

Brief of Amicus Curiae involving the appeal of the Libertarian National Committee's September 5, 2021 suspension of Caryn Ann Harlos

Submitted by J. Robert Latham

October 22, 2021

Fellow Libertarians,

Having followed with interest the pending appeal before the Judicial Committee of the Libertarian National Committee, I write to share some of my perspectives. By way of background, I have served as a member of the Libertarian National Committee's Judicial Committee, as a member of the Bylaws and Convention Rules Committee, as Regional Alternate for Region One, and in all officer positions for the Utah Libertarian Party (save its recently-created At-Large Member). As an attorney, during the 2008 election I successfully sued the Governor of Utah to reinstate a disqualified Libertarian candidate back onto Utah's general election ballot. In addition to being a Life Member, I have also attended more than one dozen national conventions of the Libertarian Party since 1993.

For context, the delegates to the second sitting of the Libertarian Party's 2020 national convention in Orlando, Florida elected Caryn Ann Harlos to serve a second term as Secretary. The Party's Secretary is not only a ministerial position, but like other Party officers may vote on Party business. Notably, at the same convention and subsequent to the announcement of the results of the election for Secretary, balloting began for delegates to elect the members of this Judicial Committee. *See Approved Minutes of Libertarian Party National Convention Second Sitting, July 9-12, 2020, at p. 65.* At its meeting on September 5, 2021, the Libertarian National Committee suspended Harlos by a vote of 11-2-1.

The Judicial Committee is a Juroral Check on the National Committee

The Libertarian Party's plank titled "Crime *and Justice*" includes the following sentence: "We assert the common-law right of juries to judge not only the facts but also the *justice* of the law." Libertarian Party Platform, 1.7 (emphasis supplied). Libertarians recognize that not only may a law be unjust, but that an

ostensibly “just” law may be unjustly applied. A jury serves as a check against both types of injustice.

Article 6, Section 7 of the Bylaws provides, in relevant part: “The Judicial Committee shall either affirm the National Committee’s suspension of the officer or order the officer’s reinstatement within 30 days of the hearing.” Libertarian Party Bylaws, Art. 6, Sec. 7. This Bylaws provision empowers each Judicial Committee member — like a juror — to exercise complete discretion for this appeal. Accordingly, although a member of this Judicial Committee could conclude that the Libertarian National Committee adhered to the Bylaws in its suspension of Harlos, that Judicial Committee member would also be authorized to conclude that the Libertarian National Committee acted unjustly in this instance, and order the reinstatement of Harlos as Secretary.

For those delegates who attended the 2020 national convention in Orlando, Florida in person or remotely, it was apparent that candidates from disparate communities of interest were elected to officer and at large member positions by a majority of delegates. One might believe from this that the Party’s convention delegates were voting inconsistently. However, as various observers affiliated with the Cato Institute have expressed, “divided government” is desirable for democratically-elected organizations. Thus, Party members — each of whom holds varying preferences — populated the Libertarian National Committee with candidates from competing viewpoints to further legitimize its decision-making among Party members.

Moreover, given that all of the officer elections had concluded before balloting began for the Judicial Committee, one may draw the inference that Party members populated the Judicial Committee with an eye toward protecting Libertarian National Committee officers and members anticipated to dissent more often on votes from suspension by Libertarian National Committee officers and members anticipated to prevail more often on votes.

The Judicial Committee May Determine that the National Committee’s Cause for Suspension is Improper or Insufficient

In evaluating the propriety or equity of a cause, courts have held that although some actions may be taken “for any reason or no reason at all,” those same actions cannot be for “an improper reason.” *See Barela v. Superior Court*, 636 P.

2d 582, 584 (Cal. 1981); *see also* *Gilead Cmty. Servs. v. Town of Cromwell*, 432 F. Supp. 3d 46, 74-75 (D. Conn., Sept, 30, 2019) (“a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter.”); *Innovative Health Sys. v. City of White Plains*, 931 F. Supp. 222, 243 (S.D.N.Y. 1996) (“[I]f an official act is performed simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter.”), *aff’d* by 117 F.3d 37, 49 (2d Cir. 1997); *cf.* *United States v. City of Black Jack*, 508 F.2d 1179, 1185 n.3 (8th Cir. 1974) (racist statements by “leaders of the incorporation movement” and fact that “[r]acial criticism was made and cheered at public meetings” could be considered evidence of improper purpose).

Here, a cursory review of the Bill of Particulars cited by the makers of the suspension motion on the Libertarian National Committee evinces an “everything but the kitchen sink” approach — as compared to the minimalist approach proposed by former chair Bishop-Henchman to “disaffiliate the New Hampshire Libertarian Party organization of which Mr. Pelletier is interim chair based on their violating the Statement of Principles.” *See* LNC Business Mail Archives (Current). However, as the members of this Judicial Committee review the record submitted in relation to this appeal, should any member identify an improper purpose for the suspension motion, such an improper purpose would justify a finding that the suspension motion was tainted, a pretext, contrived and/or otherwise illegitimate, and justify a vote to reinstate Harlos as Secretary.

Furthermore, in reviewing the memorandum provided by Oliver Hall on this matter, one may note the following sentence at page two: “Article 6(7) contemplates that the propriety of an officer’s suspension – including a determination whether the LNC properly identified a cause for the suspension **and the sufficiency of that cause** – is to be decided by the Judicial Committee following a hearing and argument based upon the evidence.” Memorandum of Oliver Hall to Whitney Bilyeu, October 8, 2021 (*citing* Libertarian Party Bylaws, Art. 6, Sec. 7) (emphasis supplied).

For that reason, Hall’s memo appears to concede that any cause underlying an effort to suspend an officer of the Libertarian National Committee must not only be identified, but also that such cause is *sufficient* for the purpose to which that cause has been enlisted. Whether any cause cited by the Libertarian National

Committee is sufficient to suspend Harlos as an officer - is for this Judicial Committee to decide.

And without intending any disrespect to Hall's praiseworthy past and ongoing legal advocacy on behalf of the Libertarian National Committee, Hall's October 8, 2021 memorandum submitted to the Judicial Committee should be viewed in the light of someone who may be called upon to defend the actions of the Libertarian National Committee before a tribunal, rather than a neutral interpretation of how the Party's Bylaws should apply to this instance.

"No Corporate Board" = No True Scotsman....

A recurring trope repeated throughout the present attempt of the Libertarian National Committee to suspend Harlos as an officer is that "[o]n no board in corporate or nonprofit America could a board member act" as has Harlos. *See* LNC Business – Discuss group, Facebook, post by (representative of Region Five) Susan Hogarth, September 2, 2021; *see also* Comments of (at large member) Laura Ebke, Meeting of the Libertarian National Committee, September 5, 2021 ("for those of you who have served on any other corporate board or for profit or nonprofit...").

This logical fallacy notwithstanding, in my view the Party is not like a corporation, or non-profit, or government entity -- it is *sui generis*, its own unique quasi-political entity. As such, the Party should not necessarily emulate the institutional forms and practices it aspires to replace or — in some cases — dismantle. Rather, it should adopt — and continuously explore ways to improve — its own processes and practices. In this spirit, the members of this Judicial Committee should not feel bound to precedents arising from distinguishable settings, and should feel at liberty to illuminate an enlightened way forward.

Libertarian law professor Eugene Volokh relates a trenchant observation made by Yale Law student Trent Colbert about pressure directed at him by school administrators following a slang-laden invitation he distributed to classmates: "People are less interested in discussion than domination". In the free speech context, courts evaluate restrictions on speech by a "least restrictive means" standard. *See Sable Communications of California v. F.C.C.*, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally

protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”).).

Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities “simply by averting [our] eyes.”

U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000) (quoting *Cohen v. California*, 403 U. S. 15, 21 (1971)).

Rather than set the stage for the promulgation of a Libertarian National Committee Speech Code, Libertarians from different communities of interest can model less-restrictive and more-inclusive democratic decision-making processes by favoring more narrowly-tailored restrictions on debate and discussion that reasonably accommodate — rather than abrogate — the rights of Party members, and their elected representatives serving on the Libertarian National Committee.

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Although it is disappointing to see fellow Party members in contention, I don’t view this Judicial Committee’s decision on the appeal of the Libertarian National Committee’s suspension of Harlos as an officer as an existential crisis for the Party. The Party’s membership is dynamic, and will respond to and transcend whatever outcome this Judicial Committee’s decision yields as circumstances require.

Thank you very much for your service to the Party and your time in considering my remarks.

In Liberty,

J. Robert Latham

Disclaimer: This document is intended to provide a structural analysis of the Libertarian National Committee and the role of the Judicial Committee for this appeal as informed by the Bylaws, and is not intended as a legal opinion on any matter.