

## MEMORANDUM

**TO:** Libertarian National Committee

**FROM:** Oliver Hall

**DATE:** December 10, 2016

**SUBJECT:** Special Counsel's Report

### Introduction

This report summarizes my work as Special Counsel to the Libertarian National Committee since I last submitted a report on July 14, 2016. The report is a privileged attorney-client communication, but only relates facts, and not legal advice. As such, it may be appropriate for sharing with a wider audience, including members of the Libertarian Party, at your discretion.

### General

As Special Counsel to the LNC, I have reviewed documents and correspondence, responded to questions, and provided legal advice and services on a variety of matters as needed or requested. In particular, I researched and resolved queries relating to the following: compliance with ballot access laws in the District of Columbia, New Hampshire and Ohio; compliance with Massachusetts campaign finance law; construction of the Presidential Transition Act; campaign finance law governing debate staging organizations; and requirements for retaining ballot access under Ohio law.

I also provided the following services: coordinated the LNC's potential sponsorship of Massachusetts ballot initiative event involving Governor Weld; negotiated terms of proposed Joint Operating Agreement with Johnson/Weld Campaign counsel; drafted campaign finance authorization for coordination between LNC and Indiana state party; sent demand letters and negotiated for inclusion of Libertarian candidates in event sponsored by Iraq and Afghanistan Veterans' Association and in debates in Colorado and Illinois; sent Government Services Administration a demand letter seeking national security briefings and other services for Governor Johnson; negotiated settlement of Pennsylvania petitioner's claim; ensured Pennsylvania election officials corrected omission of Libertarian ticket from absentee ballots; evaluated proposed litigation on behalf of Tennessee state party; responded to notice of bequest from estate of Frank Welch Clinard; reviewed briefs and 9th Circuit opinion and provided recommendation regarding possible filing of amicus brief in *Wilson v. Lynch*, No. 14-15700 (9th Cir. August 31, 2016).

I provided litigation assistance in several pending actions involving the LNC or a state party affiliate, including: filed an emergency application for relief with the United States Supreme Court in *Libertarian Party of Ohio v. Husted*, No. 16-3537 (6th Cir.); attended

deposition, assisted settlement negotiations and served subpoenas on District of Columbia-based defendants in *Libertarian National Committee v. Holiday*; reviewed the petition for rehearing *en banc* and provided comments and consulted on the anticipated filing of a petition for certiorari in *Libertarian Party of Kentucky v. Grimes*; and consulted on settlement negotiations in *Libertarian Party of Maine v. Dunlap*.

Finally, I drafted or reviewed and approved multiple contracts, including those executed with the following: outreach consultant; graphic design and branding consultant; affiliate development specialist; contract journalist and content developer; and petition circulator contracts for Connecticut, Illinois, New York and Ohio.

### **Litigation**

*Arizona Libertarian Party v. Reagan*, No. 2:16-cv-01019: This case challenges Arizona's newly enacted law that drastically increases signature requirements for Libertarian Party candidates seeking access to AZLP's primary ballot. It requests declaratory and injunctive relief. The Plaintiffs filed an emergency motion for preliminary injunctive relief in May 2016, which the Court denied without reaching the merits on May 27, 2016. The Plaintiffs therefore filed a new motion for preliminary injunction, which does not request emergency relief, which the Court also denied, citing a lack of evidence in the record. The case is now in the discovery period and we are in the process of developing the evidentiary record. (I represent the Plaintiffs outside the scope of my representation of the LNC.)

*Constitution Party of Pa. v. Cortes* – On July 23, 2015, the federal district court in Philadelphia held that Pennsylvania's ballot access scheme for minor parties is unconstitutional as applied. Specifically, the court held that 25 P.S. § 2911(b), the provision that requires minor parties to submit nomination petitions containing a specified number of signatures, and 25 P.S. § 2937, the provision that authorizes private parties to challenge the sufficiency of those nomination petitions, are unconstitutional as applied to the plaintiffs, including the Libertarian Party of Pennsylvania. The defendants are the Pennsylvania elections officials charged with enforcing the provisions. They appealed the district court decision to the Third Circuit Court of Appeals. The Third Circuit affirmed on June 2, 2016. On July 1, 2016, the District Court entered an order significantly lowering the signature requirements for minor party nomination petitions, and enjoining the assessment of costs against candidates who defend their nomination petitions when challenged pursuant to Section 2937. However, the Court also imposed county-based signature distribution requirements, which are likely unconstitutional under *Moore v. Ogilvie*, 394 U.S. 814 (1969). We have therefore appealed this limited aspect of the Court's order. Briefing will be complete in December 2016, and oral argument, if any, will likely take place in Spring of 2017. (I represent the Plaintiffs outside the scope of my representation of the LNC.)

*Gary Johnson v. Commission on Presidential Debates*, No. 1:15cv-1580 (D.D.C.) – This case was filed on September 28, 2015, and asserts antitrust claims under the Sherman and

Clayton Acts. It asserts that the Commission on Presidential Debates is a commercial enterprise and is prohibited from holding debates and excluding all but the major party candidates. The Defendants filed a motion to dismiss, which was granted in August. The Plaintiffs appealed. The appeal is No. 16-7107. Plaintiffs' counsel is Bruce Fein: (202) 465-8727; [bruce@feinpoints.com](mailto:bruce@feinpoints.com).

*Level the Playing Field v. Federal Election Committee*, No. 1-15-cv-01397: This case challenges the FEC's failure to act upon, and constructive denial of, an administrative complaint against the Commission on Presidential Debates. The Plaintiffs filed an Amended Complaint in January 2016, to reflect that the FEC formally denied the administrative complaint in December 2015. They moved for summary judgment on April 6, 2016, and the FEC filed a cross-motion for summary judgment. Briefing on the summary judgment motions was completed in July 2016, and the motions remain pending. The case has generated some interest, with amicus briefs filed by the Commission on Presidential Debates and the Independent Voters Project. Plaintiffs' counsel is Alexandra Shapiro, Shapiro Arato LLP: [ashapiro@shapiroarato.com](mailto:ashapiro@shapiroarato.com); 212-257-4881.

*Libertarian National Committee v. Federal Election Committee*, No. 16-cv-0121: This case challenges the FEC's treatment of a bequest from Joseph Shaber, deceased, to the LNC, which imposes an annual limit on the amount of the bequest that may be distributed to the LNC. The FEC filed a motion to dismiss, which was fully briefed on May 20, 2016, and remains pending. Plaintiffs' counsel is Alan Gura, Gura & Possessky: [alan@gurapossessky.com](mailto:alan@gurapossessky.com); 703.835.9085.

*Libertarian National Committee v. Holiday*, No. 3:14-cv-00063 (E.D. Ky.) – This case challenges a debate requirement limiting participation to candidates with “a realistic chance of winning” the election. It also requires that the candidate have raised at least \$100,000 for the campaign. On October 11, 2014, the court denied the plaintiff candidate injunctive relief that would permit him to participate in the debate. In September 2015, the judge ordered that there be a trial, and the state answered the Complaint. On February 5, 2016, the Court entered an order granting in part the Defendants' motion for partial dismissal on the pleadings. Plaintiffs are currently in the process of taking discovery. Plaintiffs' counsel is Chris Wiest: [chris@cwiestlaw.com](mailto:chris@cwiestlaw.com); 859-486-6850.

*Libertarian Party of Arkansas v. Martin*, No. 4:15cv-635 (E.D. AR.) – This case was filed on October 14, 2015. It challenges the state requirement that new or minor parties must choose all of their nominees except presidential nominees by November of the year before the election. The parties have taken discovery. In April 2016, the Defendants sent the Plaintiffs an extensive request for production of documents and interrogatories encompassing a wide range of communications relating to nomination procedures and other internal party matters. The Court held a hearing in the case on July 11, 2016, and entered a decision on July 15, 2016, which held that the state can't require the party to hold its nominating convention before the major parties hold their primaries. This will permit the party to hold its convention in May 2018. Plaintiffs' counsel is Jim Linger: (918) 585-2797; [bostonbarristers@tulsacoxmail.com](mailto:bostonbarristers@tulsacoxmail.com).

*Libertarian Party of CT v. Merrill*, No. 3-15-cv-01851: This case challenges Connecticut's ban on out of state petition circulators. On January 27, 2016, the Court granted our motion for preliminary relief and enjoined the prohibition. In August 216, the state agreed not to continue defending the laws, and the case is being settled.

*Libertarian Party of Illinois v. Illinois State Board of Elections*, No. 1:12-cv-2511 (N.D. Ill.) – This case challenges Illinois' unique statute that requires new parties, but not old parties, to run a full slate of candidates, as well as the state's June petitioning deadline. The District Court ruled in the Plaintiffs favor, and the state appealed in May 2016. The appeal is pending, with briefing to be completed by July 15, 2016. Plaintiffs' counsel was Gary Sinawski, with local counsel William Malan, (312) 415-0800; [billm@malanlaw.com](mailto:billm@malanlaw.com).

*Libertarian Party of Kentucky v. Grimes*, No. 3:15-cv-86: This case challenges Kentucky's requirement that minor political parties submit separate petitions to obtain ballot access for each of their candidates, unless the party's presidential candidate appeared on the ballot in the previous election and received more than 2 percent of the vote (in which case, the party may place its entire slate of candidates on the ballot for the next four years). On July 8, 2016, the District Court entered an order granting summary judgment to the Defendants. The Plaintiffs filed an appeal and requested an expedited schedule. On July 14, 2016, the Court of Appeals for the Sixth Circuit granted Plaintiffs' motion to expedite, and ordered that all briefing in the appeal be completed by July 28, 2016. The Sixth Circuit affirmed. Plaintiffs are preparing a petition for certiorari, which is due in early 2017. Plaintiffs' counsel is Chris Wiest: [chris@cwiestlaw.com](mailto:chris@cwiestlaw.com); 859-486-6850.

*Libertarian Party of Maine v. Dunlap*: This case challenges Maine's statute requiring new parties to submit 5,000 registered members in December of the year prior to an election year, as well as related restrictions. The Complaint and a motion for preliminary injunction were filed in January 2016, and a hearing on the motion was held in March. The Court originally denied the motion for preliminary injunction, but we filed a motion for reconsideration, which was granted. The Court concluded the state party has shown a likelihood of success on the merits, and ordered the Secretary of State to credit it with the 4,513 voters it had submitted as registered members, and to allow the party until July 12, 2016 to register 487 new members. The Secretary of State of Maine has now certified that the Libertarian Party of Maine has registered more than enough members to be a ballot-qualified political party in the 2016 election cycle. Plaintiffs are in the process of negotiating a final settlement with the state. Plaintiffs' counsel is John Branson of Branson Law Office: [jbranson@bransonlawoffice.com](mailto:jbranson@bransonlawoffice.com); 207-780-8611.

*Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953 (S.D. Oh. Oct. 14, 2015) – this case raises several claims, including an equal protection challenge to the state's statute requiring "new" parties (including LPO) to submit a petition with 30,000 signatures in order to re-qualify as a party, and a claim that a financial disclosure requirement imposed on the party's circulators had been selectively enforced. In October 2015, the court granted the defendants summary

judgment on the challenge to the new party qualification statute, and held that the selective prosecution claim requires more evidence. On May 20, 2016, the court granted the defendants summary judgment on the selective prosecution claim. LPO appealed, the Sixth Circuit affirmed. LPO filed its petition for certiorari on October 26, 2016. Plaintiffs' counsel is Mark Brown: [mbrown@law.capital.edu](mailto:mbrown@law.capital.edu).

*Libertarian Party of New Hampshire v. Gardiner*, No. 15-2068 (1st Cir) – This case was filed in 2014 to challenge the law prohibiting a party from circulating a petition during and odd year. The plaintiffs lost in the district court and filed their notice of appeal on September 14, 2015. The First Circuit entered an opinion affirming the district court on December 2, 2016. Plaintiffs' counsel is the ACLU of Connecticut.

### **Conclusion**

I look forward to discussing this report with the LNC during its next meeting. Should you have questions or need further information prior to that time, please contact me at 617-953-0161 or [oliverbhall@gmail.com](mailto:oliverbhall@gmail.com).