March 7, 2014. To the extent he testified that he knew beforehand that Smith was somehow involved, Bridges simply was mistaken. In any case, the matter presents, at bare minimum, a genuine issue of material fact for the evidentiary hearing.

Further, even if Bridges knew before March 7, 2014 that Smith was somehow involved in the *Susan B. Anthony* litigation, he could not have known of the scope and duration of Smith's involvement. That was not revealed until the summer of 2014 when Smith was finally deposed. The Associated Press first reported that "DeWine's office confirmed Smith held an appointment from Feb. 27, five days before the Libertarians' hearing, through June 30" on September 2, 2014. Julie Carr Smyth, Ohio Libertarians tossed from ballot eye GOP ties, Cincinnati.com, Sept. 2, 2014.[2] Plaintiffs had no knowledge of this lengthy "appointment," which overlapped completely (and beyond) with Smith's appointment as the hearing officer, until the day the story was released.

Felsoci additionally argues that one of Plaintiffs' two lawyers, Mark Brown, knew that Smith was acting as Mike DeWine's lawyer during the protest hearing on the morning of March 4, 2014: "[T]here is absolutely no doubt that he knew, before the protest hearing began, that Professor Smith was representing Attorney General DeWine, but Professor Brown chose to say nothing about it." Memorandum of Felsoci in Opposition to Plaintiffs' Motion for Temporary

Restraining Order ("Felsoci Response), Doc. No. 209 at PAGEID 4407. Felsoci's charge is "absolutely" false, as made clear by Brown's attached Declaration. *See* Exhibit 2.

Brown first learned that Smith wrote DeWine's amicus brief in the *Susan B. Anthony* litigation before the Supreme Court of the United States on March 13, 2014, when Steven Linnabary called it to his attention. Brown did, in fact, circulate an e-mail to his colleagues (including Professor Smith whose name is on the group list) at Capital Law School early in the morning on March 4, 2014 (about an hour before protest hearing began) pointing to a post in Ballot Access News that reported Ohio's concession in the case. But the item in Ballot Access News did not mention Smith's involvement. Neither did Brown's e-mail to his colleagues. Had Brown known that Smith wrote the brief, he would have conveyed that fact in the e-mail to his colleagues.

Professor Smith should be able to corroborate Brown's recollection of events at the evidentiary hearing scheduled for September 29, 2014. As stated in Brown's Declaration (attached), either after the hearing or during a late recess on March 4, 2014 Brown bumped into Smith in the hall outside the hearing room. In a brief conversation that lasted perhaps one or two minutes, Brown remembers asking Smith if he had heard about Ohio's concession in the *Susan B. Anthony* case. If Brown had read the brief that morning or otherwise had known that Smith wrote it, he would not have asked Smith if knew about Ohio's concession. He would have known that Smith knew.

Smith responded that he knew about it because he had 'worked on it', or words to that effect. Brown did not understand Smith's comment to mean that Smith wrote the brief, signed it,

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[2] http://www.cincinnati.com/story/news/politics/elections/2014/09/02/ohio-libertarians-tossed-

was DeWine's pro bono lawyer, or had a continuing connection with DeWine and the case. Because it is not unusual for law professors (especially experts like Smith) to assist with litigation in various capacities, Brown did not think anything unusual about it. Contrary to Felsoci's claim that there is "absolutely no doubt" that Brown knew on the morning of March 4, 2014 that Smith had authored DeWine's brief, Brown did not read Smith's brief or know about Smith's involvement as an attorney for DeWine until March 13, 2014 when Linnabary brought it to his attention.

III. Neither Plaintiffs Nor Brown Were Involved in Michigan Ballot Access Litigation.

Felsoci argues that because Plaintiffs were involved in *Gelineau v. Johnson,* 896 F. Supp.2d 680 (W.D. Mich. 2012), and *Libertarian Party of Michigan v. Johnson,* 905 F. Supp. 2d 751 (E.D. Mich. 2012), "one must wonder how they could repeat this mistake in the instant case?" Felsoci's Response at PAGE ID 4404 n.6. Neither Plaintiffs nor their attorney, Brown, was involved in the Michigan ballot access litigation described by Felsoci. The Libertarian Party of Ohio has no connection with the Libertarian Party of Michigan, and Plaintiffs played no role in that case. Nor was Brown involved in that litigation. As he makes clear in his attached Declaration, Brown joined the *Johnson* case as co-counsel after it was appealed to the Sixth Circuit. He was not involved with either case before that. *See* Exhibit 2.

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CONCLUSION

Plaintiffs' Motion for Temporary Restraining Order should be **GRANTED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of this Reply 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
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