

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI DIVISION

JOHN DOE,
On His Own Behalf and On Behalf
Of All Those Similarly Situated,
c/o Jennifer M. Kinsley, Esq.
Kinsley Law Office
Post Office Box 19478
Cincinnati, Ohio 45219,

Plaintiff,

V.

JON HUSTED, Ohio Secretary of State,
In His Official Capacity Only,
180 East Broad Street, 16th Floor,
Columbus, Ohio 43215,

DAVID BOWERS, Special Investigator,
In His Official Capacity Only,
410 Colonial Building
212 North Elizabeth Street
Lima, Ohio 45801,

THE STRATEGY NETWORK LLC,
An Ohio Limited Liability Company,
1349 North Broad Street
Columbus, Ohio 43205,

RESPONSIBLEOHIO,
545 East Town Street,
Columbus, Ohio 43215,

and

IAN JAMES,
1349 East Broad Street,
Columbus, Ohio 43205,

Defendants.

Case No. 1:15 CV 570
Judge J. BLACK

Timothy S.

2:40 PM

**CLASS ACTION
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Now comes Plaintiff John Doe, who, on his own behalf and on behalf of all others similarly situated, complains against Defendants Jon Husted, Ohio Secretary of State, and David Bowers, Special Investigator, in their official capacities only, and against Defendants The Strategy Network, ResponsibleOhio, and Ian James, as follows:

PRELIMINARY STATEMENT

1. This is an action under the Constitution and laws of the United States asserting that Defendants Jon Husted, the Ohio Secretary of State, and David Bowers, his appointed Special Investigator, have engaged in an intentional, relentless, unlawful, and content-based campaign to violate the constitutional rights of individuals who actively engaged in the reform of Ohio's marijuana laws. Beginning with Bowers' appointment in late July 2015 and culminating with the issuance of an overly broad and invasive subpoena duces tecum, the Secretary of State and his Special Investigator have sought to expose the identities and privileged communications of hundreds if not thousands of Ohioans who have participated in this important legislative effort. Reminiscent of McCarthyism, the subpoena – which was directed to the political action committee and a private political strategy group behind the marijuana legalization ballot initiative – seeks to uncover more than a years' worth of stored electronic communication, volunteer names, website username and password information, and other private and personal information wholly protected by the First Amendment rights of political association and free expression. Through this lawsuit, Plaintiff John Doe, a Hamilton County resident and supporter of legalized marijuana who has both sent and received communication covered by the subpoena, seeks to enjoin the disclosure of his private political speech and his identity to the government.

JURISDICTION

2. This is a lawsuit authorized by law to redress deprivations, under color of state law, of rights, privileges and immunities secured by the First, Fourth, and Fourteenth Amendments of the United States Constitution. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331; 28 U.S.C. § 1343; 28 U.S.C. § § 2201 and 2202; and by 42 U.S.C. § 1983.

3. Plaintiff also states causes of action under the Constitution and laws of the State of Ohio. These claims are inherently related to the other claims in this case, over which this Court has original jurisdiction, that they are a part of the same case or controversy under Article III of the United States Constitution. Accordingly, this Court has supplemental jurisdiction of these claims under 28 U.S.C. § 1367.

4. Venue in this Court is appropriate under Local Rule 82.1(g) because a substantial amount of the events giving rise to the claim occurred in Hamilton County within the Southern District of Ohio, Cincinnati Division and the harm Plaintiff John Doe will suffer if his identity and communication are disclosed will occur in the Cincinnati Division of the Southern District of Ohio.

PARTIES

5. Plaintiff John Doe is a resident of Hamilton County, Ohio who supports the decriminalization of marijuana. Over the past year, Doe has sent numerous communications from his residence and other locations in Hamilton County to agents of the ResponsibleOhio political action committee regarding its efforts to amend the Ohio Constitution to permit marijuana usage in the state. Doe has also actively received communications from ResponsibleOhio on this issue at his home and in other locations in Hamilton County. Doe has also accessed online resources maintained by ResponsibleOhio from his computer and other

devices. Recognizing that the issue is controversial and that some members of the public stigmatize supporters of legalized marijuana, Doe has carefully guarded his support for the movement.

6. Defendant Jon Husted is the elected Secretary of State for the State of Ohio. Secretary Husted maintains the statutory power to investigate the administration of election laws, frauds, and irregularities in any county and to report potential violations of election law to the attorney general or prosecuting authority. *See* Ohio Rev. Code. § 3501.05(N). At all times relevant to this Complaint, Secretary Husted has acted under color of state law in executing his statutory investigatory powers.

7. Defendant David Bowers is a Lima, Ohio attorney who was appointed by Secretary Husted to serve as a Special Investigator and to investigate potential elections fraud in conjunction with Issue 3, a ballot measure designed to legalize marijuana usage in the State of Ohio. According to a July 29, 2015 press release issued by Husted's office, Bowers was formerly the prosecuting attorney for Allen County, where he served as the longest-tenured prosecutor in the state and maintained a 90 percent conviction rate. At all times relevant to this Complaint, David Bowers has acted under color of state law in executing the investigatory powers delegated to him by Secretary Husted.

8. Defendant The Strategy Network LLC, an Ohio limited liability company, is a full-service political consultancy that touts its services in pursuing grassroots ballot campaigns and constitutional amendments. The Strategy Network website lists Defendant ResponsibleOhio's initiative to legalize marijuana in Ohio as one of its current projects. It is presently seeking to hire Team Leaders and Petitioners in the Cincinnati area to assist with the ResponsibleOhio ballot initiative.

9. Defendant ResponsibleOhio is the registered Ohio political action committee that is leading the marijuana legislation reform movement in the state. ResponsibleOhio, through its work with The Strategy Network, has collected sufficient signatures to place an initiative on the November 3, 2015 ballot which will legalize marijuana possession and growth.

10. Defendant Ian James is the Chief Executive Office of The Strategy Network and Executive Director of ResponsibleOhio. Upon information and belief, he retains records, both in document and electronic form, of communication to and from supporters of the marijuana legalization movement. Upon information and belief, he also maintains access to volunteer records, website username information, and the identities of countless individuals involved in the effort to reform Ohio's marijuana laws.

CLASS ACTION

11. Plaintiff John Doe brings this action pursuant to Fed. R. Civ. P. 23(b)(2) on behalf of himself and all others similarly situated. The proposed class of plaintiffs consists of all individuals whose identities and/or communication are sought by the Bowers subpoena.

12. The members of the class are so numerous that joinder of all members is impractical. In fact, Doe believes that the number of individuals who contributed communication to or received communication from ResponsibleOhio, created usernames and passwords online, and/or volunteered with the organization is in the thousands if not tens of thousands.

13. There are common questions of law and fact between the members of the proposed Plaintiff class regarding the constitutionality of the Bowers subpoena and whether the First, Fourth, and Fourteenth Amendments protect the class members' communication and identities from being disclosed to the government.

14. The named Plaintiff, John Doe, will fairly and adequately protect the interests of the member class. So too will Plaintiff's counsel, an experienced civil rights and First Amendment attorney with extensive class action experience, adequately advance the interests of the Plaintiff class.

15. The Plaintiff class is proper under Fed. R. Civ. P. 23(b)(2) because all Defendants have acted on grounds generally applicable to the class, thereby making declaratory and injunctive relief appropriate for the class as a whole.

STATEMENT OF THE CASE

16. The status and enforcement of America's drug laws have been the subject of frequent and ongoing political debate for the better part of the last century. In recent years, the discussion over whether to legalize the growth, sale, and use of marijuana in the United States has intensified, resulting in sweeping change in some jurisdictions to the manner in which marijuana is approached under the law. To date, several states have either decriminalized the possession and consumption of marijuana altogether or have legalized its usage to treat certain medical conditions.

17. The State of Ohio has not been immune from this important political issue. In fact, numerous organizations and individuals have lobbied for legislative change around Ohio's marijuana laws in the recent past. One such organization is ResponsibleOhio. Formed approximately a year ago in an effort to garner enough support to place a marijuana legalization initiative on the popular ballot, ResponsibleOhio has been in the forefront of the popular political debate on the issue.

18. As part of its efforts, ResponsibleOhio partnered with The Strategy Network to solicit a sufficient number of signatures to place a constitutional amendment legalizing marijuana

on the November 3, 2015 Ohio ballot. To further this campaign, ResponsibleOhio and The Strategy Network created websites and social media accounts in order to spread the word about its political reform efforts. The groups also recruited volunteers to gather signatures and to educate the general public about the benefits of legalized marijuana. Ohio citizens were invited to provide comments to the organizations in order to shape the ongoing political debate, and the groups also circulated information to their members and constituents about the ballot initiative. In tandem, the groups actively engaged in political expression through an ongoing dialogue with their supporters.

19. The effort was a resounding success. In mid-August 2015, Secretary of State Jon Husted announced that ResponsibleOhio had collected sufficient signatures for the issue to be placed on the November 3, 2015 ballot.

20. Nevertheless, Secretary Husted has expressed ongoing disdain for ResponsibleOhio's political message throughout its year-long existence. In his public comments on the subject, Husted has argued that the initiative is tantamount to a "monopoly" and has resoundingly opposed the idea of legalized marijuana.

21. Notably, even before the ballot initiative was certified, Husted appointed Bowers as Special Investigator to determine whether ResponsibleOhio and The Strategy Network violated Ohio election laws. In his press release announcing Bowers' appointment, Husted touted the former prosecutor's conviction rate and suggested that he would aggressively target any fraud or irregularities committed by the groups.

22. As part of the investigation, the Secretary of State's office issued an administrative subpoena duces tecum to Ian James seeking a broad swath of information maintained by ResponsibleOhio and The Strategy Network. The subpoena was issued on August

24, 2015 and named a return date of August 27, 2015. However, based on an agreement between Bowers and ResponsibleOhio and The Strategy Network's lawyers, the response date has been extended to Tuesday, September 8, 2015.

23. Upon information and belief, issuance of the subpoena was initiated by Bowers as part of his investigation of the marijuana legalization ballot initiative. Thus, the subpoena will be referenced in this Complaint as the "Bowers subpoena."

24. The Bowers subpoena seeks disclosure of the following categories of information:

- Any and all documents or electronically stored information reflecting communications, to or from ResponsibleOhio and/or Strategy Network, concerning the proposed statewide initiative to amend the Ohio Constitution referred to as Issue 3;
- Any and all documents or electronically stored information related to names of individuals who are or were volunteers and who obtained a username and password through the ResponsibleOhio and/or Strategy Network website; and
- Any and all documents or electronically stored information related to or reflecting names of persons who created usernames and passwords to download petitions from The Strategy Network website.

25. Upon information and belief, Bowers has threatened to prosecute Ian James, ResponsibleOhio, and The Strategy Network if they do not disclose the full range of information sought by the subpoena on or before Tuesday, September 8, 2015. To date, however, no criminal charges have been filed and there is no pending state court action surrounding the investigation.

26. Plaintiff John Doe both submitted and received communication that is covered by the scope of the subpoena. John Doe's communication directly relates to an important and timely political topic and the subject of legislative drug policy reform.

27. John Doe has also viewed and used the ResponsibleOhio website and has engaged in online activity that would ostensibly be subject to disclosure under the subpoena. John Doe's involvement with the ResponsibleOhio and The Strategy Network's website has been solely for legitimate political purposes, and he has not violated any elections laws by his participation in the reform movement.

28. Recognizing the stigma that is occasionally attached to those who advocate the decriminalization of marijuana, John Doe fears retribution from family, friends, neighbors, and his employer and other associates if his private communications with ResponsibleOhio and The Strategy Network are publicly revealed. John Doe has therefore contemplated restraining his communications to the organization going forward and has been chilled in his participation in the movement so as not to be the target of government overreaching and harassment.

STATEMENT OF CLAIMS

COUNT ONE:

Violation of First Amendment Rights Under 42 U.S.C. § 1983

29. Each of the foregoing paragraphs is incorporated by reference as if repeated here.

30. Plaintiff John Doe and the putative class members retain a protected First Amendment right to associate with political organizations and to do so anonymously.

31. Plaintiff John Doe and the putative class members also retain a fundamental right to participate in political debate through anonymous online usernames to protect their identities.

32. Plaintiff John Doe and the putative class members further retain a First Amendment right to engage in political debate and dialogue and to receive information on important political topics without fear that their identities, beliefs, and communication will be exposed by the government.

33. These First Amendment rights create an associational privilege against discovery of protected political associations, affiliations, and communication.

34. The Bowers subpoena seeks information and communication protected by the First Amendment associational privilege and is therefore unconstitutional. Equally problematic is the fact that the subpoena imposes a chilling effect on future communication to and from ResponsibleOhio and The Strategy Network on whether and how to legalize marijuana usage, as well as actively discourages individuals from volunteering with the organization for fear their identities may be exposed to the government.

35. The protected political communication of supporters and their identities and online usernames are not necessary or even relevant to any investigation into possible election law violations. In other words, Husted and Bowers can demonstrate no compelling need for the information sought in the subpoena.

36. The Bowers subpoena therefore violates the First Amendment and its issuance and response should be enjoined.

**COUNT TWO:
Violation of Fourth Amendment Rights
Under 42 U.S.C. § 1983**

37. Each of the foregoing paragraphs is incorporated by reference as if repeated here.

38. Plaintiff John Doe maintains a right secured by the Fourth Amendment to be free from unreasonable searches and seizures and more specifically compelled administrative searches that are unsupported by probable cause that a crime has occurred.

39. The Bower subpoena seeks to seize communication and information that does not constitute evidence of a crime and is further unsupported by probable cause to believe that any crime occurred.

40. The Bowers subpoena therefore violates the Fourth Amendment prohibition against unreasonable searches and seizures.

**COUNT THREE:
Civil Rights Conspiracy
Under 42 U.S.C. § 1985**

41. Each of the foregoing paragraphs is incorporated by reference as if repeated here.

42. Should they chose to produce the information sought by the Bowers subpoena, Defendants ResponsibleOhio, The Strategy Network, and Ian James would be engaging in state action designed to violate Plaintiff John Doe's constitutional rights.

43. Any action Defendants ResponsibleOhio, The Strategy Network, and Ian James may take in disclosing Plaintiff's information to Husted and Bowers would be in furtherance of a conspiracy to violate Plaintiff's civil rights.

**COUNT FOUR:
Violations of Ohio Constitution**

44. Each of the foregoing paragraphs is incorporated by reference as if repeated here.

45. Plaintiff pleads each of the foregoing federal constitutional claims in the alternative as state constitutional claims under the Ohio Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff John Doe seeks the following relief against Defendants Jon Husted, David Bowers, The Strategy Network, ResponsibleOhio, and Ian James:

1. Permission for Plaintiff John Doe to proceed in pseudonym to protect his right to anonymous political association and expression;
2. Certification of the Plaintiff class described in the Complaint, to be sought by separate motion;
3. A declaration that the Bowers subpoena is overly broad and seeks disclosure of communication and information that is presumptively protected by the First and Fourteenth Amendments to the United States Constitution and related provisions of the Ohio Constitution;
4. A declaration that the Bowers subpoena seeks disclosure of information that does not itself constitute a crime or evidence of a crime and constitutes a broad fishing expedition absent probable cause that a crime occurred in violation of the Fourth Amendment and related provisions of the Ohio Constitution;
5. A temporary restraining order, to be sought by separate motion, along with preliminary and permanent injunctive relief enjoining Defendants Husted and Bowers from enforcing the challenged provisions of the Bowers subpoena and enjoining Defendants ResponsibleOhio, The Strategy Network, and Ian James from disclosing Plaintiff's communications, identity, and online username and password in response to the subpoena;
6. An award of Plaintiff's reasonable attorney fees and costs pursuant to 42 U.S.C. 1988; and
7. Any such other relief in law or equity that this Court deems appropriate under the circumstances.

Respectfully submitted,

JENNIFER M. KINSLEY
(Ohio Bar No. 0071629)
Kinsley Law Office
Post Office Box 19478
Cincinnati, Ohio 45219
(513) 708-2595
Kinsleylawoffice@gmail.com

Counsel for Plaintiff John Doe