

# The Intelligencer

## U.S. files brief supporting revival of McDonough civil rights suit

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The U.S. Solicitor General and eight other interested groups ranging from conservative to liberal filed briefs Monday with the U.S. Supreme Court supporting the reversal of a decision that halted a federal civil rights lawsuit that arose from a decade-old Troy ballot fraud case.

The nine amici curiae – friends of the court – filings back the position that Rensselaer County Democratic Elections Commissioner Edward G. McDonough was timely in filing his \$8 million lawsuit against former special prosecutor Trey Smith.

McDonough brought the civil rights case after he was acquitted, and not when he said he had discovered that fabricated evidence had been introduced in his criminal case by the prosecution. The U.S. Second District Court of Appeals ruled in August 2018 that the suit should have been filed when the discovery was made.

“It’s good to see conservative groups and liberal groups coming together on this issue,” Brian Premo, McDonough’s local attorney, said Tuesday.

“The brief filed by the solicitor general means law enforcement. They’re speaking for the Department of Justice, the FBI, all law enforcement,” Premo said about the federal legal submission.

In addition to the U.S., briefs filed included those involving the Cato Institute, the Cause of Action Institute, Constitutional Accountability Center, criminal law centers at New York University and Harvard University law schools, the American and New York Civil Liberty Unions and The Innocence Network.

McDonough’s lawsuit alleges that Smith fabricated evidence and claims malicious prosecution for charging him with committing 74 felonies as part of a scheme in the 2009 Working Families Party primary election to forge more than 50 absentee ballots for Troy City Council Democratic candidates. The suit also alleged that the other Democrats conspired to have McDonough take the fall and Smith went along with it as part of a political vendetta he had against the elections commissioner.

Premo filed the suit on McDonough’s behalf under Section 1983 of federal law within the three-year limit set for bringing the case after his December 2012 acquittal in the ballot fraud trial. Premo has represented McDonough through a mistrial, the acquittal, the filing of the federal lawsuit and the appeals.

Neal Katyal, a former acting U.S. solicitor general, and partner at Hogan Lovells in Washington D.C., will argue the case for McDonough on April 17 before the U.S. Supreme Court. The case is considered to have national importance because Katyal argues the Second District created a

new rule, one that would create an unequal playing field where the statute of limitations would depend on the district where a lawsuit was filed. Five other federal districts adhere to the timeline McDonough followed.

The U.S. brief argues that under Section 1983 a plaintiff “seeking damages for the wrongful initiation of criminal proceedings based on fabricated evidence” needs to have the criminal case end in his favor before he can file a claim and would not have a complete cause of action until that happens.

“There’s no surprises,” Thomas J. O’Connor, who represents Smith, said of the filings. O’Connor said he anticipated support for Smith’s case in upcoming filings. O’Connor of Napierski, VanDemburgh, Napierski and O’Connor will argue the case before the Supreme Court.

McDonough’s federal case is the last one resulting from the ballot fraud investigation. Former Democratic Councilman Michael LoPorto also was acquitted, but his \$80 million lawsuit was dismissed with prejudice. Former Councilman John Brown, former City Clerk William McInerney and Democratic operatives Anthony Renna and Anthony DeFiglio pleaded guilty to charges in the case.