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

LIBERTARIAN PARTY OF OHIO, et al.,	:	
Plaintiffs,	:	Case No. 2:13-cv-00953
v.	:	Judge Watson
JON HUSTED,	:	Magistrate Judge Kemp
Defendant.	:	

DEFENDANT SECRETARY OF STATE JON HUSTED'S POST-HEARING BRIEF

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I. INTRODUCTION

Throughout this case the Plaintiffs' theories have been moving targets. But after six months, four amended complaints (two proposed and two actually filed), one temporary restraining order motion, one Sixth Circuit appeal, two attempts for United States Supreme Court consideration, and two preliminary injunction hearings, the Plaintiffs are no closer to hitting any of those targets than they were in March. Plaintiffs have completely failed to produce evidence to support any one of their theories, regardless of which iteration the Court considers. Moreover, Plaintiffs have waited entirely too long to press their claims. They have made no effort to expedite this case, and are now asking this Court to alter the status quo and upend the November general election because of their self-induced emergency. The Secretary has produced ample evidence of the damaging impact Plaintiffs' requested relief would have on a general election that is well underway. (*See* Docs. 205-4, 205-5, 205-6, 213-1). Plaintiffs have failed to rebut any of it.

Plaintiffs' claims do not just fail as a matter of timing, they fail on their face. It is undisputed that Secretary of State Husted was the sole decision-maker regarding the validity of the protests and the removal of Mr. Earl and Mr. Linnabary from the ballot. (Doc. 203-1, Husted Depo., p. 8, Page ID # 4181; p. 33, Page ID # 4206; p. 42, Page ID # 4215; p. 49, Page ID # 4222; p. 52, Page ID # 4225). And the Plaintiffs are clear that "[they]'re not attempting to cast any shadow of a doubt on [Secretary of State Husted's] particular decision." (*Id*. at 77:21-23, Page ID # 4250). This makes sense, as there is no evidence that Secretary Husted based his decision to remove Mr. Earl and Mr. Linnabary from the primary ballot on anything other than their failure to comply with Ohio law.

Inexplicably, it is upon Secretary of State Husted's decision, which they do not doubt, that they base their various theories for relief. Those theories center on Terry Casey. Although Plaintiffs have delved rather far into Terry Casey's involvement in *filing* the protest, they failed to present any connection between the Secretary (the sole decision-maker) and Mr. Casey. And they cannot. When Secretary Husted was deciding the protests, he had no idea that Terry Casey was involved. (*Id.* at 31:4-32:5, Page ID # 4204-05). The Secretary only learned of Mr. Casey's involvement a few days before his September 4, 2014 deposition (*id.* at 31:23-32:1, Page ID # 4204-05), and even then he did not know the nature of his involvement (*id.* at 31:21-22, Page ID # 4204). Plaintiffs' counsel succinctly summed up the Secretary's knowledge of Terry Casey's involvement in this case in the following exchange:

> Mr. Brown: "So it's pretty clear that you did not know that Mr. Casey was involved at the time of the hearing process?"
> Secretary Husted: "That's correct."

(*Id*. at 32:2-5, Page ID # 4205).

Mr. Casey corroborated this testimony as follows:

> Mr. Brown: "Sir, have you had any contact with Secretary of State Husted during any period of time when his office was considering the protests involving the two Libertarian candidates?"
> Mr. Casey: "None with him. None whatsoever."

(Doc. 247, P.I. Hearing Transcript, 95:10-14, Page ID # 6581). Plaintiffs presented absolutely no evidence as to how the Secretary could conspire with someone to whom he never spoke or otherwise contacted.

While it is true that Mr. Casey communicated with Matt Damschroder during the protest process, it is undisputed that their communications were on "technical details," (*id.* at 15:15-19, Page ID # 6501) and "procedural process questions" related to filing and hearing the protests (*id.* at 23:22, Page ID # 6509; 28:3-5, Page ID # 6514; 29:16-21, Page ID # 6515). They did not talk

about the substance of the protests, (*id.* at 35:20-22, Page ID # 6521), because as Mr. Casey stated: "[i]f I was talking to [Matt Damschroder] on the substance of the case that might not be the best thing even though I knew Matt wasn't the one deciding the case" (*id.* at 35:13-15, Page ID # 6521). In fact, Mr. Casey agreed that "talking substance is no good but process and hearing dates [were] fine." (*Id.* at 35:16-19, Page ID # 6521).

Regardless, the Plaintiffs challenge the substance of the protest hearing decision. It is undisputed that Matt Damschroder was *not* a decision-maker on substantive matters related to the protests. (*Id.* at 186:5-7, Page ID # 6672). He is instead a "go-to" person at the Secretary's Office for Democrats, Republicans, and unaffiliated people alike. (*Id.* at 188:6-8, Page ID # 6674). Thus, Mr. Damschroder did not think it was odd for Mr. Casey to contact him seeking otherwise public information that was related to the protest. (*Id.* at 186:18-23, Page ID # 6672).

Importantly, Plaintiffs have failed to show that any of the communications between Mr. Damschroder and Mr. Casey had any impact on the Secretary's ultimate decision on the protests. And they cannot, because Matt Damschroder did not have any conversations with the Secretary *at all* until after the protest was decided. (*Id.* at 188:13-16, Page ID # 6674). So even if Mr. Damschroder had "talked substance" with Mr. Casey—and he did not—the only decision-maker in this case, Secretary Husted, was not aware of, and could not have been influenced by, Casey and Damschroder's hypothetical discussions. But in light of the Secretary's "concern" (Doc. 203-1, Husted Depo., 38:13-40:7, Page ID # 4211-13) regarding the communications with Mr. Casey and Mr. Damschroder, and the fact that the Secretary described it as a "teaching moment" (Doc. 247, P.I. Hearing Transcript (9/29/14), 188:13-20, Page ID # 6674) for Mr. Damschroder, it is clear that the Secretary could not be, and was not influenced by, Terry Casey's actions.

It is undisputed that Secretary Husted was indifferent as to the outcome of the protest hearings. (Doc. 203-1, Husted Depo., 49:18-22, Page ID # 4222). He did not care who won or lost. He simply expected everyone, the petition circulators, his staff, and the Hearing Officer to follow the law. (*Id*. at 49:18-20; Page ID # 4222; 51:6-52:7, Page ID # 4224-25; 76:6-12, Page ID # 4249). Oscar Hatchett is the only person in this case who failed to follow the law, and he testified that he would have gladly completed the payor statements in question had Libertarian Party operatives requested that he do so. (Doc. 63-1, Protest Hearing Transcript, pp.94-97, Page ID # 1325-1328) These failures are entirely of Plaintiffs' own making and are precisely why Plaintiffs find themselves in this position. Try as they might, Plaintiffs are unable to point to any similar failures on the part of the Secretary, his staff, or the Hearing Officer.

What Plaintiffs lack in evidence, they make up for in theories. But the extraordinary preliminary relief that Plaintiffs seek cannot be granted on theories alone, especially when doing so will bring an election to a grinding halt and create chaos in the process. *See e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections, []can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.") and *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 645 (6th Cir. 2012) ("As a general rule, last-minute injunctions changing election procedures are strongly disfavored.") *see also Westerman v. Nelson*, 25 Ohio St. 500 (1874) (Douglas, J., in chambers) (denying request to have candidate's name printed on ballot where absentee ballots had already been sent and returned because the "time element is now short," the "election machinery is already under way, printing the ballots. Absentee ballots have indeed already been sent out and some have been returned. The costs of reprinting all the ballots will be substantial" and "orderly election processes would likely be disrupted by so late an action."). Simply put,

there is nothing more fundamental to an "election procedure" than the ballot itself, which Plaintiffs seek to alter at this late date.

It is simply too late, and Plaintiffs have failed to offer any evidence to the contrary. Their claims fail on the merits, and as a matter of law, on laches.[1] Their request for preliminary injunctive relief must therefore be denied.

II. STANDARD GOVERNING MOTIONS FOR PRELIMINARY INJUNCTION

"Injunctive relief is an extraordinary remedy and is issued cautiously and sparingly." *TOA Techs., Inc. v. Guzzetti*, No. 1:12CV667, 2012 WL 1096114, at *2 (N.D. Ohio Mar. 29, 2012). A preliminary injunction is granted only if the movant can show that: (1) the movant has a strong likelihood of success on the merits; (2) the movant would suffer irreparable injury absent the injunction; (3) issuance of a preliminary injunction would not cause substantial harm to others; and (4) the public interest would be served by issuance of a preliminary injunction. *See Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

Plaintiffs bear the burden of establishing their claim to a preliminary injunction, which "should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) (quotation omitted). The proof required to obtain an injunction is "much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. Plaintiffs must establish their case by clear and convincing evidence. *Damon's Rests., Inc. v. Eileen K Inc.*, 461 F. Supp.2d 607, 621 (S.D. Ohio, 2006). That evidence "must more than outweigh the [opposing] evidence," but must also "persuade the court that its claims are highly probable." *Id.*

[1] Secretary Husted incorporates by references and reasserts the laches arguments and related evidence set forth in his *Motion for Summary Judgment* (Doc. 205) filed September 14, 2014.

A. Plaintiffs' Have Not Demonstrated a Likelihood of Success on the Merits.

1. Plaintiffs' claims are barred by laches.

Plaintiffs cannot demonstrate that they are likely to succeed on the merits of their claims when those claims are barred by laches. As this Court noted, "[t]he Secretary has adduced substantial evidence indicating adding the LPO candidates to the ballot would be impossible and even attempting to do so would cause the State to incur significant additional expense." (Doc. 225, Opinion and Order, p. 5, Page ID # 5145). But rather than decide this case on the Secretary's evidence produced up to that point, the Court gave the Plaintiffs every opportunity to refute its finding at the September 29, 2014 hearing. (*Id.* at p. 6, Page ID # 5416). They failed to do so.

a. Although invited to do so by this Court, the Plaintiffs failed to present any evidence as to why laches should not bar their claims.

Plaintiffs did not present any evidence that it is still possible to change the November general election ballot without causing an interruption in early voting. They did not present any evidence that the ballot can still be changed in all eighty-eight counties in time for Election Day, let alone in time for the absentee voting period commencing in four days. Equally absent is any evidence showing, or even suggesting, that Ohio's military voters would not be disenfranchised by the remedy that Plaintiffs seek.

The Plaintiffs made no arguments regarding the "confusion and disarray" this Court noted could result from a ballot change. (*Id.*). They did not present evidence that two ballots would *not* confuse voters, or provide any evidence as to how it could be avoided. Also missing is any evidence to rebut the Secretary's declarations outlining the significant costs that boards would incur should a statewide ballot change at the last minute. (Docs. 205-4; 205-5; 205-6;

213-1). Finally, Plaintiffs presented no evidence as to *how* such a last minute change could be effectuated.

Perhaps most importantly, although invited to do so by this Court (*see* Doc. 225), Plaintiffs failed to show that they did not delay in bringing their claims. They did not address, much less deny, their delay in bringing Counts Seven and Eight. Plaintiffs further admit delay in bringing Count Nine (see Docs. 235; 235-1; 236; 236-1), but argue that they did not understand the law and should therefore be excused from having to exercise the diligence required of other plaintiffs in an election case or any other case. Their arguments are not evidence, but as set forth below, even if they were, they would fail.

b. Plaintiffs' counsel's misinterpretation of the law is insufficient to overcome laches.

"[T]he error of an attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control." *Holland v. Florida*, 560 U.S. 631, 657 (2010). Thus, in the statute of limitations context, "a lawyer's mistake is not a valid basis for equitable tolling." *Whalen v. Randle,* 37 Fed. Appx. 113, 120 (6th Cir. 2002). Instead, "'[t]he remedy for negligence by a party's lawyer is generally a legal malpractice suit or an ineffective assistance of counsel claim, not forcing the opposing party to defend against a stale claim'." *Jurado v. Burt,* 337 F.3d 638, 645 (6th Cir. 2003) (quoting *Whalen*, 37 Fed. Appx. at 120).

The same logic applies here. Mr. Brown appears to accept responsibility for not understanding the law and failing to bring the due process claim earlier. (Doc. 234, Plaintiffs' Motion to Supplement Witness List, p. 2, Page ID # 5691). However, his clients bear the burden of his mistake. *See Jurado,* 337 F.3d 645. This is especially true here where Mr. Linnabary testified that he left it entirely up to his lawyers to decide what claims to bring and when to bring them. (Doc. 252, P.I. Hearing Transcript (9/30/14), 290:4-17, Page ID # 6787). Mr. Linnabary

raised the purported conflict with Mr. Brown on March 13, 2014, (*see* Doc. 235-1, Plaintiffs' Supplemental Exhibit B, Page ID # 5698), and in response Mr. Brown gave what he later realized to be bad legal advice. Mr. Brown's mistake is constructively attributable to the Plaintiffs. *See Holland*, 560 U.S. 657. His error cannot save his clients' claims from laches.

Mr. Brown's detailed analysis of his mistake does not alter this conclusion. In his "proffer," Mr. Brown asserts that he did not understand that the hearing, which was held in front of a hearing officer before whom Mr. Brown represented his clients, introduced exhibits, and called and cross-examined witnesses, was a "judicial" process. (Doc. 234, Plaintiffs' Motion to Supplement Witness List, Page ID # 5690-94). He admits that he may have been wrong about this, (*id.* at p. 4, Page ID # 5693), and attributes it to what could only be his own misreading of *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) and *Blankenship v. Blackwell,* 341 F. Supp.2d 911 (S.D. Ohio 2004).

In *Nader,* presidential candidate nominating petitions were challenged through the same protest-hearing process at issue in this case. 545 F.3d at 462. As here, the protests were upheld and Nader was removed from the 2004 presidential ballot. *Id.* Before the election, Nader's request for injunctive relief was denied. *Id.* *After* the election, Nader, represented by Mark Brown, sued the Secretary in his *individual capacity* under 42 U.S.C. § 1983 and sought *damages* related to his removal. *Id.* The Court denied his claim for damages, holding that:

> "[T]he hearing held prior to the decision to remove Plaintiff's name from the ballot was sufficiently adjudicative in nature to confer absolute immunity."

Nader v. Blackwell, No. 2:06-cv-821, 2007 WL 2744357 at *4 (S.D. Ohio Sept. 19, 2007). The district court's holding was not disturbed on appeal. Rather, the Sixth Circuit held that the statute that served the basis for the appeal, Ohio Rev. Code § 3503.06 was unconstitutional, but that then-Secretary Blackwell enjoyed qualified immunity from Plaintiff's suit for damages.

Nader, 545 F.3d at 473. The Court stated, "[g]iven our holding that Blackwell has qualified immunity from suit, it is unnecessary for us to decide whether he also enjoys absolute immunity." *Id.* at 478. Thus, the Sixth Circuit did not reach, and therefore did not overturn, the district court's finding that the same protest process at issue here is a "judicial" process. Plaintiffs' counsel's misunderstanding of his own case is insufficient to overcome laches.

Plaintiffs' reliance on *Blankenship* is equally puzzling. There, the nature of the protest hearing process was not at issue. Instead, the Plaintiffs challenged the constitutionality of Ohio Rev. Code § 3503.06 (the petition circulator residency requirement), as it was applied to them and served as the basis for invalidating their nominating petitions. *Blankenship*, 341 F. Supp.2d at 913-17. Because the same Plaintiffs had also filed a mandamus action in the Ohio Supreme Court challenging the Secretary's decision, the Secretary argued that the Court should abstain from deciding the Plaintiffs' constitutional question under the *Younger* abstention doctrine. *Id.* at 918-19; *see Younger v. Harris*, 401 U.S. 37 (1971). The Court declined to apply *Younger*, but also rejected Plaintiffs' request for injunctive relief. *Blankenship*, 341 F. Supp.2d at 912, 924. It held that rampant fraud served as an otherwise valid basis for rejecting the petitions; thus, "it [was] unnecessary to delve into the constitutional issues presented." *Id.* at 923. If Plaintiffs' counsel understood *Blankenship* to hold that the protest hearing process was not "judicial" in nature, he was wrong to do so.

What Plaintiffs should have understood from *Blankenship*, is what came out of the parallel mandamus action that Mr. Brown filed in the Ohio Supreme Court. *Blankenship v. Blackwell*, 817 N.E.2d 382 (Ohio 2004). In that case the Court held that Relators (represented by Mr. Brown) "failed to act with the requisite diligence in asserting their claims" because they waited *thirty-one days* to do so. *Id.* at 387. There, as here, Mr. Brown sought relief for his

clients that would take effect after the statutory deadline for printing absentee ballots had passed. *Id.* The Court stated, "'[i]f relators had acted more promptly, this might have been avoided and any potential prejudice to count[ies] in [their] statutory obligation to absentee voters would have been minimized.'" *Id.* at 387-88 (quoting *State ex rel. Vickers v. Summit Cnty. Council*, 777 N.E.2d 830, 833 (Ohio 2002)). The Court recognized that "granting relators' requested relief at this late date would endanger Ohio's election preparations." *Id.* at 388

Simply put, Plaintiffs' counsel has been down this road before, and rather than attempting to distinguish the Ohio Supreme Court *Blankenship* case from the case at bar, he ignores it entirely. He disregards the fact that his thirty-one day delay in bringing claims barred them in *Blankenship*, while attempting to justify (not deny) a six month delay in this case. His justification (that he was wrong about his own cases, namely *Nader* and *Blankenship*) does not excuse his delay in this case.

c. The Secretary notified the Plaintiff in June 2014 that the protest hearing process was "judicial."

Giving the Plaintiffs the benefit of the doubt regarding their delay in March, April, and May, Mr. Brown has been on notice since June 12, 2014 that the Secretary would argue that the protest hearing process was judicial. (*See* Doc. 116-4, Motion to Compel, Ex. 3, Page ID # 2621-22). Counsel for the Secretary sent him a letter expressly stating as such. (*Id.*). Mr. Brown immediately acknowledged the Secretary's position, but described it as "weak." (Doc. 116-5, Motion to Compel, Ex. 4, Page ID # 2623). He was wrong.

In his July 14, 2014 ruling, Magistrate Judge Kemp found that the hearing process was judicial in nature. But still Plaintiffs waited until September 11, 2014, to finally raise the due process claim. Plaintiffs' attempt to explain their six-month delay in bringing their due process claim falls flat. Their admitted *fifty-nine day* delay (July 14, 2014 to September 11, 2014) that

they do not explain is far more egregious than the thirty-one day delay that barred Plaintiffs' claims in *Blankenship*. They have failed to present any evidence as to why their claims are not barred, even as invited to do so by this Court. (Doc. 225, Opinion and Order, p. 6, Page ID # 5146). Plaintiffs cannot demonstrate a likelihood of success on claims that are barred and their motion for preliminary injunction must be denied.

d. The Plaintiffs' attempt to avail themselves of counsel's mistake must be rejected.

Ultimately, there is no one in this case in a position to seek shelter in Mr. Brown's mistake. Mr. Earl clearly stated that the purported "conflict of interest" that Mr. Brown claims not to have understood "didn't affect directly my race." (Doc. 226-1, Earl Depo., 43:1-5, Page ID # 5192). That leaves only Mr. Linnabary. But he admits that he is not a party in this case. (Doc. 252, P.I. Hearing Transcript (9/30/14), 289:12-13, Page ID # 6786). Thus, this Court does not have jurisdiction to grant Mr. Linnabary the relief that he seeks.

In order to invoke the jurisdiction of a federal court, a plaintiff must have "a personal stake in the outcome" of an otherwise justiciable controversy. *Warth v. Seldin*, 422 U.S. 490, 498–99; U.S. Const., art. III, § 2, cl. 2. Mr. Linnabary must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 499. Rather, this Court's "Art. III judicial power exists only to address or otherwise to protect against injury to the *complaining party*, even though the court's judgment may benefit others collaterally." *Id.* (emphasis added). Mr. Linnabary is not a "complaining party" in this case, and the Court lacks jurisdiction to grant the relief that he seeks.

2. Plaintiffs failed to prove that Ohio Rev. Code § 3501.38(E)(1) was selectively applied to them based on their political affiliation.

Plaintiffs' selective application claim fails on a number of fronts. First, there is a strong presumption that state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary. *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997); *Gardenhire v. Schubert*, 205 F.3d 303, 320 (6th Cir. 2000). Thus, the Sixth Circuit has established a three-part test for determining if selective enforcement has occurred:

> First, [an official] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, [the official] must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on the *group* which the defendant belongs to.

United States v. Anderson, 923 F.2d 450, 453 (6th Cir. 1991) (citations omitted).

a. Plaintiffs have not identified anyone to whom they are similarly situated against whom Ohio Rev. Code Section 3501.38(E)(1) was not applied.

As a threshold matter, "it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside her category were not prosecuted." *Stemler*, 126 F.3d at 873. Plaintiffs did not present *any* evidence of similarly situated individuals against whom Ohio Rev. Code § 3501.38(E)(1) was not enforced. And we know that it has been enforced. Brandi Seskes testified that, in 2010, the Secretary advised boards of elections to invalidate initiative petitions if paid circulators failed to fill out the entire employer disclosure box. (Doc. 247, P.I. Hearing Transcript (9/29/14), 116:13-119:1, Page ID # 6602-05; Secretary of State's hearing exhibits E, F, G). Offending petitions were rejected as a result. (*Id.*).

In order to prove their selective enforcement claim, the Plaintiffs had to present evidence that similarly situated candidates used paid circulators, failed to disclose that fact on part-petitions, the Secretary *knew* that they failed to disclose that fact, and the Secretary opted

not to enforce the law against them. They failed to present such evidence, and that failure is fatal to their claims. *See Daubenmire v. City of Columbus*, 507 F.3d 383, 390 (6th Cir. 2007) (dismissing selective enforcement claim when the Plaintiff failed to allege that the City of Columbus (the enforcer) knew of other violations); *see also United States v. Armstrong,* 517 U.S. 456, 469 (1996) (holding that a defendant alleging selective prosecution must produce some evidence that similarly situated defendants not in protected class could have been prosecuted but were not); *Harajli v. Huron Township,* 365 F.3d 501, 508 (6th Cir. 2004) ("[A]ccording to *Gardenhire*, it is an absolute requirement that the plaintiff make at least a prima facie showing that similarly situated persons outside [his or] her category were treated differently." (second alteration in original) (quotation omitted)); *Stemler*, 126 F.3d at 873 (same).

Plaintiffs' attempt to compare this case to a Title VII employment discrimination case and relieve themselves of having to identify a similarly situated individual is misplaced. The Sixth Circuit has held that an Equal Protection claim under § 1983—including a selective enforcement claim—has the same elements as a Title VII disparate treatment claim. *Deleon v. Kalamazoo Cnty. Road Comm'n*, 739 F.3d 914, 917-18 (6th Cir. 2014); *see also Arnold v. City of Columbus*, 515 Fed. App'x. 524, 539 (6th Cir. 2013) (noting that, in a selective enforcement action, "[t]he showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section 1983."). And though in a Title VII discrimination claim, the plaintiff can produce either direct or circumstantial evidence to prevail, *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 584 (6th Cir. 2009), the same is not true for an Equal Protection claim under 42 U.S.C. § 1983. For such claims, the plaintiff must still establish (among other things) that he was "treated differently than

a similarly situated" individual. *Deleon*, 739 F.3d at 918. Plaintiffs are simply wrong to argue otherwise.

Finally, enforcing the law only against persons whose violations are reported does not give rise to an Equal Protection claim. In *Wayte v. United States*, 470 U.S. 598 (1985), the government's policy to prosecute only those draft violators who informed the government of their intent not to register did not violate the Equal Protection Clause. The Sixth Circuit has similarly concluded that a passive enforcement policy, one that prosecutes only those who report themselves or were reported by others, does not constitute purposeful discrimination or give rise to a selective enforcement claim. *United States v. Schmucker*, 815 F.2d 413 (6th Cir. 1987). Much like in *Wayte* and *Schmucker*, the Secretary constitutionally enforces Ohio Rev. Code § 3501.38(E)(1) against those whose violation is reported to him through a protest. Plaintiffs apparently believe that the Secretary must review every petition it receives and independently investigate whether every circulators who leaves the employer disclosure box blank was actually paid. The law imposes no such requirement, but the law (Ohio Rev. Code § 3513.05 & Ohio Rev. Code § 3501.39) does provide a process for filing a protest against the certification of a candidate.

Plaintiffs failed to prove the existence of a similarly situated person against whom Ohio's payor disclosure law was not enforced. This failure is fatal to their Equal Protection claim and preliminary injunctive relief must be denied.

b. Plaintiffs cannot show that the Secretary initiated the enforcement of Ohio Rev. Code § 3501.38(E)(1) with discriminatory purpose.

The undisputed evidence in this case is that Secretary Husted had only one purpose in enforcing Ohio's payor disclosure law: because that is what the law required him to do.

(Doc. 203-1, Husted Depo. 76:6-12, Page ID # 4249). Plaintiffs have not presented any evidence to the contrary. They have theories as to why Terry Casey did what he did, but none of that matters, because what they have to prove in this case is a discriminatory purpose on the part of the *enforcer*. Terry Casey was not the enforcer in this case. The Secretary was. And as the Plaintiffs stated, they are not questioning his decision. (*Id*. at 77:21-23, Page ID # 4250).

Importantly, Plaintiffs offer no support for the proposition that the Secretary could have handled the protests any differently had he known of Terry Casey's involvement. In relevant portion the Ohio Revised Code provides that "upon the filing of the protest, the election officials with whom it is filed *shall* promptly fix the time and place for hearing it." Ohio Rev. Code § 3513.262 (emphasis added). At the hearing, the election official "*shall* hear the protest and determine the validity or invalidity of the petition." *Id.* (emphasis added). Once the protest was filed, Ohio law required the Secretary to hold a hearing and determine the validity of the petition. He did exactly that. The Secretary's purpose throughout the protest process was to fulfill his statutory obligations as Ohio's chief elections officer. Plaintiffs have failed to produce any evidence to the contrary.

c. Plaintiffs failed to present any evidence on the effect of the Ohio Revised Code to the Libertarian Party.

Finally, to prove their selective enforcement claim Plaintiffs must show that the enforcement of Ohio's payor disclosure law had a discriminatory effect on the group to which they belong, namely the Libertarian Party. They completely failed to do so. There is no evidence in the record as to how Ohio Revised Code § 3501.38(E)(1) effects the Libertarians.

As they have in the past, Plaintiffs will undoubtedly attempt to conflate the alleged discriminatory effect of Ohio's minor party's laws with the actual statute whose enforcement they challenged here (Ohio Rev. Code § 3501.38(E)(1)). But the Plaintiffs are challenging the

Secretary's enforcement of Ohio's disclosure laws, not its minor party laws. It is the alleged discriminatory effect of the disclosure law for which they were obligated to present evidence. They failed to do so, and their selective enforcement claim must therefore fail.

i. Plaintiffs have already litigated and lost their claim that the law was retroactively changed and applied against them.

Plaintiffs' are re-litigating the exact same "retroactive application" claim that this Court (*See* Op. and Order Doc. 80), the Sixth Circuit, *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 424 (6th Cir. 2014), and the Ohio Supreme Court, *State ex rel. Linnabary v. Husted*, 8 N.E.3d 940 (Ohio 2014) have already rejected. Notably, the first time this Court rejected Plaintiffs' "retroactive interpretation" claim it stated:

> Ohio law has never contained such an exception for independent contractors, and prior to the events that gave rise to this matter, Ohio courts and Secretary Husted indicated paid circulators were required to fill in the employer information box on part petitions with the name and address of the pay regardless of whether the circulator was an employer or independent contractor.
>
> The notion that independent contractors are exempt from the disclosure requirement appears to be little more than urban legend based on a misreading of *Rothenberg*.

(Doc. 80, Opinion and Order, p. 25, Page ID # 2170 (citations omitted)). That is the law of this case. "[T]he law of the case doctrine dictates that issues, once decided, should be reopened in limited circumstances, e.g., where there is substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice." *United States v. Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994) (quotation omitted). Although this Court is not foreclosed from reconsidering its prior order, it should refuse to do so in the absence of extraordinary circumstances. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("A court has the power

to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances.").

Extraordinary circumstances do not exist here. The only difference between Plaintiffs' "retroactive interpretation" claim that the Court rejected in March and the claim as it is alleged here (Doc. 188, Third Amended Complaint, ¶ 369, Page ID # 3846) is that Plaintiffs point to the difference between Hearing Officer Smith's Final submitted Report and Recommendation and a working draft that includes an alternate interpretation of Ohio Rev. Code § 3501.38(E)(1), favorable to Plaintiffs. However, Plaintiffs overlook that the Secretary never saw the working draft and Hearing Officer Smith *ultimately concluded this alternate interpretation was an incorrect interpretation of the law.* (*Id.* at ¶ 368, Page ID # 3846; Doc. 252, P.I. Hearing Transcript (9/30/14), 236:15-21, Page ID # 6733).

At the June 5, 2015 status conference Plaintiffs seemed to recognize that their retroactive application claim was effectively dead. They represented to this Court:

> "Count Eight was our due process challenge which this Court refused in its denial of our preliminary injunction request and which the Sixth Circuit affirmed. So I think we can effectively say that's off the table, Your Honor."

(Doc. 118, Hearing Transcript, 4:5-8, Page ID # 2653). Further, in their second *Motion to Amend the Second Amended Complaint*, Plaintiffs stated: "Plaintiffs' (*sic*) concede that their claims under Counts Six and Eight have been 'effectively' resolved." (Doc. 111, Motion to Amend, p.3, n. 2, Page ID # 2541).

Plaintiffs cannot put a claim "back on the table" and unilaterally "unresolve" it by adding one factual allegation, especially when that factual allegation does not help their case. The Supreme Court's decision in *Univ. of Texas v. Camenisch*, 451 U.S. 390 (1981), does not alter that conclusion, as it stands only for the proposition that "the findings of fact and conclusions of

law made by a court granting a preliminary injunction are not binding at trial on the merits." 451 U.S. at 395. It does not stand for the proposition that Plaintiffs may repeatedly litigate the exact same claim for *injunctive* relief.

The law of this case is that the Secretary did not change the application of Ohio Rev. Code § 3501.38(E)(1) and retroactively apply the new interpretation to the Plaintiffs. The Sixth Circuit upheld the law, *Libertarian Party of Ohio*, 751 F.3d at 424, and the Ohio Supreme Court reached the same conclusion, *State ex rel. Linnabary*, 8 N.E.3d 940. Plaintiffs have failed to demonstrate that extraordinary circumstances exist to justify changing that law. Preliminary injunctive relief must therefore be denied as to Count Eight.

ii. Plaintiffs cannot prevail on their conflict of interest claim.

At the preliminary injunction hearing Plaintiffs' counsel represented to the Court that:

> "there was no conflict of interest count at the time [of the protest hearing] because it didn't—that count was not creating July 14 when Magistrate Kemp finally ruled that Professor Smith was acting in a judicial capacity."

(Doc. 252, P.I. Hearing Transcript (9/30/14), 251:3-6, Page ID # 6748). Thus, even if Plaintiffs had presented evidence to demonstrate that Count Nine, their due process claim, is not barred by laches (and they did not) it still fails on the merits. While due process requires that those who act in a judicial or quasi-judicial function be impartial, the burden of proving that an officer is not impartial is on the party making the assertion. *Schweiker v. McClure*, 456 U.S. 188, 196 (1982).

Plaintiffs failed to carry that burden here, where they did not present any evidence as to Hearing Officer Smith's "partiality" and expressly maintain that at the time of the hearing none existed. Their position makes no sense. Because if there was no conflict at the time of the hearing, there was nothing for Hearing Officer Smith to disclose, or anything that he, or anyone else, could have done differently.

Thus, the facts of this case are in stark contrast from those in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), upon which Plaintiffs' rely. In *Caperton*, the Supreme Court set forth several instances in which due process would require a court to recuse. 556 U.S. at 877-82. All of the instances cited involved situations in which a conflict of interest between the court and a party that existed *at the time the court presided over the case. Id.* Plaintiffs admit that is not the case here, and cannot rely on a case that, by their own admission, is inapplicable.

There are alarming inconsistencies between Plaintiffs' allegations in their pleadings, and their representations in open court. That is, they allege that Hearing Officer Smith had a "constitutionally debilitating" conflict of interest when he heard the protest hearing. (Doc. 188, Third Amended Complaint, ¶ 376, Page ID # 3847). They assert that they did not know about the conflict "*at the time of the hearing"*, could not have waived it, and are therefore entitled to preliminary relief. (Doc. 192-1, Memo in Support of Fourth P.I. Motion, p. 16, Page ID # 3895 (emphasis added)). Then after making such serious charges against Hearing Officer Smith (who is himself an attorney), they change their theory and contradict their own allegations. (Doc. 252, P.I. Hearing Transcript (9/30/14), 250:23-251:6, Page ID # 6748). They cannot un-ring the bell. Their due process claim amounts to nothing more than an attack on Hearing Officer Smith premised upon Plaintiffs' counsel's misinterpretation of the law. Furthermore, the Secretary, not Hearing Officer Smith, was the final decision-maker. Under all circumstances, Plaintiffs' due process claim must fail and preliminary injunctive relief denied.

d. The additional three remaining preliminary injunction factors weigh against Plaintiffs.

Plaintiffs did nothing to rebut the Secretary's "detailed and extensive" evidence, (Doc. 225, Opinion and Order, p. 5, Page ID # 5145), regarding the unprecedented negative

impact that a last minute ballot change would have. (*See* Docs. 205-4; 205-5; 205-6; 213-1). The undisputed evidence is that at this late stage in the election cycle the general election ballot could not be changed on a statewide basis in time for Election Day, let alone in four days when absentee voting begins. (Doc. 247, P.I. Hearing Transcript (9/29/14), 199:11-21, Page ID # 6685). For counties that could perhaps effectuate a change faster than others, such as Franklin County, the change could not be made without an interruption in early voting. (Doc. 252, P.I. Hearing Transcript (9/30/14), 365:8-10, Page ID # 6862). If the ballot were to change at the last minute there would be voter confusion, (Doc. 247, P.I. Hearing Transcript (9/29/14), 206:20-21, Page ID # 6692; Doc. 252, P.I. Hearing Transcript, 364:18-23, Page ID # 6861); the secrecy of the ballot could be destroyed, (Doc. 252, P.I. Hearing Transcript, 363:23-364:1, Page ID # 6860-61); and our military voters could be disenfranchised, (Doc. 247, P.I. Hearing Transcript (9/29/14), 192:3-193:10, Page ID # 6678-79; Doc. 252, P.I. Hearing Transcript, 362:12-21, Page ID # 6859).

All of these prejudices can be avoided if the November general election is permitted to proceed as planned. Plaintiffs have failed to demonstrate any set of circumstances in which the balance of these harms tips in their favor. The voters, boards of elections, candidates, and the State would be prejudiced by the relief they seek, and their request for preliminary injunctive relief must be denied.

III. CONCLUSION

For the foregoing reasons, the merits, the law, and laches bar Plaintiffs' attempted relief. Plaintiffs' Motion for a Preliminary Injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically on this 3rd day of October, 2014. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Bridget C. Coontz
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