

**IN COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT**

**Franklin County, Ohio**

**NO. 16APE-03-161**

**REGULAR CALENDAR**

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**CHARLES EARL,**

**Appellant,**

**VS.**

**OHIO ELECTIONS COMMISSION,**

**Appellee.**

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**On Appeal from the Franklin County  
Court of Common Pleas**

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**BRIEF FOR APPELLANT**

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## ASSIGNMENTS OF ERROR

1. The Common Pleas Court erroneously ruled that the full Ohio Elections Commission (hereinafter "the Commission") could only resolve Earl's Complaint based on lack of jurisdiction, insufficient pleadings, or lack of probable cause. *See Earl v. Ohio Elections Commission*, No. 15CV-05973, OA211 at K64-65 (Franklin Court of Common Pleas, Feb. 29, 2016) (hereinafter "*Earl v. OEC*").
2. The Common Pleas Court did not apply the proper analysis, announced in *Common Cause/Ohio v. Ohio Elections Commission*, 150 Ohio App.3d 31, 2002-Ohio-5965, 779 N.E.2d 766 (10th Dist.), for assessing whether a dismissal by the full Commission is based on a lack of probable cause. *See Earl v. OEC*, OA211 at K63-65.
3. The Common Pleas Court erred in concluding that the Commission's record "absolutely refuted" the possibility that the full Commission's dismissal might have been on the merits. *See Earl v. OEC*, OA211 at K63.

4. The Common Pleas Court erred in concluding that it lacked jurisdiction over Appellant's administrative appeal. *See Earl v. OEC*, OA211 at K65.

**ISSUES PRESENTED FOR REVIEW**

1. Whether the full Commission lacks authority to rule on the merits of an administrative complaint that has been properly filed and referred to it for preliminary review by its Legal Director. (First Assignment of Error).

2. Whether this Court's holding in *Common Cause/Ohio v. Ohio Elections Commission*, 150 Ohio App.3d 31, 2002-Ohio-5965, 779 N.E.2d 766 (10th Dist.), governs whether there may be appellate review of a dismissal entered by the full Commission. (Second Assignment of Error).

3. Whether a dismissal by the full Commission that is based on legal arguments and affirmative defenses raised by the respondents may be appealed. (Third and Fourth Assignments of Error).

4. Whether the full Commission's dismissal in this matter was necessarily based on a lack of probable cause and therefore not appealable. (Third and Fourth Assignments of Error).

### **STATEMENT OF THE CASE**

This matter has its genesis in the 2014 gubernatorial election in Ohio. Because the Libertarian Party of Ohio (LPO) had on January 7, 2014 won back its right to participate in Ohio's elections, *see Libertarian Party of Ohio v. Husted*, No. 13-953, District Court Doc. No. 47 (S.D. Ohio, Jan. 7, 2014),<sup>1</sup> its presence on the ballot threatened Governor Kasich's hegemony in Ohio. Not because its candidate, Charlie Earl, would win the election; but because Earl threatened to siphon votes away from Kasich's campaign.

Of course, the Democratic challenger, Ed Fitzgerald, was soon to falter in his effort to unseat Kasich. But when the LPO and Earl were

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<sup>1</sup> Documents filed in Earl's federal District Court proceeding (No. 13-953) and denoted "Doc. No. \_\_\_" can be accessed through the Moritz Election Law web page using the dates of their filings. *See* <http://moritzlaw.osu.edu/electionlaw/litigation/LPOHusted.php>. The January 7, 2014 Order restoring the LPO to the ballot can be found at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/PIorder.pdf> (last visited March 31, 2016).

restored to the ballot in January of 2014, Fitzgerald's problems were weeks away. When Earl qualified, Kasich's campaign became concerned that Earl could draw votes away from Kasich in the general election. Earl had to be stopped.

Kasich succeeded in having Earl removed, but it was not easy. As the record makes clear in this case, it cost almost \$600,000. For legal and political reasons, the Kasich Campaign went to great lengths to distance itself from Earl's removal. It constructed a "secret client," Terry Casey, to take care of the needed financial transactions. It was Casey, a secret operative, who hired the lawyers (the Zeiger firm or "ZTL") to remove Earl. Casey hired the Zeiger firm; Casey received the bills from the Zeiger firm; Casey agreed to insure that the bills -- which came to \$600,000 -- were paid.

Political espionage is a nasty business. When allowed to prosper in the shadows, it grows. It infects. Soon, the political process is consumed by this cancer. Only public disclosure and strident enforcement can prevent it. This State's campaign finance laws must be enforced. This case is about enforcing Ohio's plain and understandable campaign

finance laws. It is about preventing political espionage like that perpetrated by the Kasich Campaign.

### **FACTS**

Appellant Earl submitted a sufficient number of signatures to run in the LPO's 2014 primary. He was duly certified to do so by Ohio's elections officers. Then, mysteriously, a last minute protest was lodged against him by an ostensible LPO member, Gregory Felsoci. Unknown at the time (and for several months thereafter), Felsoci was (unknowingly) an agent for Casey and the Kasich Campaign.<sup>2</sup>

Earl immediately challenged his ejection by the Secretary in federal court. Because the LPO and Earl were already in federal court challenging Ohio's newly passed law, S.B. 193, Earl on March 7, 2014 amended his federal complaint to challenge his removal from Ohio's

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<sup>2</sup> Although Casey has repeatedly argued that his reason for protesting Earl was 'improper' support lent by Democrats, the hearing officer (Professor Bradley Smith) concluded that this was not true. Neither the Democratic Party, the LPO nor Earl did anything illegal. Earl was removed from the ballot because one of his circulators, Oscar Hatchett, Jr., failed to disclose that he was paid by LPO to circulate Earl's petitions -- a fact that LPO never denied.

ballot. Felsoci (with Casey's "secret" support) immediately intervened in federal court in order to continue his effort to keep Earl off the ballot.

Senate Bill 193 was the Ohio Republican Party's (ORP) first attempt to keep the LPO from running a gubernatorial candidate in the 2014 election. It was hurriedly enacted on November 6, 2013 with Governor John Kasich's signature. In addition to denying minor parties the primaries they had always enjoyed and setting huge signature requirements for new parties, Senate Bill 193 dissolved the LPO. Senate Bill 193 kicked the LPO off the ballot. It was plainly a partisan measure<sup>3</sup> to assist Kasich's re-election campaign. No Democrats joined the six

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<sup>3</sup> Republican efforts to dislodge Libertarian candidates are not confined to Ohio. For instance, the Republican National Committee (RNC) the week of March 28, 2016 filed an amicus brief in a New Hampshire case in support of keeping the Libertarian Party of New Hampshire off the 2016 ballot. *See Republican National Committee Files a Brief in Defense of New Hampshire Ballot Access Law*, BALLOT ACCESS NEWS, <http://ballot-access.org/2016/03/31/republican-national-committee-files-amicus-curiae-brief-in-defense-of-new-hampshire-ballot-access-restriction/> (last visited April 1, 2016). Republicans in Illinois attempted to remove the Libertarian Party's gubernatorial candidate in 2014. *See also* Ray Long, *Libertarian Grimm could play spoiler in governor race*, CHICAGO TRIBUNE, Oct. 27, 2014, <http://www.chicagotribune.com/news/local/politics/ct-illinois-libertarian-governor-candidate-met-20141027-story.html> (last visited April 1, 2016).

Republicans who were co-sponsors, and only one Democrat in either House voted for it. In contrast, Republican support was enormous in both Houses. In the Ohio Senate, 20 of 23 Republicans supported it.<sup>4</sup> In the Ohio House, 50 of 59 Republicans voted for it.<sup>5</sup>

Earl argued in federal court: (1) that Ohio's "employer statement" requirement (which Hatchett was found to have violated), *see Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir.), *stay denied*, 134 S. Ct. 2164 (2014); and (2) that Felsoci's targeting of Earl for removal, were both unconstitutional. To support the latter argument, Earl needed to discover who financed Felsoci's protest. If it were either

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<sup>4</sup> *See* Ohio Senate Journal, Nov. 6, 2013, at 1289 (<http://archives.legislature.state.oh.us/JournalText130/SJ-11-06-13.pdf>) (last visited Dec. 11, 2015) (officially reporting votes); <https://legiscan.com/OH/rollcall/SB193/id/304024> (identifying votes by parties) (last visited Dec. 11, 2015).

<sup>5</sup> *See* Ohio House of Representatives Journal, Nov. 6, 2013, at 1326 (<http://archives.legislature.state.oh.us/JournalText130/HJ-11-06-13.pdf>) (last visited Dec. 11, 2015) (officially reporting votes); <https://legiscan.com/OH/rollcall/SB193/id/372340> (identifying votes by parties) (last visited Dec. 11, 2015).

the Kasich Campaign or the ORP,<sup>6</sup> as Earl (and Judge Watson)<sup>7</sup> suspected, either's selectively targeting Earl could potentially violate the federal Equal Protection Clause.

Remarkably, Felsoci did not know who was paying his lawyers. This information was purposely kept from him in direct contravention of Ohio's Rules of Professional Conduct. *See Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 at \*4 (S.D. Ohio 2014) (concluding that Ohio's Rules of Professional Responsibility required the Zeiger firm to inform Felsoci who was paying them). His benefactors' identity was kept from him for a reason -- to prevent Earl from discovering who sabotaged his candidacy. It was kept from him to prevent Earl from

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<sup>6</sup> That the ORP wanted to remove Earl from the ballot to assist Kasich's re-election campaign was no secret. *See Ohio: Two Libertarians Removed From Ballot*, N.Y. TIMES, March 7, 2014, <http://www.nytimes.com/2014/03/08/us/ohio-two-libertarians-removed-from-ballot.html> (last visited April 1, 2016) ("Earl could draw votes from Gov. John Kasich, a Republican, in his re-election bid this fall").

<sup>7</sup> Judge Watson observed that one could infer that "operatives or supporters of the Ohio Republican Party orchestrated the protest." *See Libertarian Party of Ohio v. Husted*, No. 13-953, March 17, 2014, Doc. No. 80 at PAGEID # 2148-49, <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Libertarian93.pdf> (last visited April 1, 2016).

making his constitutional case. It was kept from him to insulate the Kasich Campaign from the political fallout that would accompany media exposure.<sup>8</sup> It was kept from him to prevent him from leaking their campaign finance violation.

It took six months and two federal court orders, *see Libertarian Party of Ohio v. Husted*, 2014 WL 3928293 at \* 9 (S.D. Ohio 2014) (directing Felsoci to produce documents identifying who paid his lawyers); *Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472, 475 (S.D. Ohio 2014) (directing Felsoci to sit for his deposition so that Earl could inquire who paid his lawyers), but Earl on August 15, 2014 discovered that Terry Casey was behind Felsoci's protest. Casey was the secret client who hired Felsoci's lawyers. Now the question turned to who put Casey up to it. Was it the ORP? Was it the Kasich Campaign? Was it both?

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<sup>8</sup> The ORP's belatedly paying Casey's bill, for example, was itself immediate news. *See* Jeremy Pelzer, *Ohio Republican Party paid \$300,000 in legal bills to keep Libertarian candidate off ballot*, CLEVELAND.COM, May 19, 2015, [http://www.cleveland.com/open/index.ssf/2015/05/ohio\\_republican\\_party\\_paid\\_300.html](http://www.cleveland.com/open/index.ssf/2015/05/ohio_republican_party_paid_300.html) (last visited April 2, 2016).

Casey was deposed on August 28, 2014. He testified that he alone was responsible for paying Felsoci's lawyers. Casey denied that the Kasich Campaign or the ORP was involved. (Matt Borges, chair of the ORP, also denied that the ORP was involved.) Less than four weeks later, Earl would uncover e-mails proving that Casey had not told the truth. In addition to invoices establishing that Casey owed Felsoci's (and his) lawyers over \$250,000, Casey finally produced e-mails proving that the Kasich Campaign assisted Casey's efforts to remove Earl.

Earl on April 15, 2015 filed his administrative complaint with the Commission. He filed with his complaint the invoices he had by then uncovered showing that Casey owed more than \$250,000 to Felsoci's lawyers, as well as the dozen or so e-mails Casey had reluctantly produced in September 2014. The invoices, Casey's testimony and the e-mails, Earl argued, proved that Casey's agreement to pay Felsoci's lawyers constituted an impermissible in-kind contribution to the Kasich Campaign.

Casey and the Kasich Campaign immediately moved to dismiss Earl's administrative complaint. In addition to offering unique legal

interpretations of Ohio's campaign finance laws, both (for the first time) revealed that the ORP had paid \$300,000 to Felsoci's lawyers to retire Casey's debt. Conveniently, these payments began just after the November 2014 election.

Earl was astonished, to say the least. First, Casey and Borges had both denied under oath that the ORP was involved with Felsoci's protest. Second, evidence of payments from the ORP to the Zeiger firm was precisely what Earl had been seeking for several months in federal court. This evidence should have been produced six months earlier, no later than when the first payment was made following the general election in November of 2014.

Armed with this admission that the ORP was paying Felsoci's lawyers, Earl immediately (in federal court) demanded that the Felsoci/Casey team produce all documents surrounding these payments. Earl formally charged Felsoci's lawyers with discovery violations and sought sanctions. Earl would later be forced to charge Casey with discovery violations and seek sanctions. At the very time the Commission was dismissing Earl's administrative complaint, Earl was

finally uncovering in federal court the documents he had been seeking (and denied) for several months.

On July 6, 2015, the federal court officially re-opened discovery. *See* Doc. No. 305, July 6, 2015.<sup>9</sup> That very day Casey finally produced e-mails further establishing his connection with the Kasich Campaign. Casey also produced additional invoices establishing that by April 15, 2015, the day Earl filed his complaint with the Commission, Casey's bill was almost \$600,000! While \$300,000 had been paid by the ORP, almost \$300,000 of the balance remained. Casey's defense before the Commission that the ORP had cured any violation -- even if a true legal defense -- was factually false. The ORP had paid only half what Casey owed to the Zeiger firm.

Earl submitted the documents he uncovered on July 6, 2015 to the Commission on July 8, 2015 and requested a rehearing. The Director denied rehearing. Earl appealed on July 14, 2015.

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LibPartyOHOderStriking07062015.pdf> (last visited March 31, 2016).

Discovery continued in federal court. In early October 2016, as result of yet additional court orders, *see* Doc. No. 322,<sup>10</sup> Sept. 2, 2015; *Libertarian Party of Ohio v. Husted*, 2015 WL 5766518 at \*3 (S.D. Ohio, Oct. 2, 2015), Casey and Felsoci released more incriminating documents they had improperly withheld for many months. These e-mails proved that the Kasich Campaign had intimate and active involvement with Casey's protest of Earl.

While the federal court did not formally sanction Casey or Felsoci, it chastised them:

The overall conduct of discovery in this case, especially on the part of Mr. Felsoci's and Mr. Casey's counsel, demonstrates a pattern of technical and begrudging responses and objections to discovery requests, which pattern **was clearly designed to delay or obstruct the Plaintiffs' ability to learn that the Ohio Republican Party was involved in the effort to keep Libertarian Party candidates off the ballot.** ... Should these particular attorneys or parties come before the Court in future cases, the history of their conduct here will strongly influence the Court's approach to discovery, including sanctions ....

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LibPartyOrder09022015.pdf> (last visited March 31, 2016).

*Libertarian Party of Ohio v. Husted*, 2016 WL 447566 at \*4 (S.D. Ohio, Feb. 5, 2016) (emphasis added).

This was not the first time, moreover, the federal court was forced to address Felsoci's and Casey's lawyers' recalcitrance. In a prior opinion released on October 2, 2015, the court observed that Casey's reluctance to produce documents "seems particularly designed to cause delay and increase costs." *Libertarian Party of Ohio v. Husted*, 2015 WL 5766518 at \*3 (S.D. Ohio, Oct. 2, 2015). And on October 17, 2014, the federal court disciplined Felsoci and Casey's lawyers (by refusing them the defense of laches) for employing "tactics that resulted in delay," Doc. No. 260 at PAGEID # 7102 (Oct. 17, 2014),<sup>11</sup> and "harassing and obstructing" Earl's discovery efforts. *Id.* at PAGEID # 7106.

These obstructive efforts prove that Casey wanted to keep his, the Kasich Campaign's and the ORP's involvement with Felsoci's protest a secret. Casey did not want the documents used in the federal proceeding,

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<http://moritzlaw.osu.edu/electionlaw/litigation/documents/Opinion101714.pdf> (last visited March 31, 2016).

and he especially did not want them used in Earl's administrative proceeding before the Commission.<sup>12</sup>

### **Proceedings Before the Ohio Elections Commission**

Earl's administrative complaint argued that the Kasich Campaign's and Casey's joint efforts, wherein Casey (and Casey alone) agreed to pay the Zeiger firm to prosecute the protest, constituted an "in kind" contribution from Casey to the Kasich Campaign. The Kasich Campaign should have reported what was then known by Earl to be a \$250,000+ contribution. Better yet, the Kasich Campaign should not have accepted the contribution in the first place.

In support of his complaint, Earl included the testimony and documentation from his federal case that was in his possession on April 15, 2015.<sup>13</sup> This included the following:

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<sup>12</sup> During the second phase of discovery in the summer of 2015 Felsoci and Casey (unsuccessfully) attempted to win a confidentiality agreement that would have prevented Earl from using the invoices and e-mails between Casey and the Kasich Campaign in Earl's proceeding before the Commission. *See* Doc. No. 299 at PAGEID # 7783, June 12, 2015, <http://moritzlaw.osu.edu/electionlaw/litigation/documents/LibPartyMotionandMemo06122015.pdf> (last visited April 2, 2016).

1. The testimony of Felsoci establishing that he had not and would not pay his lawyers. *See* Transcript of Preliminary Injunction Hearing, Testimony of Gregory Felsoci, Doc. No. 86, March 13, 2014 (attached as Exhibit H to Earl's administrative complaint).
2. Proof that Felsoci's lawyers had never disclosed to him who was paying his bill. *See Libertarian Party of Ohio v. Husted*, 302 F.R.D. 472 (S.D. Ohio 2014).
3. Evidence that the federal court considered Felsoci to be a "guileless dupe" who was likely acting on Republicans' behalf. *See* Opinion and Order, March 19, 2014, Doc. No. 80 at PAGEID # 2148 (attached as Exhibit I to Earl's administrative complaint).
4. Proof that Matt Borges denied any involvement on the part of the ORP at the federal court hearing held in March of 2014.

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<sup>13</sup> Earl requested that the Secretary and the Attorney General, both of whom possessed this same evidence, investigate whether Casey had illegally supplied a campaign contribution to the Kasich Campaign. They did not respond to his request, which necessitated his filing his complaint directly with the Commission. Ironically, once he had filed his complaint with the Commission, Earl's own campaign finance filings (which were well over one year old) were audited by the Secretary.

5. Proof that Felsoci denied knowing who was paying his lawyers at his deposition conducted on August 12, 2014. *See* Transcript of Deposition of Gregory Felsoci, Aug. 12, 2014, at PAGEID # 3525-28 (attached as Exhibit J to Earl's administrative complaint).

6. An e-mail produced by Felsoci's lawyers pursuant to federal court order establishing that Casey was responsible for paying Felsoci's legal bill. *See* e-mail from Zeiger to Casey, May 16, 2014 (attached as Exhibit K to Earl's administrative complaint).

7. An invoice showing that the amount owed by Casey to Felsoci's lawyers exceeded \$250,000 as of the date of that invoice, May 16, 2014. *See* letter from Zeiger to Casey, May 16, 2014 (attached as Exhibit L to Earl's administrative complaint).

8. Deposition testimony of Casey, taken on August 28, 2014, establishing that he alone was responsible for paying Felsoci's lawyers. *See* Transcript of Deposition of Terry Casey, Aug. 28, 2014, Doc. No. 241-1 at PAGE ID # 6233 (attached as Exhibit M to Earl's administrative complaint).

9. An affidavit signed by Felsoci's lawyer in July of 2014 stating that their "confidential client," later revealed to be Casey, wanted to keep his identity a secret. *See* Doc. No. 159-1, at PAGEID # 3205-06 (attached as Exhibit N to Earl's administrative complaint).

10. An affidavit from Felsoci's lawyer stating that Casey, and Casey alone, was paying Felsoci's lawyers. *Id.* at 3206.

11. Deposition testimony taken from Casey denying that the Kasich Campaign was involved in any way with his plan to recruit someone, ultimately Felsoci, to protest Earl. *See* Doc. No. 241-1 at 6367-6369 (attached as Exhibit M to Earl's administrative complaint).

12. Documents uncovered following Casey's deposition establishing that Kasich Campaign agents, including Kasich's campaign manager, Carle, as well as Polesovsky and Luketic, organized Casey's plan to recruit someone (ultimately Felsoci) to protest Earl. *See* Doc. No. 240-1 (attached as Exhibit O to Earl's administrative complaint).

The e-mails attached as Exhibit O to Earl's administrative complaint involved e-mail exchanges between Casey, Dan Mead (one of Felsoci's and Casey's lawyers), Zeiger (another of Felsoci's and Casey's

lawyers), Polesovsky (Kasich Campaign official), Luketic (Kasich Campaign official), and Carle (Kasich Campaign manager), just days before Felsoci filed his protest (on February 21, 2014). They included the following:

A. A Casey e-mail on February 17, 2014 to Richard Lumpke, with blind copies to Mead and Polesovsky, stating that he (Casey) was "doing an (sic) **high priority research project for the Governor's folks ....**" Doc. No. 240-1 at PAGEID # 6162 (emphasis added).

B. A Casey e-mail on February 17, 2014 to Mead, Zeiger, Polevosky, Carle, and Luketic, stating: "Great finding by our 'legal eagle', Dan!! BUT, this \$700 was paid out to our 'hero' Oscar Hatchett<sup>14</sup> on Nov. 21, 2013, way before these signatures were obtained in early 2014. Clearly it shows proof for Oscar being a hired signature guy. ... Our folks are working on more information about Ohioans for Liberty, **plus the added items we discussed this afternoon.**" *Id.* at 6158 (emphasis added).

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<sup>14</sup> Oscar Hatchett, Jr. was first targeted for being a convicted felon. When this proved untrue, Felsoci argued that Hatchett improperly failed to disclose on his part-petitions that the LPO had paid him.

C. A Luketic e-mail on February 19, 2014 to Casey stating: "Agree Terry. There is no way they are going to hit that number IF we could get rid of those circulators. Still awaiting the final part-petition copies from the SoS office." *Id.* at 6181.

D. A Casey e-mail to Luketic that same day, with copies to Mead, Zeiger and Polevosky, and a blind copy to Carle: "Thanks, Dave! Just talked with Dan [Mead]. Keep working on those numbers and details from the SoS office for which circulators got what numbers of good ones from each of the counties. **Dan needs more specifics on Oscar conviction, the charges, penalty, timing, etc.** ... Let me know what else I can do, push, help on for this afternoon and evening." *Id.* (emphasis in original).

E. A Luketic e-mail on February 19, 2014 to Casey, Mead, Zeiger, Polesovsky, and Carle, stating: "**Team.** Our numbers may have been a little of (sic) (in a good way). ... We are still awaiting from the SOS the copies of petitions validated by the BOE's." *Id.* at 6178 (emphasis added).

F. A Casey e-mail to this "Team," including Mead, Zeiger, Polesovsky, Luketic and Carle, on February 19, 2014, stating that "a client from Cuyahoga County who is a Libertarian Party member and who is concerned about these types of issues" had been located. *Id.* at 6191. Casey explained that "[t]hey are still working on a 'back-up' from Lima/Allen County. Plus, maybe if needed, a true non-affiliated voter, too. **Matt Carle has been up in Akron today for the funeral of Lt. Gov. Mary Taylor's mother. Will have more on the other questions. Matt has been on the phone lining up those other needs for this process.**" *Id.* (emphasis added).

G. A Luketic e-mail on February 20, 2014, to the "Team," including Casey, Mead, Zeiger, and Polevosky, including a "Validity Report" on the signatures collected by Earl. *Id.* at 6192 & 6198.

H. A Casey e-mail on February 21, 2014 to this "Team," including Zeiger, Mead, Luketic and Polevosky, stating that the filing against the LPO's candidate for Attorney General, Steve Linnabary, "seemed kind of close to the filings by attorney Zeiger in the Governor's Charlie Earl protest." *Id.* at 6205.

Casey authenticated these e-mails at the federal hearing on September 29, 2014. *See* Transcript of Preliminary Injunction Hearing, Sept. 29-30, 2014 (attached as Exhibit D to Earl's administrative complaint). He also admitted at that federal hearing that he retained the Zeiger firm on February 14, 2014, that he knew Jeff Polesovsky and Dave Luketic worked for the Kasich campaign, and that Matt Carle was Kasich's Campaign Manager.

Although he denied that he was acting on “behalf” of the Kasich Campaign, *id.* at 6493-94, Casey admitted in his federal testimony that Luketic was “helpful” in finding an LPO member to protest Earl. *Id.* at 6504. Casey also admitted that Felsoci was “probably” the person mentioned in his February 19, 2014 e-mail to Luketic, Polesovsky and Carle. *Id.* at 6517. Casey further admitted that he is a Kasich supporter, played a significant role in the Kasich Campaign during the 2010 election, and was appointed by Governor Kasich to the State Personnel Review Board after the 2010 election. *Id.* at 6529.

Casey admitted in his federal testimony that he “called upon them [Carle, Polesovsky and Luketic] to help on some of the mechanics of

like getting copies of petitions, things that they already had. So they were helpful in that way when I asked for information.” *Id.* at 6530. When confronted with his deposition testimony in open federal court and asked, “since January 1, 2014, have you communicated with anyone in the John Kasich for governor campaign as of today?,” Casey this time answered "yes." *Id.* at 6541. Casey only admitted after the e-mails were uncovered that he had discussed Earl's protest with Carle, Polesovsky and Luketic prior to Felsoci's filing. *Id.* at 6541.

Casey admitted in open federal court after the e-mails were uncovered that there was “back and forth” between himself and the Kasich Campaign about the protest. *Id.* at 6545. Casey admitted after the e-mails were uncovered that he “reach[ed] out to” Polesovsky and Luketic to locate someone to protest Earl. *Id.* at 6557. When specifically asked whether Polesovsky, Carle and Luketic "were ... helping you?," Casey testified, "Yes." *Id.* at 6590.

Earl also presented to the Commission evidence that Felsoci's and Casey's attorneys had purposely obstructed his discovery efforts in federal court. *See* Opinion and Order, Oct. 17, 2014, Doc. No. 260

(attached as Exhibit P to Earl's administrative complaint). This evidence demonstrated that Casey actively attempted to keep his participation in Earl's removal a secret.

The Kasich Campaign and Casey separately defended before the Commission. The Kasich Campaign never claimed in its motion to dismiss that the complaint lacked probable cause. It admitted its "involvement in providing copies of petitions to Casey and responding to requests for information about potential protestors." Kasich Campaign Motion to Dismiss (hereinafter "Kasich Motion") at 3, OC627 at J69.

In defense, the Kasich Campaign argued that Earl's complaint failed because an in-kind contribution only exists when the campaign agent who was assisted by the third party acted "with a view toward having an expenditure made" for the campaign. *Id.* at J73. Proving that the campaign consented to and coordinated activities with the third party who made the expenditure, the Kasich Campaign argued, is insufficient as a matter of law. *Id.*

The Kasich Campaign also presented three affirmative defenses. First, it claimed that if a violation were to be found, the Commission

should "find that good cause has been shown not to impose sanctions ...." *Id.* at J68. Second, with supporting evidence, it argued that "the Ohio Republican Party ("ORP") made payments to Zeiger, Tigges & Little, LLP [ZTL] for legal services. Those payments were properly reported ...." *Id.* at J76. Citing to Ohio Admin. Code 111-5-16, the Kasich Campaign argued that "[t]he expenditure to [ZTL] was appropriately paid for and reported by the ORP, precisely as permitted by law. Pertinent to these proceedings, the transaction did not need to be reported by KFTO as an in-kind contribution ...." *Id.* at J77. Lastly, the Kasich Campaign argued at the hearing that Casey's activity was protected by the First Amendment. *See* Transcript of Proceedings, May 21, 2015 at H22 (hereinafter "Hearing").

Casey's motion to dismiss did not claim a lack of probable cause either. Casey's chief defense, like the Kasich Campaign's, was that Ohio Republican Party had subsequently paid his entire legal: "inasmuch as the payment of fees by the ORP Executive Committee to ZTL has been properly reported pursuant to O.A.C.111-5-16 ... Respondent Terry Casey prays the Complaint of Charles Earl be dismissed ...." Motion to

Dismiss and Response of Respondent Terry Casey (hereinafter "Casey Motion") at J61. Like the Kasich Campaign, Casey included evidence of these payments. Like the Kasich Campaign, Casey also added that he had a First Amendment right to protest Earl in violation of Ohio's campaign finance laws. *Id.* at J60-61.

Earl challenged Casey's and the Kasich Campaign's legal interpretation of Ohio's campaign finance laws and their affirmative defenses -- both in his written response and orally at the May 21, 2015 hearing. Because neither the Kasich Campaign nor Casey raised a lack of probable cause in their written motions, Earl's written response said nothing about it. Still, at the hearing on May 21, 2015, Earl argued in addition to his legal interpretations that at bare minimum probable cause existed to support his filing his administrative complaint.

The full Commission dismissed Earl's complaint without a formal opinion. It did not say that Earl's complaint was dismissed for lack of probable cause, lack of jurisdiction, or insufficiency. It simply granted Casey's and the Kasich Campaign's motions to dismiss -- neither of which claimed that Earl's complaint lacked probable cause.

Earl in his ongoing federal discovery efforts uncovered additional documentation from Felsoci and Casey on July 6, 2015. This newly discovered information was troubling to Earl because it not only was documentation that should have previously been produced, but because it plainly proved that Casey's debt was twice what he claimed in his affirmative defense filed with the Commission. Casey knew this when he represented to the Commission that the Republican Party had relieved his debt and taken care of his in-kind contribution.

Earl immediately on July 8, 2015 sought reconsideration based on this newly uncovered documentation. Along with the newly discovered invoices, he submitted the newly discovered e-mails between Casey and the Kasich Campaign. *See* J-94 through K-16; K-17 through K-43; K-44 through K-59. The Director denied rehearing.

### **Proceedings in the Court of Common Pleas**

The Franklin County Court of Common Pleas concluded that the full Commission's dismissal of Earl's Complaint could only have been based on probable cause. "**As a matter of law**, specifically Ohio Adm. Code 3517-1-11(A), there were only three possible issues for the

Commission to determine at the preliminary review on May 21, 2015; the Commission's jurisdiction; the sufficiency of the Appellant's Complaint; and whether there was probable cause to believe that a violation of Ohio election law had occurred." *Earl v. OEC* at K64-65 (emphasis added). It reached this conclusion notwithstanding its own acknowledgement that the Commission's notice to the parties explained that "the Commission may do one of the following: 1. Find there has been no violation; 2. **Find there has been a violation**; or Set the matter for a hearing ....." *Id.* at K55 (emphasis added).

Because the Commission could only decide whether probable cause existed, the Court reasoned, its dismissal had to be for lack of probable cause. This, along with Earl's argument at the hearing that probable cause existed, "absolutely refuted" Earl's claim that the Commission's decision was not necessarily based on a lack of probable cause. *Id.* at K63.

### **ARGUMENT**

A candidate's use of campaign funds to challenge an opponent's qualification for the ballot is permissible under Ohio's campaign finance

laws. *See* Ohio Election Commission Advisory Opinion 2003 ELC-01 (Sept. 18, 2003). Still, these expenditures must be properly reported. *See* Federal Election Commission Advisory Opinion 1980-57 ("a candidate's attempt to force an election opponent off the ballot ... is as much an effort to influence an election as is a campaign advertisement derogating that opponent").

Funds supplied "to initiate legal action to remove an identified candidate from the ballot," meanwhile, are necessarily campaign contributions. *See* Federal Election Commission Advisory Opinion 1983-37. When these funds are paid directly by a third party (as was the case here), they are an "in-kind" contribution. *See* Ohio Campaign Finance Handbook at 2-17 (stating that "having personnel assistance compensated by a third party" constitutes an in-kind contribution). Not only must they be reported, they are governed by caps on contributions. Here, Casey's in-kind contribution exceeded permissible limits and was not properly reported. Both he and the Kasich Campaign are responsible.

**I. The Full Commission Possessed the Authority to Rule on the Merits.**

The Common Pleas Court below erred in concluding that the full Commission's dismissal of Earl's Complaint could not have been based on the merits. "As a matter of law, specifically Ohio Adm. Code 3517-1-11(A)," it ruled, "there were only three possible issues for the Commission to determine at the preliminary review on May 21, 2015; the Commission's jurisdiction; the sufficiency of the Appellant's Complaint; and whether there was probable cause to believe that a violation of Ohio election law had occurred." *Earl v. OEC* at K64-65.

This conclusion not only contradicts Ohio law, it contradicts the notice sent by the Commission on April 17, 2015 to the parties in this case: "At the preliminary review ... the Commission may do one of the following: 1. Find there has been no violation; 2. **Find there has been a violation**; or Set the matter for a hearing ....." *Earl v. OEC* at K55 (emphasis added). That is why both the Kasich Campaign and Casey in their pleadings presented affirmative defenses and did not bother to

argue a lack of probable cause. They understood that the full Commission's review was on the merits.

This Court in *Common Cause/Ohio v. Ohio Elections Commission*, 150 Ohio App.3d 31, 2002-Ohio-5965, 779 N.E.2d 766 (10th Dist.), made this clear. There, two lobbying groups brought three administrative actions before the Commission. One of the actions, which had been referred to a probable cause panel of the Commission, was quickly dismissed. *Id.* at 34, 779 N.E.2d at 768. The second and third actions, in contrast, went to the full Commission on "separate motions for judgment on the pleadings and for summary judgment ...." *Id.* The full Commission thereafter dismissed these complaints.

Following appeals from all three dismissals, the Court of Common Pleas dismissed them all. This Court reversed two of the dismissals, ruling that a complainant whose complaint is dismissed by a vote of the full Commission may properly appeal as a "party adversely affected." Disposing of the first action dismissed by a panel of the Commission, this Court stated: "At that stage, the commission is acting in an executive, rather than in an adjudicative, function, and because a

dismissal based on lack of probable cause is not an adjudication there is no provision for appeal." *Id.* at 35, 779 N.E.2d at 768 (citing *Billis v. Ohio Elections Commission*, 146 Ohio App.3d 360, 766 N.E.2d 198 (10th Dist. 2001)).

With the second and third actions, however, "a hearing before the full panel of the commission was set." *Common Cause/Ohio*, 150 Ohio App.3d at 35, 779 N.E.2d at 768 (emphasis added). "Although the granting of the motions to dismiss ultimately prevented a full hearing on the actions, the record is clear that by the time the motions to dismiss were filed, the commission had moved beyond its executive function and was acting in its adjudicative role." *Id.* at 35, 779 N.E.2d at 769. These two appeals were therefore deemed to be proper.

This Court in *Common Cause/Ohio* expressed doubt that the full Commission could even dismiss a matter short of rendering an adjudicative decision. Still, it stated, "[a]ssuming, arguendo, that [a full Commission could under Ohio Admin. Code 3517-1-11(A)], in fact, allow a dismissal without a final determination being made, the facts in the second two actions in the case at bar do not support such a finding."

*Id.* In particular, the Court observed, "our interpretation of the administrative rule [Ohio Admin. Code 3517-1-11(A)] is that the section does not refer to a review of all motions, but, rather, **only to a review of motions having to do with 'jurisdiction, sufficiency of the complaint, and \* \* \* probable cause.'**" *Id.* at 37, 779 N.E.2d at 770 (emphasis added).

In order to determine whether a dismissal by the full Commission falls into one of these three limited categories, this Court ruled that when the full Commission dismisses an administrative complaint without explanation, a reviewing court should look to the underlying bases supporting the motion to dismiss:

The basis for the motions filed before the commission in this case did not involve any of those issues, but, rather, the question of whether *Buckley* [a First Amendment issue] ... operated to protect the contested political advertisements as being "issue based" political speech that did not contain the "magic words" of "express advocacy" that would potentially invoke First Amendment protections. This issue is not a preliminary matter, involving questions of jurisdiction, sufficiency of the complaint, or probable cause, but is rather **at the heart of the action, addressing the legal standard to be applied to appellants' cause.**

*Id.* (emphasis added). "The determination of this issue [that is, whether *Buckley* protected the speech] involves a **concise reading of the law in light of the facts, and a disposal of an action on this basis must be viewed as a judgment on the merits.**" *Id.* (emphasis added). The Court observed that "Ohio Adm. Code 3517-1-01(B) requires the rules to be 'construed and applied to effect due process [and] just results.' To apply the rules in a manner allowing the commission to dismiss any action for any reason without its decision being subject to judicial review would clearly be an unjust result." *Id.* at 37, 779 N.E.2d at 770-71.

*Common Cause/Ohio* establishes that where the full Commission dismisses a complaint, a reviewing court must look to "[t]he basis for the motions filed before the commission" to determine whether it has jurisdiction. *Id.* at 37, 779 N.E.2d at 770. Where the basis for the motions "involves a *concise reading of the law in light of the facts*, ... a disposal of an action on this basis must be viewed as a judgment on the merits." *Id.* (emphasis added). Where the basis for the motion to dismiss addresses "the legal standard to be applied to appellants' cause," *id.*, it is at the "heart of the action," *id.*, and reflects a decision on the merits.

This Court's rationale in *Common Cause/Ohio* makes perfect sense. Ohio law distinguishes between what a panel of the Commission may do and what the full Commission can do. A panel of the Commission is limited by Ohio Admin. Code 3517-1-11(A)(1). It has no authority to do anything other than assess jurisdiction, sufficiency of the complaint, and probable cause.

The full Commission, in contrast, may do a number of things, including: (1) continuing the matter for good cause shown, Ohio Admin. Code 3517-1-11(A)(2)(a), (2) allowing amended complaints and adding parties, *id.* 3517-1-11(A)(2)(b), (3) requesting that an investigator be appointed, *id.* 3517-1-11(A)(2)(c), (4) setting the matter for a full evidentiary hearing, *id.* 3517-1-11(A)(2)(d), and (5) resolving the case by dismissing or penalizing the charged party. *Id.* 3517-1-11(A)(2)(e).

As explained by this Court in *Common Cause/Ohio*, it is the presence of all these options, as well as the authority of the full Commission to dismiss for investigative reasons (lack of jurisdiction, insufficiency of the complaint, or lack of probable cause) that necessitates exploring the bases for the respondents' motions to dismiss.

Contrary to the conclusion of the Court of Common Pleas, the full Commission here -- as its formal notice to the parties in this case explained -- was empowered to fully and finally adjudicate the merits. Contrary to the Court of Common Pleas' conclusion, the full Commission was not restricted to the "probable cause" grounds in Ohio Admin. Code 3517-1-11(A)(1). The Common Pleas Court erred.

**II. The Common Pleas Court Erred By Not Following this Court's Holding in *Common Cause/Ohio*.**

The present matter almost perfectly mirrors *Common Cause/Ohio*, where this Court found that two of the complainants' claims were not dismissed for lack of probable cause. Here, the legal Director did not recommend dismissal of Earl's complaint and it was not referred to a panel of the Commission for preliminary review. Earl's complaint was considered by the full Commission. The full Commission did not announce that it was dismissing based on a lack of probable cause. It instead granted, by a vote of 5 to 2, Casey's and the Kasich Campaign's motions to dismiss -- which under *Common Cause/Ohio* was presumably

for the reason(s) argued by Casey and the Kasich Campaign in their motions to dismiss.

Neither Casey nor the Kasich Campaign challenged the Commission's jurisdiction. Neither claimed that dismissal was supported by a lack of probable cause. To the extent they argued that Earl's complaint was insufficient, their arguments were predicated on their unique legal interpretations of Ohio's campaign finance laws -- in particular, R.C. 3517.01(16). The bases for these two motions to dismiss were not factual insufficiency or a lack of probable cause. Their bases were purely legal. They involved a "concise reading of the law in light of the facts," *Common Cause/Ohio*, 150 Ohio App.3d at 37, 779 N.E.2d at 770, making their "disposal ... a judgment on the merits." *Id.* They required deciding "the legal standard to be applied to appellants' cause," resolution of which can only be considered adjudicatory. *Id.*

The Common Pleas Court erred by not following *Common Cause/Ohio*, 150 Ohio App.3d at 37, 779 N.E.2d at 770. Had it properly applied this Court's holding in *Common Cause/Ohio*, it would have assessed the basis for Casey's and the Kasich Campaign's motions to

dismiss. After properly considering these basis, it could have only concluded that the full Commission's dismissal of Earl's Complaint was not based on a lack of factual probable cause.

**A. Proper Application of *Common Cause/Ohio* Demonstrates that the Full Commission's Action was Adjudicatory.**

Under *Common Cause/Ohio*, a reviewing Court must look at the "basis for the motions filed before the Commission." *Id.* Where the basis for the motions "involves a concise reading of the law in light of the facts, ... a disposal of an action on this basis must be viewed as a judgment on the merits." *Id.* Such a resolution is necessarily adjudicatory. Alternatively, where the motion to dismiss addresses "the legal standard to be applied to appellants' cause," its resolution is also adjudicatory. *Id.* Dismissals like these are appealable.

Here, neither Casey's nor the Kasich Campaign's motions to dismiss challenged the jurisdiction of the Commission. Neither so much as mentioned "probable cause." Instead, their motions included arguments that raised legal questions. To the extent Earl's complaint was claimed to be insufficient, it was not because of the facts he alleged (and

supported with documentary evidence), it was because, Casey and the Kasich Campaign claimed, Earl's facts did not support relief under their (Casey's and the Kasich Campaign's) interpretations of Ohio's campaign finance laws. Each argument raised in the motions to dismiss require "a concise reading of the law in light of the facts."

**B. Casey's and the Kasich Campaign's Motions to Dismiss Were Based on Their Legal Interpretations of Ohio's Campaign Finance Laws.**

Neither Casey nor the Kasich Campaign argued that Earl's administrative complaint should be dismissed for lack of probable cause. Indeed, the words "probable cause" were never uttered in either party's written motions to dismiss. They were never mentioned by either party's lawyers at the May 21, 2015 hearing. Rather than argue a lack of probable cause or a lack of factual sufficiency, the Kasich Campaign argued that "[e]ven with all the evidence taken in light most favorable to [Earl], the Complaint fails to set forth a sufficient claim **as a matter of law** and should be dismissed." Kasich's Motion at J68 (emphasis added).

The Kasich Campaign offered two legal interpretations of Ohio's campaign finance laws to justify its defense. First, the Kasich Campaign

argued that in order to prove an in-kind contribution, one must establish that the party on whose behalf the in-kind contribution was made coordinated the activity "with a view toward having an expenditure made." *Id.* at J73. Earl's failure to plead this 'essential' element, the Kasich Campaign argued, "is fatal to his Complaint." *Id.*

Next, the Kasich Campaign asserted that because Casey's ultimate "motivation" was only to hurt the Democratic Party in the 2014 election, "there was no in-kind contribution to [the Kasich Campaign]." *Id.* at J72. *See also* Hearing at H16-19. Only if the contributor's sole "motivation" is to specifically benefit a particular candidate at the polls, the Kasich Campaign argued, can an in-kind contribution be established. *Id.*

Like the Kasich Campaign, Casey offered his own unique interpretation of R.C. 3517.01(16) to support his motion to dismiss. Under Casey's interpretation, because "[n]one of the other Respondents in this matter had any input or involvement in the decision-making relating to the protest or the litigation that followed the protest nor did they direct or control any aspect of the protest or litigation," Casey's Motion at J58, Casey's protest could not constitute an in-kind

contribution. According to Casey, R.C. 3517.01(16) only extends to coordinated activity that includes direct input in specific decision-making by third parties providing in-kind contributions. Consent is not enough. A candidate who consents to third-party advertising, for example, must also have been proved to have had direct input in how the advertisement was presented. *Id.* at J61.

Further, Casey argued at the hearing that an actual benefit must have been bestowed on a candidate, and that this benefit must translate into success at the polls: "There is absolutely no evidence in this record of polling data to show who would have or would not have benefitted." Hearing at H31. (Ineffective advertising, under Casey's argument, would be insulated from Ohio's campaign finance laws.)

Earl challenged all of these interpretations, both in his written response and at the hearing. Contrary to the Kasich Campaign's argument, R.C. 3517.1(C)(16), Earl pointed out, defines an "in-kind contribution" as "anything of value that is used to influence the results of an election ... and that is made with the consent of, or in coordination, cooperation, or consultation with ... the benefited candidate ...." Earl's

Response to Casey's and the Kasich Campaign's Motions to Dismiss, May 21, 2015 (hereinafter "Earl's Response"), at J85.

That a candidate or campaign has no direct input into specific decisions, Earl argued, cannot mean that the candidate did not consent to a third person's efforts. Earl argued that "if an expenditure is made with the consent of a candidate, it constitutes an in-kind contribution under § 3517.01(C)(16)." *Id.* Further, Earl argued, specific motivation to increase a specific candidate's poll numbers is not needed. Assistance under R.C. 3517.01(C)(16) need only be designed to "influence the results of an election."

In his administrative complaint, Earl alleged that "a candidate's attempt to force an election opponent off the ballot so that the electorate does not have an opportunity to vote for that opponent is as much an effort to influence an election as is a campaign advertisement derogating that opponent." Earl's Administrative Complaint at I25 (quoting Federal Election Commission Advisory Opinion 1980-57). Casey's effort to force Earl off the ballot was therefore "an in-kind contribution regardless of what Casey's ulterior motive was." Hearing at H41.

In regard to the Kasich Campaign's argument that an administrative complaint must allege that a candidate's consent was accompanied by a claim that his "view [was] toward having an expenditure made," Earl pointed out that this sort of allegation under R.C. 3517.01(C)(17)(i) "merely creates a presumption." Earl's Response at J84. It may be sufficient but it is not necessary. "This does not mean ... that no other facts can support finding an 'in-kind' contribution." *Id.* at J84-85. The ultimate question, Earl argued, is simply whether the assistance was consented to and was designed "to influence" an election.

Regardless of whose interpretation of R.C. 3517.01(C)(16) and (17) is correct, the Kasich Campaign's and Casey's successful dismissal depended on the Commission's acceptance of their interpretations. They never argued a lack of probable cause. They never argued that Earl's evidence was deficient under Earl's interpretation of R.C. 3517.01(C)(16). Their arguments were predicated on Earl's legal interpretation being rejected by the Commission. Dismissal under these circumstances, as made clear by *Common Cause/Ohio*, is adjudicatory.

**C. Casey's and the Kasich Campaign's Affirmative Defenses Do Not Equate With an Absence of Probable Cause.**

In addition to their novel interpretations of R.C. 3517.01(16) and (17), Casey and the Kasich Campaign offered three affirmative defenses. First, they asserted that because the ORP eventually paid \$300,000 toward Casey's then-known \$250,000 bill<sup>15</sup> "precisely as permitted by law [Ohio Admin. Code 111-5-16]," Kasich's Motion at J77, Casey and the Kasich Campaign were somehow excused from their reporting requirements and contribution limitations. Casey's Motion at J59-60.

Second, they argued that Casey's activity was protected by the First Amendment. Hearing at H22 (Kasich Campaign argument); Casey's Motion at J60-61. The Kasich Campaign even added a third affirmative defense: "good cause has been shown not to impose sanctions." Kasich's Motion at J68.

Affirmative defenses, by definition, do not equate with a lack of probable cause. "An affirmative defense involves an excuse or justification for doing an otherwise illegal act. It does not deny the

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<sup>15</sup> Earl only later discovered that this bill was in reality almost \$600,000.

existence of the act; it simply provides a legal justification for it. Thus, the test for sufficiency of the evidence does not apply to affirmative defenses ...." *State v. Cooper*, 170 Ohio App.3d 418, 425, 2007-Ohio-1186, 867 N.E.2d 493, 498 (4th Dist.).

The Kasich Campaign's first affirmative defense, that the Commission should "find that good cause has been shown not to impose sanctions ...," Kasich's Motion at J68, assumes a violation of Ohio's campaign finance laws. It merely begs forgiveness for "good cause ... shown."

The Kasich Campaign's and Casey's second affirmative defense -- that payments made by the ORP absolved them of liability under Ohio's campaign finance laws -- does the same thing. *Id.* at J76-J77. It assumes that a violation would have occurred but for the ORP's later payments. It had nothing to do with whether probable cause supported Earl's claim that Casey and the Kasich Campaign coordinated the protest.

The same is true of the Kasich Campaign's and Casey's reliance on the First Amendment. Indeed, this is the quintessential example of the kind of defense that has nothing to do with probable cause. In *Common*

*Cause/Ohio* the respondent argued the First Amendment as a defense. This Court ruled that a constitutional defense can only be resolved following "a **concise reading of the law in light of the facts, and a disposal of an action on this basis must be viewed as a judgment on the merits.**" *Common Cause/Ohio*, 150 Ohio App.3d at 37, 779 N.E.2d at 770 (emphasis added). The same is true in the present case with Casey's and the Kasich Campaign's constitutional defense.

Each and every one of Casey's and the Kasich Campaign's legal interpretations and affirmative defenses demanded a "concise reading of the law in light of the facts" within the meaning of *Common Cause/Ohio*. All of these arguments centered on "the legal standard to be applied" within the meaning of *Common Cause/Ohio*. Granting a dismissal on any of these grounds can only be considered adjudicative.

**D. Earl's Argument That Probable Cause Existed Does Not Mean that the Commission Could Only Rule Based on Probable Cause.**

As demonstrated above, Earl made several legal arguments in support of his Complaint. In addition to these, he argued orally at the hearing that probable cause existed. He did so because he had to. As

explained by this Court in *Common Cause/Ohio*, the full Commission is arguably empowered to not only rule on the merits, but could also dismiss for lack of probable cause. Just as Casey and the Kasich Campaign argued their affirmative defenses at the hearing to avoid being held liable, Earl argued that probable cause existed to avoid being dismissed. Any complainant coming before the full Commission must be prepared to do so.

### **III. Commission Members' Questions and Statements Reveal that They Considered Casey's and the Kasich Campaign's Legal Arguments.**

Although the full Commission did not explain its reasons for granting Casey's and the Kasich Campaign's motions to dismiss, Commission members did ask questions and make statements. These questions and comments suggest that Casey's and the Kasich Campaign's novel legal interpretations of R.C. 3517.01(16) may have resonated with some on the Commission.

Commissioner Grimshaw, for example, asked of the Kasich Campaign: "Your point as to who would benefit in this case, was there any evidence presented throughout the Federal litigation, the discovery

process as to whether the Democrat or the Republicans would benefit by Earl not being on the ballot?" Hearing at H29. The Kasich Campaign responded, "I'm not aware of any." *Id.* at H30. Casey added, "There is absolutely no evidence in this record of polling data to show who would have or would not have benefitted." *Id.* at H31.

Earl had already challenged these strained interpretations of R.C. 3517.01(16) in his written response to the motions to dismiss. Earl argued in his written response: "The ultimate question ... is whether agents of the Kasich Campaign 'engage[d] in substantial discussion or negotiation with [Casey] regarding the contents, timing, type or frequency of' the plan to remove Earl." Earl's Response at J85 (quoting *Disciplinary Counsel v. Spicer*, 106 Ohio St. 3d 247, 2005-Ohio-4768, 834 N.E.2d 332, 338-39). Earl added illustrations of impermissible in-kind contributions from the Ohio Campaign Finance Handbook at 2-17 (2015): "Examples include receiving postage or signs, receiving rent-free office space, having personnel assistance compensated by a third party or having a third party buy media advertising on behalf of a committee." Earl's Response at J86.

Earl added that the Handbook not say any of in-kind contribution must be proven to be effective. Nor does any other authority. Instead, Earl argued, the Handbook perfectly describes what Casey did: "The facts present a textbook example of an in-kind contribution. The Kasich Campaign obviously had Casey hire the Zeiger law firm with a view toward having Earl removed." *Id.* at J86.

At the hearing, Earl continued his challenge to Casey's strained interpretation: "whether it did benefit the Kasich Campaign is irrelevant." Hearing at H44. In response to Commissioner Grimshaw's questions: "was he trying to help Kasich or is he just trying to embarrass the Democrats?" *id.* at H57; "What was his motive? Was it to help Kasich, or was it to help the Republican Party ....?" *id.* at H58, Earl reiterated that "motive has no bearing on whether this entire plan was for the benefit of the Kasich Campaign." *Id.* at H61. Whether evidence established that the Kasich Campaign was actually benefitted, Earl argued, "is simply not relevant." *Id.* at H62.

Commissioner Allison was also apparently intrigued by Casey's and the Kasich Campaign's constructions of R.C. 3517.01(16). In voting

against Commissioner Wilhelm's motion to reject the motions to dismiss, Commissioner Allison stated: "I guess in my mind **the case came down to what exactly involves coordination.**" Hearing at H82 (emphasis added). Commissioner Allison said nothing about Earl's complaint lacking probable cause. Nor did anyone else.

#### **IV. The Wealth of Evidence Presented Makes it Unlikely that the Full Commission Dismissed Based on a Lack of Probable Cause.**

As described above, *see supra* at pages 13 - 23, Earl presented a wealth of uncontested evidence establishing communications between the Kasich Campaign and Casey about the protest in the days before it was filed. Because this evidence was so extensive, neither Casey nor the Kasich Campaign attempted to refute it. They admitted that these contacts and communications had taken place. All they could do was attempt to explain why these communications did not support finding of coordination in violation of Ohio's campaign finance laws. Their only defense was to argue that Ohio's campaign finance laws require motivation, require proof of actual benefits at the polls, and require

direct input into specific decisions. Their defense was to interpret R.C. 3517.01(16) in such a way that it is virtually unenforceable.

Given Earl's wealth of uncontested evidence, it is highly unlikely that the Commission -- had it accepted Earl's interpretation of R.C. 3517.01(16) -- could have dismissed his complaint for lack of probable cause. The Commission's legal Director had already reviewed Earl's complaint and accompanying evidence and referred it to the full Commission. Indeed, Commissioner Grimshaw commented, "Ms. Armstrong, a lot of materials have been submitted in this case, a lot exist." Hearing at H28. It is doubtful that Commissioner Grimshaw, given this extensive documentation, based his vote on a lack of probable cause.

No Commissioner during the hearing inquired about probable cause. Their only stated concerns were Casey's and the Kasich Campaign's legal interpretations of Ohio's campaign finance laws. Their expressed concerns were whether the Kasich Campaign was actually benefitted. Their expressed concerns were whether Casey was motivated by a desire to help Kasich or hurt the Democratic Party. The relevance

of all of these concerns depended on how they interpreted R.C. 3517.01(16).

This is corroborated by Commissioner Grimshaw's remarks immediately following the hearing. Commissioner Grimshaw, who voted to grant the motions to dismiss, told a news reporter, "Bottom line is, I don't think there was more than a 50-50 presentation of the case here today, and that's why I voted the way I voted." John Michael Spinelli, *In 5-2 OEC Ruling, Kasich Campaign Caper Coddled. LPO Considers Options*, PLUNDERBUND, May 22, 2015 (<http://www.plunderbund.com/2015/05/22/in-5-2-oec-ruling-kasich-campaign-caper-coddled-lpo-considers-options/>) (last visited March 31, 2016).

**V. Newly Discovered Evidence Proves that the Kasich Campaign Coordinated Earl's Removal With Casey.**

Following Earl's discovery on May 21, 2015 that the ORP had paid \$300,000 to Felsoci's and Casey's lawyers, he immediately demanded from Felsoci and Casey in the pending federal proceeding all documentation related to these payments. In his June 12, 2015 motion to

compel filed with the federal court, Earl argued that Felsoci was under a continuing obligation to update his document production for requests Earl made long ago.<sup>16</sup>

Felsoci responded that he would produce the documents, but only if Earl agreed to a protective order prohibiting their use in any other proceeding. *See* Plaintiffs' Motion to Compel, Doc. No. 299 at PAGEID # 7784 & 7789-91 (filed June 12, 2015).<sup>17</sup> Felsoci, or better yet Casey, wanted to insure that the e-mails and invoices could not be used by Earl in his administrative case before the Commission against Casey and the Kasich Campaign.

Casey's gambit proved unsuccessful, but it did delay production until after the Commission dismissed Earl's administrative complaint. The federal court proved unsympathetic to his demand for a protective

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<sup>16</sup> The federal court stated that "it would probably side with Plaintiffs" on this point but for Felsoci's finally producing the documents. *See Libertarian Party of Ohio v. Husted*, 2016 WL 447566 at \*2 (S.D. Ohio 2016).

<sup>17</sup>

<http://moritzlaw.osu.edu/electionlaw/litigation/documents/LibPartyMotionandMemo06122015.pdf> (last visited April 2, 2016).

order and Casey was forced to unconditionally produce the documents on July 6, 2015. Because the Commission had already dismissed Earl's administrative complaint by this time, all Earl could do was submit these documents to the Commission as part of his request for a rehearing.

More damaging documents were finally produced by Casey even later. Earl suspected that Casey was continuing to withhold documents even after July 6, 2015 and again sought a federal court order directing their release. Earl's motion was granted on October 2, 2015. *See Libertarian Party of Ohio v. Husted*, 2015 WL 5766518 (S.D. Ohio 2015). By this time the Commission's dismissal of Earl's complaint was pending before the Franklin County Court of Common Pleas.

The documents and e-mails uncovered after the Commission's dismissal are astounding. Dozens of e-mails between the Kasich Campaign and Casey beginning on February 14, 2014, one week before the protest was filed, were uncovered. Many of these e-mails were from the Kasich Campaign to Casey. (Commissioner Allison expressed concern at the Hearing that only two e-mails originated with the Kasich Campaign. *See* Hearing at H53 ("But show me something going the

other way." ). These newly discovered e-mails show that an equal number flowed back and forth.) These newly discovered e-mails, which were all filed with the federal court,<sup>18</sup> prove that extensive, detailed communications went in both directions. Here is just a small sampling:

1. Carle, Luketic and Polesovsky were e-mailed by Casey on February 14, 2014, "Just had a call back from John Zeiger. Will get together with him later this afternoon .... Will update later today ... Plus, what is next!!" *See* Doc. No. 335, Exhibit 3, Casey Dep.Ex.1, at TC000115.

2. Carle, Luketic and Polesovsky were e-mailed again on February 15, 2014 by Casey with detailed descriptions of "Legal Needs" flowing from "Attorney-Client Protected Notes." Casey stated "Keep working on gaining potential Libertarian filers in each of these major counties. ... That will be the key as we get closer to **our** protest deadline." *Id.* TC000116 (emphasis added).

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<sup>18</sup> Likely because they are voluminous, the Moritz web page has not reproduced them. They can be found using PACER at *Libertarian Party of Ohio v. Husted*, No. 13-953 (S.D. Ohio), Doc. No. 335, Exhibits 2, 3 and 10.

3. On February 15, 2014, Polesovsky wrote to Luketic, with copies to Carle, Scott Blake (also a member of Kasich Campaign), and Casey, "Dave, can we get copies of the petitions and the Form 14s over to Terry today? Scott - can you send around your findings on circulator statements/party ID of circulators? Then **we** can continue to work down the action item list." *Id.* TC000118 (emphasis added).

4. On February 17, 2014, Casey wrote to Polesovsky, Luketic and Carle about his "two-hour plus meeting with these two attorneys this afternoon." *Id.* TC000119. Casey stated "**we** need to keep digging on Oscar [Hatchett]. He could be a key 'star' in this future production/show." *Id.* (emphasis added). Casey added, "Jeff [Polesovsky presumably] and I have discussed some 'creative' options for research with Oscar. Need to review more on Tuesday." *Id.*

5. On February 18, 2014, Luketic e-mailed and forwarded to Casey records that had been obtained by Chris Schrimpf (who then was working for the ORP and now works for Kasich's presidential campaign) from Chris Shea at the Secretary Office. *Id.* TC000121. These records

were "all Form 14's filed for all Libertarian candidates for statewide office." *Id.* TC000122.

6. On February 19, 2014, Casey wrote to Polesovsky, Luketic and Carle that "Clock is Ticking!!!" and that he had pushed "Stainbrook earlier this morning for getting **us** a Libertarian potential client." *Id.* TC000182 (emphasis added). When asked "Who was 'us'", Casey testified at his second deposition "**Our** attorneys." *See* Doc. No. 335, Exhibit 2, Casey Dep., at 30 (emphasis added).

7. Luketic responded later that day, February 19, 2014, with information on the "Earl Validity Report - SOS." *See* Doc. No. 335, Exhibit 3, Casey Dep. Ex.1, at TC000183.

8. Polesovsky replied to Casey on February 20, 2014 about "Having Client, Working on Back-Up, Too!," and stated "just lost **our** client in Allen County. Looking for others by **we** might just have to roll with Cuyahoga." *Id.* (emphasis added).

9. Luketic on February 20, 2014 e-mailed to Casey "Hackett & Hart reports" from "**Our** Friends." *Id.*, Casey Dep. Ex.1, at TC000184

(emphasis added). This report contained criminal background information on Earl's circulator. *Id.* TC000186-000191.

10. On February 20, 2014, Luketic e-mailed to Casey "Gregory Felsoci Voting History," which identified how Felsoci voted in the most recent elections. *Id.* TC000192.

11. On February 20, 2014, Luketic e-mailed Casey a "Lib. Petition Report," which was "Paid For By Kasich Taylor For Ohio," *id.* TC 000193, and outlined in detail the signature collection efforts of Earl's circulators, including Hatchett and Hart. *Id.* TC000194-000203.

12. On February 21, 2014, just hours before the protest was filed against Earl, Polesovsky sent to Casey the name of Chris Klym as a "Contact." *Id.* TC 000204.

13. On February 21, 2014, Casey e-mailed Klym Felsoci's name and telephone number, *see* Exhibit 10, Casey Docs., at TC000545, establishing that contact with Felsoci originated with Polesovsky. Casey testified that Klym may have known Felsoci. *See* Exhibit 2, Casey Dep., at 36.

14. On February 26, 2014, Luketic texted Casey asking "Would it help **our** case if one of the circulators signed a Democrat petitions this year?" See Exhibit 3, Casey Dep. Ex.1, at TC000206 (emphasis added).

15. On February 26, 2014, Polesovsky e-mailed to Casey Musca's (who initially contacted Felsoci) phone number. *Id.* TC000207.

Should the Common Pleas Court's decision be allowed to stand, Casey and the Kasich Campaign will have succeeded in their plan to hide evidence, obstruct discovery efforts, and subvert the truth. They will have succeeded in their misguided miscarriage of justice. This Court should not tolerate this result.

### **CONCLUSION**

The judgment of the trial court should be **REVERSED**.

Respectfully submitted,

*s/ M.G. Kafantaris*

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was electronically filed using the Court's eFlex filing system and will thereby be served on all parties. It will also be e-mailed in an electronic format to Zackery Keller, [Zachery.keller@OhioAttorneyGeneral.gov](mailto:Zachery.keller@OhioAttorneyGeneral.gov), Nicole Koppitch, [Nicole.Koppitch@OhioAttorneyGeneral.gov](mailto:Nicole.Koppitch@OhioAttorneyGeneral.gov), John Zeiger, [zeiger@litohio.com](mailto:zeiger@litohio.com), and Steven Tigges, [tigges@litohio.com](mailto:tigges@litohio.com), on this 4th day of April, 2016, pursuant to Local Rule 2(E).

s/ M.G. Kafantaris  
Mark G. Kafantaris