UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Libertarian Party of Ohio, *et al.*,

Plaintiffs,

v. **Case No. 2:13–cv–953**

Jon A. Husted, **Judge Michael H. Watson**
Ohio Secretary of State,

Defendant.

OPINION AND ORDER

Plaintiffs bring claims under 42 U.S.C. § 1983, asserting Defendant Ohio Secretary of State Jon Husted ("Secretary Husted" or "Secretary") violated their First and Fourteenth Amendment rights when he disqualified their nominating petitions to appear on the May 2014 Ohio primary ballot. Secretary Husted disqualified the petitions because paid circulators who obtained signatures for Plaintiffs' nominating petitions failed to disclose the name and address of the entity that paid them in the "employer information box" on the petitions as required by Ohio Revised Code § 3501.38(E)(1). In their fourth motion for a preliminary injunction, ECF No. 192, Plaintiffs ask the Court to order Secretary Husted to include Plaintiff Charlie Earl and his running mate as candidates for Governor and Lieutenant Governor, respectively, for the Libertarian Party of Ohio ("LPO") on the November 2014 Ohio general election ballot. Plaintiffs similarly seek an order requiring the Secretary to add Steve Linnabary as the LPO

candidate for Ohio Attorney General to the ballot. The Court **DENIES** Plaintiffs' fourth motion for a preliminary injunction because, *inter alia*, Plaintiffs have failed to meet their burden of demonstrating that the Secretary removed them from the ballot because of their political affiliation or speech or that the hearing officer's conflict of interest resulted in the denial of due process.

I. BACKGROUND

Plaintiffs have a long history of fighting for their constitutional right to appear on the ballot in Ohio elections, and for every victory they have achieved, new barriers to ballot access have been erected. It is therefore not surprising that Plaintiffs express cynicism toward the political system that put those barriers in place.

Nonetheless, the Court cannot presume that every setback Plaintiffs suffer rises to the level of a violation of the United States Constitution. With respect to Plaintiffs' fourth motion for a preliminary injunction, the Court finds Plaintiffs have not met their burden of demonstrating a substantial likelihood that their constitutional rights were violated in this instance.

This case illustrates that electoral politics can be unkind to the uninitiated, the political novice, or the unprepared. At the end of the day, neither of the two major political parties emerged unscathed as a result of the efforts of political operatives to manipulate the ballot for their own purposes.

Four Plaintiffs filed the original complaint in this case: the LPO ; Kevin Knedler; Aaron Harris; and Charlie Earl. The LPO has previously been a ballot-qualified political party in Ohio. LPO candidates have run for local, statewide, and federal offices since 2008. Keven Knedler is the Chair of the LPO Executive Committee. Aaron Harris is the Chair of the LPO Central Committee. Charlie Earl seeks to run as the LPO candidate for Governor of Ohio in the 2014 general election.

Defendant Jon Husted is the Ohio Secretary of State. As Secretary, he is also Ohio's chief elections officer under Ohio Revised Code § 3501.04 and therefore is charged with the duty to enforce Ohio's election laws, including the disclosure requirements of Ohio Revised Code § 3501.38(E)(1). Plaintiffs sue Secretary Husted in his official capacity only.

Intervener Gregory Felsoci works as a carpenter by trade and is a nominal member of the LPO. As such, he was recruited to and did file a successful protest with Secretary Husted that resulted in the removal of Plaintiff Earl from the Ohio May 2014 primary ballot.

The basic facts concerning how Intervener Felsoci came to be involved in the protest are a matter of record and are also set forth in detail in the Court's March 19, 2014 opinion and order denying Plaintiffs' third motion for a preliminary injunction. ECF No. 81. The Court need not repeat them here. Suffice it to say that Felsoci's protest led to Secretary Husted's finding that petition signatures

gathered by circulator Oscar Hatchet were invalid because Hatchet, who was paid by the LPO to gather signatures, failed to fill in the employer information blocks on the part petitions as required by Ohio Revised Code § 3501.38(E)(1). That finding, in turn, dictated Secretary Husted's decision to remove Plaintiff Charlie Earl and his running mate as well as Steve Linnabary from the May 2014 Ohio primary ballot on the ground that they failed to submit the required number of valid signatures. As a further consequence, Earl and Linnabary were then excluded from appearing as LPO candidates on the ballot of the November 2014 Ohio general election by operation of Ohio law.

The present lawsuit is one of four actions Plaintiffs have filed in federal court over the past decade concerning their right to appear on the Ohio ballot. *See, e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (reversing judgment adverse to LPO in lawsuit LPO filed in 2003). Indeed, Plaintiffs have been successful in their prior lawsuits, and in the present case, the Court has issued two preliminary injunctions in their favor. ECF Nos. 18 & 47.

After the Court issued its decision denying Plaintiffs' third motion for a preliminary injunction on March 19, 2014, the parties began to engage in discovery. Although they had the option of doing so, Plaintiffs did not move for an expedited trial date. It was not until August 31, 2014 that Plaintiffs requested that the Court set the matter for a three-day hearing to begin on September 29, 2014. At that time, Plaintiffs had not filed a complaint or sought leave to file a complaint

asserting the factual basis for the new claims set forth in their recently-filed third amended complaint.

Plaintiffs waited until September 11, 2014 to file their third amended complaint, and, notably, only as a result of the Court's *sua sponte* invitation to file it. *See* ECF No. 187. Plaintiffs filed their fourth motion for a preliminary injunction on the same day.

The Court held an evidentiary hearing on September 29 and 30, 2015. At the hearing, Plaintiffs presented the testimony of several witnesses and introduced numerous documents. Many of the documents were of email and text message communications among the witnesses who testified at the hearing.

Plaintiffs first called Terry Casey. He is widely recognized as a Republican political strategist. Casey has been involved in Republican politics for forty years. He served as a consultant to candidate Kasich's successful campaign to become Governor of Ohio. Governor Kasich subsequently appointed Casey to serve as the chairman of the Ohio Personnel Board of Review. Casey orchestrated the Felsoci protest that ultimately resulted in the removal of Charlie Earl from the May 2014 Ohio primary ballot.

Plaintiffs also presented the testimony of Matthew Damschroder, who serves as Deputy Secretary of State and Director of Elections for Secretary Husted. Damschroder supervises the election division of Secretary Husted's office. He also oversees the statewide voter registration database and various

aspects of compliance with federal election laws. In addition, Damschroder works with the Secretary's legal division and the administration in drafting instructions for the boards of elections such as directives and advisories. Moreover, he assists the Secretary's legal and legislative departments on matters of legislation. As set forth in greater detail below, Damschroder and Casey communicated about various matters pertaining to Felsoci's protest before, during, and after the protest hearing.

Plaintiffs additionally called Professor Bradley A. Smith to testify at the hearing. Smith works as, *inter alia*, a law professor at the Capital University Law School in Columbus, Ohio and additionally taught law at West Virginia University during the relevant time period. He also previously served on and for a time chaired the Federal Election Commission. As it pertains to this case, Smith accepted an appointment to serve as the hearing officer for the protests of Earl's and Linnabary's petitions. Shortly before the protest hearing, Smith represented Ohio Attorney General Mike DeWine by coauthoring an amicus brief filed with the United States Supreme Court in *Susan B. Anthony List v. Driehaus*, 134 S.Ct 2334 (2014). As will be discussed in more detail below, following the protest hearing, Smith issued a report in which he recommended that Secretary Husted sustain the protest and remove Earl and Linnabary as LPO candidates from the May 2014 Ohio primary ballot.

Plaintiffs also called Jack Christopher as a witness. Christopher works as General Counsel for Secretary Husted. During the protest hearing, Christopher exchanged messages with Damschroder. In addition, Christopher communicated with Professor Smith while Smith was deliberating about his report and recommendation for the subject protests. Those communications will be discussed in more detail below.

Plaintiffs aver that the above conduct demonstrates that these individuals conspired to violate Plaintiffs' First and Fourteenth Amendment rights in two distinct ways. First, Plaintiffs assert that Casey was acting on behalf of Governor Kasich's reelection campaign when he orchestrated the protests and that, as a result, the protests were motivated by political bias and amount to selective enforcement of Ohio Revised Code § 3501.38(E)(1). They maintain that in doing so, Casey enlisted the assistance of Damschroder within the Secretary's office. Ostensibly related to Casey's efforts, Plaintiffs suggest that Jack Christopher improperly influenced Professor Smith's report and recommendation.

Second, Plaintiffs argue Professor Smith had a conflict of interest because he represented Attorney General DeWine before the United States Supreme Court in the *Susan B. Anthony List* case.

Plaintiffs assert the following specific incidents and communications as evidence in support of their request for preliminary injunctive relief. First, Plaintiffs note that Casey had numerous contacts and communications with Matt

Damschroder. On Monday, February 17, 2014, at about 8:07 pm, Casey and Damschroder exchanged text messages involving Democratic efforts to launder money "plus other issues and questions." *See* Pls' Ex. 57, 0076. Damschroder ended the exchange by texting "I'll call after class." *Id.* at 0077. Also on Monday, February 17, 2014 at 11:15 pm, Damschroder wrote to Halle Pelger, Secretary Husted's Chief of Staff, that he "got a call tonight that a protest is likely to come by Friday against Earl . . . ." Pls' Ex. 49. In addition, Damshroder related the substantive issues that would be the basis for the protest. Jack Christopher received this message by 7:58 am on Tuesday, February 18, 2014. *Id.*

On Friday, February 21, 2014, at 1:34 pm, Damschroder e-mailed Pat Wolfe, and others, that "if we get a protest filed with us today, even if it is after 4 pm, please accept it, date/timestamp it, and give it to Sally to disseminate." Pls' Ex. 52. At 3:32 pm later that day, Damschroder texted Melanie Poole, "If any protests are filed, please let me know as soon as they come in." Pls' Ex. 51. The statutory deadline, which had to be met for the protests to go forward, was 4:00 pm on that day.

On December 16, 2014, Damschroder was in contact with Dave Luketic, a former political director of the Ohio Republican Party and by that time an agent with the Kasich Campaign for Governor. *See* Pls' Ex. 56, 0148. Luketic asked whether there were "any petitions gathering from the [sic] Charlie Earl the LIB

candidate?" *Id.* Damschroder responded that he would "keep [an] ear to ground." *Id.* After the candidates filed their part-petitions in early February 2014, Luketic texted Damschroder: "Any filing from Charlie Earl - libertarian running for Gov." *Id.* at 0146. Damschroder reported Earl had filed. *Id.* at 0147. Luketic then stated that "ORP is sending a records request to you via email for all of them." *Id.*

Christopher Shea reported to Damschroder and Christopher by e-mail at 11:26 am on February 18, 2014 that Chris Schrimpf and Avi Zaffini had filed records requests. Schrimpf's request was for the part-petitions of Earl. *Id.* at 0075. On February 21, 2014, at 3:50 PM, just after Earl had been protested and just before Linnabary was protested, Avi Zaffini texted Damschroder, Pelger and Christopher to "Be ready looks like AG campaign, Preisse and co. are coming over with a protest for libertarian." Pls' Ex. 56, 0149. Damschroder responded "AG just filed. Time stamp 3:57." *Id.* Damschroder's communications, by text, e-mail, phone, and in-person, continued during the protest hearing. *See* Pls' Ex. 57 at 0080–0089. This is established by BCCs sent from Casey to Damschroder (forwarded to Christopher) on February 27, 2014, *see* Pls' Ex. 6, and February 28, 2014. *See* Pls' Ex. 7.

In addition to contacting Casey during the actual protest hearing on March 4, 2014, Damschroder was in contact with Christopher. From the hearing room Christopher texted Damschroder sometime before 11:58 am on March 4, 2014

that "[Felsoci's attorney] Zeiger just won't bend, will he?" Pls' Ex. 56, 0154. Damschroder responded, "I like unbending." *Id.* Christopher went on: "I think I felt the ground shake. Yeah. Not a bad idea to have Zeiger in court!" *Id.*, 0155. Christopher also texted: "You're missing some fireworks. :)," to which Damschroder responded, "Damn. In mtg." *Id.*, 00156. Christopher further commented, sometime between 2:04 pm and 4:23 pm, "I hope nobody asks Zeiger who is paying them to do this!! ;)" *Id.*, 0156. Damschroder responded, "It's a pretty penny I'm sure." *Id.*

On Thursday, March 6, 2014, at 5:53 pm, Christopher and Professor Smith had a thirty-three minute phone call. *See* Pls' Ex. 55 (Damschroder's phone log). Neither Smith nor Christopher could recall what they discussed other than Smith remembering talking about the fact they both owned the same breed of dog. Smith was in West Virginia, and Christopher was in Damschroder's office during that conversation. Later that evening, at 9:06 pm, Smith sent to Christopher an e-mail stating: "Done. I know this will anger and disappoint a bunch of people but I am recommending that the protests be dismissed. Let me do a bit of clean up and spell check and I'll get it to you shortly." Pls' Ex 31.

The report and recommendation that Smith had initially prepared was in favor of Earl and Linnabary and would have recommended dismissal of the protests. *See* Pls' Ex. 17. In that draft, as well as the final report, Smith examined *In re Protest of Evans*, No. 06AP-544–48, 2006 WL 2590613 (Ohio

App. 10th Dist. Sept. 11, 2006), which was one of the few authorities discussing the employer information box requirement of § 3501.38(E)(1). Smith's initial impression was that *Evans*

> appears to be much more limited—only employees, and not independent contractors, are required to complete the employer disclosure information. And while it is true that excluding independent contractors creates a hole in the disclosure scheme, *Evans* seemed to believe that that was required by the plain language of the statute.

Id. at 16–17. Smith also wrote that the Secretary's Directives created confusion over whether the employer-statement rule would even be enforced:

> an Ohio citizen searching out guidance on the Secretary's web page, and finding these Directives, might be unduly surprised to then find signatures invalidated on these grounds. "Election law precedent should not be construed as an elaborate trap for the unwary."

Id. at 17 (citation omitted).

On Friday March 7, 2014, at 3:30 am, while working at the office, Christopher sent Smith an e-mail extensively describing his contrary interpretation of the *Evans* case. Pls' Ex. 32.

The parties in this action filed their post-hearing briefs on October 3, 2014, and the matter of Plaintiffs' fourth motion for a preliminary injunction is now ripe for decision. The Court admits all exhibits the parties moved into evidence as well as all of the depositions filed in this case.

II. STANDARD OF REVIEW

The Court considers and balances four factors when it considers a motion

for a preliminary injunction: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.'" *Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 627 (6th Cir. 2013) (quoting *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004)). The factors are not prerequisites to injunctive relief; rather, the Court must balance them to determine whether they weigh in favor of granting an injunction. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). "To determine whether it should grant relief, the district court balances four factors—not one—even in First Amendment cases." *Platt v. Bd. of Comm'rs on Grievances and Discipline of Ohio*, --- F.3d ----, 2014 WL 5002078, at *5 (6th Cir. Oct. 08, 2014). The moving party bears the burden of justifying the issuance of an injunction, including showing likelihood of success and irreparable harm. *McNeilly*, 684 F.3d at 615.

III. DISCUSSION

A. Likelihood of Success

Plaintiffs advance three claims for relief in support of their fourth motion for a preliminary injunction. First, they assert that the employer information box requirement was selectively enforced against them because of their political affiliation and speech (Count Seven). Second, Plaintiffs contend new evidence

supports their claim that the Secretary retroactively applied a novel interpretation of Ohio Revised Code § 3501.38(E)(1) when he determined that independent contractors were required to complete the employer information box (Count Eight). Third, Plaintiffs maintain they were deprived of their due process right to an impartial decision maker because hearing officer Professor Brad Smith had a conflict of interest (Count Nine).

Plaintiffs bring these claims pursuant to 42 U.S.C. § 1983, alleging violations of rights under the First and Fourteenth Amendments to the United States Constitution. Section 1983 states in relevant part:

> [e]very person who, under color of any statute, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States, shall be liable to the party injured in an action at law, suit in equity, or other proceedings for redress[.]

42 U.S.C. § 1983. To prevail on a claim under § 1983, a plaintiff must show that a person acting under color of law deprived him of his rights secured by the United States Constitution or its laws. *Berger v. City of Mayfield Heights*, 265 F.3d 399, 405 (6th Cir. 2001).

Secretary Husted and Intervener Felsoci maintain that Plaintiffs' claims are without merit. They also argue that Plaintiffs' claims are barred by the doctrine of laches. The Court will first address whether Plaintiffs have demonstrated that they are likely to succeed on the merits of their claims and then examine whether

laches bars those claims.

1. Likelihood of Success on Selective Enforcement Claim

Plaintiffs assert that Republican operative Terry Casey, acting on behalf of the Ohio Republican Party, set into motion a protest to remove the LPO candidates from the May 2014 primary ballot as a way of ensuring that the LPO candidate for governor, Charlie Earl, did not siphon votes away from Governor Kasich in the November 2014 general election. Plaintiffs aver that in doing so, Casey sought and obtained the assistance of Secretary Husted's Director of Elections, Matt Damschroder.

Secretary Husted argues Plaintiffs' selective enforcement claim fails because Plaintiffs are unable to present evidence that similarly situated individuals were treated differently. In addition, the Secretary asserts that Plaintiffs have failed to demonstrate that his decision to remove Plaintiffs from the May 2014 Ohio primary ballot was motivated by Plaintiffs' political affiliation or speech. In that regard, the Secretary notes that Plaintiffs have failed to adduce evidence that his decision to remove Earl and Linnabary from the ballot was influenced by Casey or was the result of political animus. Felsoci asserts the latter argument as well and further contends that Plaintiffs cannot satisfy the state action component of their § 1983 claim.

a. Similarly situated individuals treated differently

The Secretary cites Sixth Circuit precedent for the proposition that

demonstrating that the subject law was not enforced against similarly situated individuals is an absolute requirement for a selective enforcement claim. *See Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997); *see also Daubenmire v. City of Columbus*, 507 F.3d 383, 390 (6th. Cir. 2007).

While the Sixth Circuit has apparently never directly addressed the issue, at least two circuits have given some indication that direct evidence may support a First Amendment selective enforcement claim. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 293 n.37 (3rd Cir. 2009) ("Demonstration of a 'pattern' of selective enforcement may not be necessary in cases where there is direct evidence of an explicit policy to implement a facially neutral law in an unconstitutionally discriminatory way."); *Williams v. City of Carl Junction, Mo.*, 523 F.3d 841, 843 (8th Cir. 2008); *see also United States v. Frazier*, 408 F.3d 1102, 1108 (8th Cir. 2005) (plaintiff may prove selective enforcement equal protection claim by direct evidence). In light of that authority, the Court declines to hold that Plaintiffs cannot prevail on their selective enforcement claim without evidence that similarly situated individuals were treated more favorably.

b. Secretary Husted's decision was not influenced

The parties appear to agree that the decision to remove Earl and Linnabary from the May 2014 Ohio primary ballot was made by Ohio Secretary of State Husted. Secretary Husted and Felsoci both stress that Plaintiffs have failed to adduce evidence that the Secretary's decision was influenced or controlled by the

conduct of Terry Casey, the Ohio Republican Party, or anyone else.

Secretary Husted testified at his deposition that he was "indifferent as to the outcome" of the protest and that he instructed his staff to that effect on "numerous occasions." Husted Dep. 49, ECF No. 203-1. Secretary Husted stated that he, and not his staff, was the decision maker in the protests and that the hearing officer's recommendation was a non-binding guide. *Id.* at 8, 52. He also indicated that he did not recall having any contact with Terry Casey during the time frame of the protests and would not have communicated with Casey if he had known of Casey's involvement in the protests. *Id.* at 32–33. The Secretary also averred that he did not speak with Governor Kasich about the protests and could not recall speaking with any member of the Governor's campaign since January 1, 2014. *Id.* at 80. Notably, Plaintiffs' counsel expressly acknowledged during the Secretary's deposition that Plaintiffs are not "attempting to cast any shadow of a doubt" on the Secretary's decision. *Id.* at 77.

The Court agrees that Plaintiffs have failed to carry their burden of showing that Secretary Husted's decision was influenced or controlled by Casey, members of Governor Kasich's campaign, or any other source of improper political animus. For that reason alone, Plaintiffs cannot succeed on the merits of their selective enforcement claim.

Plaintiffs also base their selective enforcement claim in part on the purported influence of an email concerning the *Evans* decision that Jack

Christopher sent to Professor Smith early in the morning on the day Smith issued his report and recommendation. Felsoci argues there is a lack of evidence that Professor Smith's report and recommendation was influenced or controlled by any member of Secretary Husted's staff, including Christopher. *See* Hrg. Tr. 253, ECF No. 252. Professor Smith testified that he had already decided to rewrite his report and recommendation and therefore did not give much thought to Christopher's email about the *Evans* decision. *Id.* at 254–55. Smith confirmed that Christopher's email did not factor into Smith's conclusion at all. *Id.* at 255.

The Court finds Professor Smith's testimony on this subject to be credible and as a result further finds that there is no evidence that Smith's final report and recommendation represented anything other than Smith's independent findings and legal analysis. Professor Smith is unquestionably capable of properly interpreting the scope of the *Evans* decision without anyone else's assistance. That Professor Smith reached a different conclusion earlier while under the pressure to promptly issue his report does nothing to detract from the Court's conclusion that his final recommendation was the result of his own, independent analysis. *See* Smith Dep. 19–21, ECF No. 222-1 (describing the circumstances and limited time Smith had to produce the report and recommendation and indicating he was not satisfied with the draft of the report that would have recommended dismissal of the protests).

What remains is a trail of emails and text messages among Casey,

Damschroder, and others. Those communications have little, if any, significance, however, in the absence of evidence that they actually influenced or controlled the *decision making process* in the subject protests. And while a few of the communications might read as showing political bias, an equally plausible inference is that they demonstrate a shared interest in political matters in general. It is hardly realistic to expect public employees to abandon their political views or interest in politics. The real issue is whether those views and interests rendered the process at issue unfair.

The exchange of emails and texts between Casey and Damschroder largely concern procedure and do not in any way implicate the decision making process of Secretary Husted or for that matter Professor Smith. And while Damschroder was helpful to Casey during the protest process, there is no indication that he would not have been equally helpful to anyone seeking information about election related procedures, including Plaintiffs. In fact, the LPO's political director, Robert Bridges, sought assistance from Damschroder on at least two occasions and described his experience working with Secretary Husted's office to have been "[f]or the most part pleasurable." Bridges Dep. 45, ECF 201-1.

The Court also rejects Plaintiffs' suggestion that the idle comments in texts between Damschroder and Christopher during the protest hearing betray a bias against the LPO or its candidates. While it is true Christopher and Damschroder

expressed admiration for the adversary skills of attorney John Zeiger, the undersigned can attest that it is entirely possible to recognize an attorney's talents but remain completely outcome neutral. Moreover, in the same chain of text messages, both Christopher and Damschoder indicate that they liked the LPO's political director, Robert Bridges, and thought of him as a "straight shooter." *See* Pls' Ex. 56, SOS 153. In sum, there is scant evidence of political bias, and there is no evidence that political bias affected the outcome of the protests.

Plaintiffs have failed to demonstrate that Secretary Husted's decision to remove LPO candidates from the May 2014 Ohio primary ballot or Professor Smith's recommendation to the Secretary were influenced or controlled by Terry Casey, Governor Kasich's campaign, Attorney General DeWine's campaign, or the Ohio Republican Party. The Court therefore finds that Plaintiffs are unlikely to succeed on the merits of their selective enforcement claim.

c. State actor requirement

Plaintiffs argue that the protests were in fact brought by the Ohio Republican Party and that its involvement in this case satisfies the state actor requirement of § 1983. In support of that proposition, Plaintiffs rely on decisions by the United States Supreme Court that indicate a political party may be deemed a state actor when it becomes involved in the election process.

Intervener Felsoci asserts that Plaintiffs cannot satisfy the state actor

requirement of § 1983. He avers that the decisions upon which Plaintiffs rely are inapposite because they involve circumstances in which a political party was performing a traditional state function. Felsoci asserts that unlike those cases, the filing of a protest is not a traditional state function but rather a private function.

Plaintiffs rely on *Smith v. Allwright*, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461 (1953) and the more recent plurality opinion in *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996). In *Smith*, the Democratic Party of Texas precluded African-Americans from voting in its primaries. The Supreme Court held that the party was a state actor because "state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." *Smith*, 321 U.S. at 660. In *Terry*, Texas delegated its role in the election process to the Jaybird Democratic Association, an all-white political club, in order to continue discrimination against African American voters through private actors to which the Fifteenth Amendment did not apply. Following its decision in *Smith*, the Court rejected that process, holding that Texas could not use the private status of the Jaybird Democratic Association to avoid application of the Fifteenth Amendment and the legislation passed by Congress to enact it. 345 U.S. at 468–70. In *Morse*, the Court applied *Smith* to strike down a registration fee imposed on convention delegates under the Voting Rights Act. 517 U.S. at 199–200.

As Felsoci suggests, however, the Sixth Circuit has expressly recognized

that *Smith* and *Terry* are limited to circumstances where a political party has been assigned an integral part of the elections process such that the party is performing a governmental function. *Banchy v. Republican Party of Hamilton Cnty.*, 898 F.2d 1192, 1195–96 (6th Cir. 1990). Furthermore, at least one court has recognized that a political party's filing of ballot access challenges to a competing political party's candidates does not constitute state action for purposes of a claim under 42 U.S.C. § 1983. *Nader v. McAuliffe*, 593 F. Supp. 2d 95, 102 (D.C.C. 2009). *Nader* had its genesis in efforts by the Democratic Party to remove presidential candidate Ralph Nader from ballots in much the same way, and presumably for the same reasons, that Casey did with the LPO candidates in the instant case. In dismissing the lawsuit, the court in *Nader* reasoned:

> [I]t is well-settled that a public function "is not simply one 'traditionally employed by governments,' but rather one 'traditionally exclusively reserved to the State.'" *LaRouche*, 152 F.3d at 990 (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 157, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)). The plaintiffs offer no facts that plausibly suggests that filing ballot access challenges is a function "traditionally exclusively reserved to the States." *See Twombly*, 127 S.Ct. at 1965 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (stating that "on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'")). Moreover, the fact that private citizens may file challenges under the ballot access statutes is antithetical to the assertion that doing so is a function traditionally exclusively reserved to the States. As a result, the court rejects the plaintiffs' assertion that the defendants engaged in an exclusively public function by filing challenges under the state ballot access statutes.

Id. (footnotes omitted).

Here, the act of filing the protests was not a public function exclusively reserved to the state. Rather, the protest process in Ohio is designed to be used by its private citizens. As a result, under *Banchy* and *Nader*, Felsoci's filing of the protest, even if it was on behalf of the Ohio Republican Party, did not constitute a state action under § 1983. For this additional reason, Plaintiffs are unlikely to succeed on the merits of their selective enforcement claim.

2. Likelihood of Success on Due Process Retroactive Application Claim

Plaintiffs reassert their claim that Secretary Husted violated their constitutional right to due process by retroactively applying a new interpretation of the requirements of Ohio Revised Code § 3501.38(E)(1). They contend that new evidence supports that claim. It was revealed in discovery that Professor Brad Smith wrote an initial draft of his report recommending that Felsoci's protest be denied on the ground that circulator Oscar Hatchet was not required to complete the employer information box on the petitions because he was an independent contractor as opposed to an employee. Plaintiffs aver that Smith's change of mind demonstrates that the law was not clear as to whether an independent contractor was required to provide the name and address of his employer under § 3501.38(E)(1).

Secretary Husted argues that the Court's prior determination of this issue

constitutes the law of the case, and Plaintiffs have not demonstrated extraordinary circumstances to overcome that principle.

In its opinion and order denying Plaintiffs' third motion for a preliminary injunction, the Court 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 payor regardless of whether the circulator was an employee or independent contractor. *See Rothenberg v. Husted*, 129 Ohio St. 3d 447 (2011) (accepting as reasonable Secretary Husted's assertion that Ohio Revised Code § 3501.38(E)(1) requires paid circulators to disclose the payor in the employer information box); *In re Protest of Evans*, No. 06AP-544–48, 2006 WL 2590613 (Ohio App. 10th Dist. Sept. 11, 2006) (finding Ohio Revised Code § 3501.38(E)(1) requires the circulator to disclose the identity of the entity that directly paid the circulator, and finding the employer/independent contractor distinction irrelevant).
>
> 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*. Further, the earlier Directives of the Ohio Secretary of State to which Plaintiffs refer have no bearing on the issue. Those Directives constitute instructions to the local boards of elections and do not purport to be the law of Ohio as it pertains to protest proceedings before the Secretary of State. Moreover, both Directives expired long before the events giving rise to this case took place.

ECF No. 80, at 25–26. The United States Court of Appeals for the Sixth Circuit affirmed this Court's decision in *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014). In doing so, the Sixth Circuit rejected Plaintiffs' due process retroactive application claim after a thorough analysis. *See id.* at 421–24. Moreover, after this Court issued its decision denying Plaintiffs' third motion for a

preliminary injunction, the Ohio Supreme Court confirmed that neither *Evans* nor *Rothenburg* stand for the proposition that independent contractors are exempt from the requirements of Ohio Revised Code § 3501.38(E)(1). *State ex rel. Linnabary v. Husted*, 138 Ohio St.3d 535, 540–42 (2014).

Plaintiffs rely solely on Professor Smith's momentary lapse in his analysis of the *Evans* decision and the Secretary's earlier directives to overcome these holdings. The Court finds that the context of Smith's decision-making process substantially diminishes the significance of Smith's first impression of the scope of the *Evans* decision and the Secretary's prior directives. *See* Smith Dep. 19–21, ECF No. 222-1. Secretary Husted's office requested that Smith issue the report and recommendation by Friday, March 7, 2014. *Id.* at 7. The hearing concluded at about 5:00 pm on March 4, 2014. *Id.* at 19. Smith received the final transcript of the hearing at his home the next evening, March 5. *Id.* Nonetheless, Smith was unable to immediately turn his attention to the matter because he had to drive to Morgantown, West Virginia that evening to teach an administrative law class the next day. *Id.* He had the opportunity to read some of the transcript on the evening of March 5.

On March 6, 2014, Smith taught his administrative law class in the morning and then met with a number of students from his election law class to discuss their papers. *Id.* As a result of these other obligations, Smith began working on the report and recommendation the afternoon of March 6. *Id.* At about 9:00 pm

that evening, Smith reached the conclusion that he would recommend that the protests be dismissed. *Id.* at 19–20. Even so, he aptly acknowledged in his draft report that his interpretation of the *Evans* case "creates a hole in the disclosure scheme." Pls' Ex. 17 at 16–17. Smith then sent Christopher an email indicating that he had completed the report and reached the conclusion that the protests were not well taken. Smith Dep. 19, ECF No. 222-1. Significantly, Smith relates that he was "very unhappy" with his initial draft of the report and recommendation. *Id*. at 21. When he awoke early the next morning, he had already decided that his initial conclusion was "simply not a tenable one" and that he would have to rewrite the report. *Id.*

Professor Smith was under tremendous pressure to issue a report within a short period of time. During that time frame, he had to travel to West Virginia and fulfill his teaching obligations before he could begin work on the report. Then he traveled from West Virginia to the Columbus International Airport so he could fly to Chicago. He was working on the draft during this period as time permitted. Furthermore, Smith was already unhappy with his initial draft of the report on the previous evening. Given these circumstances, the Court finds no occasion to depart from its earlier determination that Plaintiffs' due process claim lacks merit merely because Professor Smith briefly entertained an erroneous conclusion about *Evans*. Accordingly, the Court finds Plaintiffs are unlikely to succeed on the merits of their due process claim.

3. Likelihood of Success on Due Process Conflict of Interest Claim

Last, Plaintiffs assert that the hearing officer, Professor Smith, had a conflict of interest that resulted in the violation of Plaintiffs' due process right to an impartial decision maker. Specifically, shortly before the protest hearing, Professor Smith participated in writing an amicus brief for Attorney General DeWine that was filed with the United States Supreme Court in the *Susan B. Anthony List* case. The Court notes that any conflict of interest affected only Linnabary directly because Linnabary was the LPO candidate for Ohio Attorney General who would have run against Attorney General DeWine.

Plaintiffs argue that they were unable to assert their conflict of interest claim earlier because they could not have known that Professor Smith was acting in an adjudicative or quasi judicial capacity when he served as the hearing officer for the protests until the Magistrate Judge issued a ruling on discovery in this case on July 14, 2014, holding that Smith was entitled to assert the judicial mental process privilege because, *inter alia*, the protest proceeding was quasi judicial. *See* ECF No. 134.

Secretary Husted and Felsoci assert that Plaintiffs' conflict of interest claim is barred by laches, was waived, and is in any event without merit.

It appears undisputed that Plaintiffs had notice of the purported conflict before the protest hearing began on March 4, 2014. Bridges Dep. 100–102, ECF No. 201. Plaintiffs' counsel knew of Smith's pro bono participation in the *Susan*

B. Anthony List case because he asked Smith a question about it during a break in the protest hearing. Hr'g Tr. 248, ECF No. 252.

Plaintiffs' contention that they could not have known Smith was acting in a quasi judicial capacity merits little discussion. As the Secretary and Felsoci point out, it was well established before the hearing that the role of a hearing officer appointed by the Ohio Secretary of state is adjudicative. In fact, that conclusion was reached several years ago in a case in which Plaintiffs' counsel represented Ralph Nader. *Nader v. Blackwell*, 2007 WL 2744357, at *4 (S.D. Ohio 2007) *see also State ex rel. Harbarger v. Cuyahoga Cnty. Bd. of Elections*, 75 Ohio St. 3d 44, 45 (1996) ("A protest hearing in election matters is a quasi-judicial proceeding."). And although the Magistrate Judge found the issue of the judicial mental process privilege to be nuanced, he readily concluded that *all* of the relevant factors pointed to the protest hearing being quasi judicial. Opinion and Order 12–13, ECF No. 134. Even if the issue was arguable, however, there was at the very least a good faith basis for Plaintiffs to assert their conflict of interest claim before the protest hearing proceeded forward.

The Court finds that Plaintiffs waived their right to present a conflict of interest claim because although they were armed with the knowledge that Professor Smith represented Attorney General DeWine in the *Susan B. Anthony List* case before the protest hearing, they failed to object to Smith serving as the hearing officer. *See Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358–59

(6th Cir. 1989).

Furthermore, Professor Smith filed the amicus brief in the *Susan B. Anthony List* case before the protest hearing. Hence, Smith's pro bono representation of DeWine had concluded *before* Smith served as the hearing officer in the protests. In addition, Smith testified that he had no contact with Attorney General DeWine during his representation of him in the *Susan B. Anthony List* case. Given the representation was pro bono, never involved any meeting between Professor Smith and Attorney General DeWine, entailed only the filing of a single amicus brief, and was over before the protest, the Court is hard pressed to find that Smith plausibly had a significant interest in the outcome of the protests vis á vis his work on the *Susan B. Anthony List* case. *See Capeton v. A.A. Massey Coal Co.*, 556 U.S. 868, 880–86 (2009) (discussing level of interest warranting finding of due process violation on the ground of judicial bias). Rather, Smith's interest, if any, was too remote to require him to recuse.

For these reasons, Plaintiffs are not likely to succeed on the merits of their conflict of interest due process claim.

4. Laches

Secretary Husted and Intervener Felsoci argue that Plaintiffs' claims are barred under the equitable doctrine of laches. Specifically, they contend that Plaintiffs did not diligently pursue relief because they failed to: (1) request expedited discovery; (2) plead their claims and file their fourth motion for a

preliminary injunction in a timely fashion; and (3) seek an earlier hearing date. Secretary Husted presented evidence calling into question whether it would be possible to add Earl, his running mate, and Linnabary to the November 2014 general election ballot and that any attempt to add them to the ballot would lead to a substantial risk of voter confusion.

Plaintiffs contend they vigorously litigated this case. They argue that Secretary Husted and Felsoci engaged in tactics that resulted in delay. Plaintiffs maintain that because the opposing parties purposefully obstructed discovery, they have unclean hands and therefore cannot avail themselves of the equitable doctrine of laches.

> "It is well established that in election-related matters, extreme diligence and promptness are required." *State ex rel. Comm. for the Referendum of Ordinance No. 3543–00 v. White*, 90 Ohio St. 3d 212, 214, 736 N.E. 2d 873 (2000). When a party fails to exercise diligence in seeking extraordinary relief in an election-related matter, laches may bar the claim. *State ex. rel. Demaline v. Cuyahoga County Bd. of Elections*, 90 Ohio St. 3d 523, 526, 740 N.E. 2d 242 (2000). The party challenging the election bears the burden of demonstrating that "they acted with the requisite diligence." *Id.*; *State ex. rel. Manos v. Delaware County. Bd. of Elections*, 83 Ohio St.3d 562, 564, 701 N.E.2d 371 (1988).
>
> "Laches is the 'negligent and unintentional failure to protect one's rights.'" *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002) (quoting *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991)). The doctrine is rooted in the notion that "those who sleep on their rights lose them." *Powerhouse Marks LLC v. Chi Hsin Impex, Inc.*, 2006 WL 20523, at *14 (E.D. Mich. Jan. 4, 2006) (quoting *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999)). Laches does not simply concern itself with the passage of time, but rather focuses on the question of whether a delay renders it inequitable to permit the claims to be enforced. *Ford Motor*

> *Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003). As such, a party asserting laches must show: (1) a lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting it. *Ford Motor Company*, 342 F.3d at 550; *Nartron Corp.*, 305 F.3d at 408.

McClafferty v. Portage Cnty. Bd. of Elections, 661 F. Supp. 2d 826, 839–40 (N.D. Ohio 2009).

As the Court indicated in its opinion and order denying Plaintiffs' motion for a temporary restraining order, it will analyze laches separately for purposes of ruling on Plaintiffs' fourth motion for a preliminary injunction. ECF No. 225. As it did before, the Court still finds that Plaintiffs failed to advance their claims in a diligent manner and likewise failed to seek an earlier trial date. The Court also finds compelling the evidence the Secretary presented that any change to the ballot at this point would create a substantial risk of voter confusion.

Plaintiffs' unclean hands argument, however, also has merit. The following exchange between counsel is typical of what Plaintiffs faced in discovery.

> Q. So, let me break it into parts. What was your conclusion in relation to standing, the protesters— the unaffiliated protesters' standing to preserve the challenge?
>
> MR. ZEIGER: Object as to form. The question does not indicate a time frame and is ambiguous.
>
> MR. BROWN: John, this is not even your client.
>
> MR. ZEIGER: I am entitled to make objections when questions are clearly objectionable and poorly put.
>
> MR. BROWN: But you're wasting my time.

> MR. ZEIGER: And I will continue to do so.
>
> MR. BROWN: You're wasting my time. If Bridget has an objection, let her raise it. If Professor Smith wants to answer the question, let him.
>
> MR. ZEIGER: Professor Smith can answer any question his counsel suggests to him, but you, sir, will not dictate to me what objections I can make on behalf of my client.
>
> MR. BROWN: Your client's not here.
>
> MR. ZEIGER: You know, if you had any idea what you were doing, you might be a successful lawyer. Go ahead. I'm entitled to make objections as to any improper questions put to any witnesses in this matter.
>
> THE WITNESS: Would this be a good time to break for a minute or two or do you want to plow ahead?
>
> MR. BROWN: I'm ready to go.
>
> MR. ZEIGER: Would you read back the pending question, please?
> (The last question was read by the reporter.)

Smith Dep. 25–26, ECF No. 222-1. There is a lot wrong with this exchange, but the Court finds particularly troubling the statement by Felsoci's counsel that he would continue to waste the time of Plaintiffs' counsel. Felsoci's attorneys made good on that threat, and this is but one of many examples of similar harassing and obstructive conduct that occurred throughout discovery.

The Court possesses discretion, sitting in equity, in applying laches and may decline to dismiss on that ground even when the requirements for laches have been satisfied. *See Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751 (E.D. Mich. 2012). Felsoci has twice cited footnote two of *Johnson* for the

proposition that the court in that case denied relief on the basis of laches. Mem. Op. 1–2, ECF No. 209; Post Hrg. Brief 17–18. ECF No. 255. That is not an accurate representation of the *Johnson* decision, however. In reality, while the court in *Johnson* found the plaintiffs' delay "reprehensible" and "vexatious," it nevertheless "decided, given the importance of the issue *to reach the merits* . . . ." 905 F. Supp. 2d at 754 n.2 (emphasis added).

Applying the above principles, the Court holds that Plaintiffs' due process conflict of interest claim is barred by laches. Plaintiffs knew of Professor Smith's alleged conflict before the protest hearing but failed to object. They then waited several months to assert their conflict claim in this case. Unlike Plaintiffs' other claims, their conflict claim did not require extensive discovery. Rather, it is based on the bare fact of Smith's pro bono representation of Ohio Attorney General Mike DeWine in the *Susan B. Anthony List* case. Since the obstructive discovery tactics did not materially affect Plaintiffs' conflict of interest claim, it follows that conduct by opposing counsel does not represent unclean hands for purposes of that claim.

Plaintiffs' offer one excuse for not raising the claim sooner: they could not have known that Smith was acting in an adjudicative capacity until the Magistrate Judge held in July that Smith was entitled to assert the judicial mental process privilege because the protest was quasi-judicial. But as the Court found above, the adjudicative nature of a hearing officer's role was hardly first discovered by

the Magistrate Judge and was determined years ago by this Court in a case in which Plaintiffs' counsel represented Ralph Nader. *See Nader v. Blackwell*, No. 2:06–cv–821, 2007 WL 2744357, at *4 (S.D. Ohio Sept. 19, 2007); *see also State ex rel. Harbarger v. Cuyahoga Cnty. Bd. of Elections*, 75 Ohio St. 3d 44, 45 (1996) ("A protest hearing in election matters is a quasi-judicial proceeding."). While the Magistrate Judge found the issue of the judicial mental process privilege to be fairly involved, he did not hesitate to conclude that all of the relevant factors indicated that the protest hearing was quasi-judicial. Opinion and Order 12–13, ECF No. 134. Even assuming for the sake of argument that the nature of the proceeding was unclear, under *Nader* and *Harbarger*, Plaintiffs had a good faith basis to assert the purported conflict of interest claim long before the Magistrate Judge's ruling. In sum, laches bars Plaintiffs' due process conflict of interest claim.

The same cannot be said of Plaintiffs' remaining claims, which required extensive discovery. In light of the obstructive tactics employed by opposing counsel during discovery, the Court declines to hold those claims are barred by laches.

B. Irreparable Harm

Plaintiffs assert that this case implicates their First Amendment rights, and violation of those rights constitutes irreparable harm.

It is well established that even a temporary violation of First Amendment

rights constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, however, the Court has found that no violation of the First Amendment has occurred.

In the absence of an injunction, Plaintiffs will suffer the harm of being excluded from the ballot for the Ohio November 2014 general election. As a further consequence, under S.B. 193, the LPO will lose its minor party status and have to meet the more demanding requirements of S.B. 193 to re-qualify should the Court uphold the statute. Because the Court has not reached the issue, however, the risk of harm that would result from application of S.B. 193's new requirements is speculative.

The Court further finds that to some extent, the harm Plaintiffs would suffer absent an injunction was self-inflicted. Oscar Hatchet was perfectly willing to complete the employer information boxes. If there was any genuine confusion about whether he was required to do so, Plaintiffs could easily have contacted and obtained advice from their counsel who were representing Plaintiffs throughout the process, or Secretary Husted's office, as Robert Bridges had done on at least three occasions. Bridges Dep. 44–45, ECF No. 201.

To put the matter in context, Bridges thought it was "curious" and it was a red flag to him when Hatchet, a purported professional circulator, asked him whether he should complete the employer information boxes on the part petitions. *Id.* at 89. Keven Knedler, Chair of the LPO Executive Committee, testified that he

wished Bridges had called him about the issue, stating that he would have suggested that Bridges contact Secretary Husted's office to "double-check" the employer information box requirement as it applied to independent contractors. Knedler Dep. 47, 63, ECF No. 237-1.

Notwithstanding the above, the harm to Linnabary was entirely self-inflicted. Notably, while Linnabary is not a party to this action, Plaintiffs ask the Court to restore him to the November 2014 ballot as the LPO candidate for Ohio Attorney General. But at the hearing, Linnabary conceded that he had not paid Oscar Hatchet for a significant number of the signatures Hatchet gathered for Linnabary. Consequently, Hatchet was not required to fill out the employee information box on the part petitions for which he was not paid. Hatchet gathered a sufficient number of signatures for which he was not paid that Linnabary could have still qualified for the ballot. Had Linnabary raised this issue at the protest hearing or before the Ohio Supreme Court, he could have avoided removal from the ballot.

Considering all of these circumstances, the Court finds that while Plaintiffs might suffer substantial if not irreparable harm if an injunction is not granted, the impact of this factor is somewhat diminished because the harm is to some degree self inflicted, and as to Linnabary entirely self-inflicted.

C. Harm to Others and Public Interest

The harm to others and the public interest factors are intertwined in this

instance. The Court finds that there is a significant risk that the interests of the State of Ohio and its voters would suffer by the confusion and disarray that could result from a change to the voting process at this late date.

D. Balancing the Factors

Plaintiffs have made a showing of irreparable harm, although the weight of that factor is somewhat diminished because the harm was to some extent self-inflicted. Nonetheless, the remaining three factors weigh against granting injunctive relief. Weighed together, the factors do not support the issuance of an injunction. Accordingly, the Court declines to issue a preliminary injunction.

IV. DISPOSITION

Based on the above, the Court **DENIES** Plaintiffs' fourth motion for a preliminary injunction. ECF No. 192.

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT