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-953**
	:	
vs.	:	**Judge Michael H. Watson**
	:	
JON HUSTED,	:	
	:	
Defendant.	:	

DEFENDANT SECRETARY OF STATE JON HUSTED'S COMBINED RESPONSE IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT UNDER COUNT SEVEN (Doc. 338), CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT SEVEN, AND RESPONSE TO PLAINTIFFS' OMNIBUS MOTION TO SUPPLEMENT RECORD (Doc. 335)

Pursuant to this Court's October 16, 2015 Order (Doc. 337), Defendant Secretary of State Jon Husted submits this combined motion for summary judgment on Count 7 of Plaintiffs' Third Amended Complaint and response to Plaintiffs' motion for summary judgment (Doc. 338) and Omnibus Motion to Supplement the Record (Doc. 335). There are no genuine issues of material fact as to Count Seven and Defendant Husted is entitled to summary judgment as a matter of law. Accordingly, Defendant Husted's motion for summary judgment should be granted and Plaintiffs' motion for summary judgment should be denied. This motion is more fully supported by the attached memorandum in support.

Respectfully Submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Halli Brownfield Watson

Bridget C. Coontz (0072919)
Halli Brownfield Watson (0082466)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872; Fax: 614-728-7592
bridget.coontz@ohioattorneygeneral.gov
halli.watson@ohioattorneygeneral.gov

Counsel for Secretary of State Jon Husted

MEMORANDUM

I. Introduction.

Count Seven of Plaintiffs' *Third Amended Complaint* has been the subject of an evidentiary hearing, extensive briefing, and has already been ruled upon once by this Court in the context of Plaintiffs' *Fourth Motion for Preliminary Injunction.* On October 17, 2014, after an evidentiary hearing and the parties' submission of post-hearing briefs, this Court concluded: "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." (Doc. 260, Page ID # 7089).

Just three days after this Court's decision denying their *Fourth Motion for Preliminary Injunction*, the Plaintiffs filed a motion for summary judgment. (Doc. 261). The Secretary and the State responded and cross-moved for summary judgment. (Doc. 267). Despite filing a summary judgment motion, Plaintiffs continued to conduct discovery. After completing this discovery, Plaintiffs' filed an Omnibus Motion to Supplement Record on October 12, 2015. (Doc. 335). Thereafter, this Court ruled on the pending summary judgment motions and denied the summary judgment motions on Count Seven without prejudice to re-filing. (Doc. 336). Plaintiffs then renewed their motion for summary judgment as to Count Seven. (Doc. 338).

Plaintiffs' renewed motion for summary judgment and omnibus motion are best described as more of the same. In the year since this Court found that Plaintiffs were unlikely to succeed on the merits of their selective enforcement claim, they have *still* failed to gather any evidence to warrant a different conclusion. Plaintiffs have failed to submit *any* evidence to support their claim of selective enforcement. The new evidence that they have submitted, evidence regarding who paid Felsoci's lawyers and additional communications between Terry

Casey, Matt Borges, and others, fails to create an issue of fact on Count Seven. These additional communications are no different than that which the Court already stated had "little, if any significance. . . in the absence of evidence that they actually influenced or controlled the *decision making process* in the subject protests." (Doc. 260, Page ID # 7091) (emphasis in original). Plaintiffs have also failed to present anything to alter this Court's conclusion that "Felsoci's filing of the protest, even if it was on behalf of the Ohio Republican Party, did not constitute state action under § 1983." (Doc. 260, Page ID # 7095). Whether and the extent to which the ORP was involved in initiating the protest is irrelevant. Because none of Plaintiffs' "new" evidence demonstrates the requisite improper influence on the Secretary's decision making process, Count Seven fails as a matter of law.

II. Plaintiffs' Motion for Summary Judgment should be denied.

A. Plaintiffs' claims are moot.

As the Secretary argued in his first summary judgment motion, Plaintiffs claims are moot. Count Seven seeks ballot access for the May 2014 primary and November 2014 general election. (Doc. 188, Third Am. Compl., ¶ 380). Those elections are over; this Court can no longer afford Plaintiffs relief they seek, and this claim is moot. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (finding challenge to Ohio requirement that election laws be strictly followed moot by completion of election). *See also* Secretary's First Mot. for Sum. J. and Cross-Mot. for Sum. J., Doc. 267, Page ID # 7201-7202).

It is anticipated Plaintiffs will claim, as they have in the past, that meaningful relief can still be granted because the Secretary could be ordered to recognize the LPO as a minor political party. (Doc. 261-1, Memo. in Support of MSJ, Page ID # 7131, fn 8). Plaintiffs, however, never asked for minor party recognition in the *Third Amended Complaint.* This Court cannot grant relief that was never requested. Fed. R. Civ. P. 8(a)(3) (requiring that a pleading stating a claim

for relief contain "a demand for the relief sought"); *Barany-Snyder v. Weiner*, No. 1:06-cv-2111, 2007 WL 210411, *3 (N.D. Ohio Jan. 24, 2007) ("The prayer for relief of a complaint serves a clear purpose, and even the most unsophisticated reader would understand it as the definitive recitation of the relief actually sought by the plaintiff.").

In addition to Plaintiffs' failure to actually ask for minor party recognition, they have also failed to present evidence demonstrating their entitlement to minor party status. Their request is premised upon the assumption that, if Plaintiff-Earl had been on the ballot, he would have received the required two percent of the votes for Governor to retain party status. But, Plaintiffs present no evidence that such an assumption is warranted. In short, they wish to bypass S.B. 193's vote test requirement that every other minor party is required to meet to maintain party status.

B. Plaintiffs fail to satisfy their summary judgment burden.

Even if Plaintiffs' claims were not moot, they have completely failed to demonstrate that they are entitled to summary judgment. The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (internal quotation omitted); Fed. R. Civ. P. 56(a).

Rather than citing and analyzing any "new" undisputed material facts, the Plaintiffs simply move for summary judgment by incorporating by reference all of their pleadings and the entire record in this case. Doc. 338, PageID #8717-8718. But neither the Court nor the parties are obligated to sift through the record in this case to determine whether and why the Plaintiffs are entitled to summary judgment. It is incumbent upon the Plaintiffs to cite to the evidence that supports each element of their selective enforcement claim. *Vance v. Latimer*, 648 F.Supp.2d 914, 920 (E.D. Mich. 2009) ("[W]here the crucial issue is one on which the movant will bear the ultimate burden of proof at trial, summary judgment can be entered only if the movant submits evidentiary materials to establish all of the elements of the claim or defense.") (internal quotation omitted). They completely fail to do so here. Instead, they quote legal standards and do nothing to explain how the record evidence supports the elements of their claim. Plaintiffs' failure to develop their arguments on Count Seven and to explain how the evidence satisfies the elements of their claims is insufficient to satisfy their summary judgment burden.

C. The record evidence further shows that Plaintiffs are not entitled to summary judgment as to Count Seven.

1. Applicable legal standards.

Under the applicable legal standards, Plaintiffs are not entitled to summary judgment. A selective enforcement claim is an equal protection claim. The Equal Protection clause prohibits decisions to prosecute based on unjustifiable standards such as race, religion, or other arbitrary classification. *United States v. Armstrong*, 517 U.S. 456, at syllabus (1996). 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) (citation omitted). With respect to the first element, "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 v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997). "Furthermore, there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; the standard is a demanding one." *Stemler*, 126 F.3d at 873 (internal quotation omitted); *Gardenhire v. Schubert*, 205 F.3d 303, 320 (6th Cir. 2000).

In addition, "the party charged with the deprivation [of a right secured by the Constitution] must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). "A private entity or individual acting alone cannot deprive an individual of her First Amendment rights." *Wilkerson v. Warner*, 545 Fed.Appx. 413, 420 (6th Cir. 2013), citing *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 1999). However, "[p]rivate persons jointly engaged with state officials in a deprivation of civil rights are acting under color of law for purposes of § 1983." *Id*. at 421, *quoting Hooks v. Hooks*, 771 F.2d 935, 943 (6th Cir. 1985). The Sixth Circuit has explained the standard to establish such a civil conspiracy such that joint conduct can make private conduct state action:

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not know all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused the injury to the complainant.

Id., citing *Hooks*, 771 F.2d at 943.

As discussed more fully below, Plaintiffs cannot establish the elements of a selective enforcement claim. They attempt to base their claim on the conduct of private actors. But, there is no evidence to demonstrate that a conspiracy existed between the Secretary and those private actors. And, because those other private actors are not state actors as a matter of law, Plaintiffs' claim fails.

2. Plaintiffs have not identified anyone to whom they are similarly situated against whom the law was not applied and, therefore, cannot satisfy the first element of their claim.

Plaintiffs have failed to identify any similarly situated person against whom the law was not enforced and fail to satisfy the first element of their claim. To satisfy "an absolute requirement" of their claim, Plaintiffs must 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. *See Stemler*, 126 F.3d at 873. Their failure to do so dooms their claim. *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 Twp.*, 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). Moreover, the record evidence shows that Secretary has enforced the law in the past. Brandi Seskes, an attorney in the Secretary of State's office, 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, PI H'rg Tr. (9/29/14), Page ID # 6602-6605; Secretary of State's Hearing Exhibits E, F, and G). Offending petitions were rejected as a result. (*Id.*)

In addition, 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. (Doc. 79, Excerpt of Tr., Page ID # 2082). Under Plaintiffs' theory, the Constitution requires that the Secretary review every petition it receives and independently investigate whether every circulator who leaves the employer disclosure box blank was actually paid. The case law clearly rejects such a notion.

The Secretary recognizes that this Court declined, in ruling on Plaintiffs' *Fourth Motion for Preliminary Injunction*, "to hold that Plaintiffs cannot prevail on their selective enforcement claim without evidence that similarly situated individuals were treated more favorably." (Doc. 260, Page ID # 7088). In so ruling, this Court noted that "the Sixth Circuit has apparently never directly addressed the issue" of whether direct evidence may support such a claim. *Id.* The Secretary raises this argument for purposes of preserving the issue for any appeal taken to the Sixth Circuit. Regardless, there is also no direct evidence of improper influence.

3. Secretary Husted did not enforce the law with a discriminatory purpose and Plaintiffs cannot satisfy the second and third elements of their claim.

Plaintiffs have failed to proffer any evidence demonstrating that the second and third elements of their claim have been satisfied.

Plaintiffs cannot show that the Secretary, the sole decision maker, enforced the law with a discriminatory purpose and, therefore, cannot satisfy the second element. "Discrimination is 'purposeful" if it is intended to accomplish some 'forbidden aim'" like "intentional selective enforcement because of race, nationality, religion, gender or 'other arbitrary classification.'" *Gardenhire*, 205 F.3d at 319 (internal citation omitted). There is simply no evidence of such a "forbidden aim."

The undisputed evidence in this case remains that Secretary Husted was the sole decisionmaker in removing Earl and Linnabary from the May primary ballot. (Doc. 203-1, Husted Depo., Page ID #4181, 4206, 4215, 4248). He was indifferent to the outcome of the protest. (*Id.* at p. 49:18-22, Page ID # 4222). He had no knowledge of Casey's involvement in the protest until a few days before his deposition in September of 2014. (*Id.* at pp. 30:19-32:5, Page ID # 4203-05). And he had no contact with the Governor or his campaign about the protests. (Doc. 203-1, Husted Depo., Page ID # 4181, 4206, 4215, 4248; 49:18-22, Page ID # 4222; pp. 30:19-32:5, Page ID # 4203-05; p. 70:15-22, Page ID # 4243).

Plaintiffs have failed to present any evidence to refute this evidence. Although the omnibus motion incorporates communications between Kasich campaign staff members and Terry Casey, Plaintiffs point to no evidence that the communications stretched to the Secretary himself. Instead, Plaintiffs' counsel himself disavowed any attempt to call the Secretary's decision into question when he said at his deposition: "[W]e're not attempting to cast any shadow of a doubt on your particular decision." (*Id.* at p. 77:21-23, Page ID # 4250). As noted

above, this Court has already found that there was no improper influence upon the Secretary's decision. (Doc. 260, Opinion and Order, Page ID # 7089). Plaintiffs have presented no evidence that would alter this conclusion and they are not entitled to summary judgment.

Plaintiffs have also failed to offer any argument as to the third element of their claim, discriminatory effect, leaving no indication as to how they attempt to prove it. Where Plaintiffs have completely failed to address an essential element of their claim, they cannot possibly have shown entitlement to summary judgment on it.

4. Plaintiffs' "new evidence" does not establish joint action involving the Secretary to further any alleged conspiracy to remove Plaintiff-Earl from the ballot.

The "new" evidence Plaintiffs seek to present is more of the same. This Court has already, in the context of Plaintiffs' motion for preliminary injunction, considered communications between Terry Casey and Matthew Damschroder and rejected Plaintiffs' arguments that those communications demonstrate any form of political animus influenced the decision making process. (Doc. 260, Page ID # 7091). Now, Plaintiffs seek to rely upon a few additional emails produced since the hearing by Mr. Casey that are of the same nature in order to claim that Mr. Damschroder was engaged in a plan with Casey and others to remove Earl from the ballot.

The emails Plaintiffs rely on address issues already in the public domain and were sent to many recipients. Many were sent *after* the Secretary ruled on the protest. Among other things, these emails communicated the day and time of the preliminary conference in this case and discussed Plaintiff Earl's comments to the press (TC000252, Page ID # 8636), sent this Court's decision denying preliminary relief and noted the possibility of an appeal to the Sixth Circuit (TC000298, Page ID # 8645), advised that Plaintiffs sought to amend their complaint in federal court to include the ORP (TC000258, Page ID # 8638), communicated news stories about the

case (TC000295, Page ID # 8642; TC00033, Page ID # 8650; TC000335, Page ID # 8652), sent a copy of Felsoci's Sixth Circuit brief (TC000339, Page ID # 8656), sent the Ohio Supreme Court's *Linnabary* decision and commented upon the Libertarians' filing of a motion to reconsider (TC000387, Page ID # 8661), and commented on the Ohio Supreme Court's ruling in the *Linnabary* case (TC000372, Page ID #8659). The few communications that occurred before the Secretary ruled on the protest do nothing to further Plaintiffs' claims. For example, in one of these emails, Mr. Casey blind copied Mr. Damschroder and others on his communications with Chris Schrimpf where Mr. Schrimpf clarified for Mr. Casey that the ORP was not behind the protest. (Doc. 335-3, Page ID # 8479).

But none of these emails disclose that Mr. Casey was behind the protest, describe any plan to remove Linnabary and Earl from the ballot, sought assistance from Mr. Damschroder to further any such plan, obtained any agreement from Mr. Damschroder to provide any assistance, or suggest any improper influence on the Secretary's protest decision. Nevertheless, Plaintiffs claim that these emails establish that Mr. Damschroder was a willful participant and engaged in joint activity to further this plan. Plaintiffs' offer little elaboration as to how this is so, stating only that these "additional e-mails to Damschroder about the protest. . . . speak for themselves." (Doc. 338-1, Page ID # 8720). Such a perfunctory argument fails to satisfy Plaintiffs' summary judgment burden and is not supported by the evidence.

Plaintiffs' omnibus motion and renewed summary judgment rely on arguments that have no support in the record. Plaintiffs' claim that "the supplemental evidence proves that Casey, the Kasich Campaign, ORP, the Governor's Office and Damschroder acted pursuant to a 'single plan' and 'shared in the general conspiratorial objective.'" (Pltf.'s Omnibus, Doc. 335-1, Page ID # 8320). But, Plaintiffs do not cite one shred of evidence to show that Matt Damschroder

was aware of any alleged plan involving Casey, the Kasich Campaign, the ORP, and/or the Governor's Office or that he shared in the plan's objective. And, the undisputed evidence is that Matt Damschroder had no knowledge of Casey's involvement, let alone of some grand plan. Plaintiffs' also assert: "The Kasich Campaign, Borges, Schrimpf, Damschroder and members of the Governor's Office were all intricately involved in the planning of the protest of Earl from the beginning." (*Id.*, Doc. 335-1, Page ID # 8336). Not surprisingly, Plaintiffs fail to cite any evidence in support of this claim, because there is none.

The undisputed record evidence demonstrates that Matt Damschroder was not even aware of Casey's plan and, therefore, could not have engaged in any joint activity to further it. (Doc. 227-1, Damschroder depo., at p. 12-129, 199, Page ID # 5342-5348, 5418). At the time of the protest, Mr. Damschroder did not know that Terry Casey was involved with John Zeiger in the protest. (*Id.*, Page ID # 5418Damschroder depo. at p. 199). It was not until August of 2014, well after the Secretary decided in the protests in March, that Mr. Damschroder learned that Mr. Casey was behind the protests. (*Id.* at p. 128-29, Page ID # 5347-5348). Mr. Damschroder and Mr. Casey have been friends for years. (*Id.* at p. 81, Page ID # 5300). Mr. Damschroder knew that Mr. Casey had a general interest in things like the protests. (*Id.* at p. 152, 154, Page ID # 5371, 5373). He described him as a "gadfly" and explained that he frequently blind copies "a lot of people" on his emails. (*Id.* at p. 180, 155, Page ID # 5374, 5399). There was nothing unusual about his interest in the protests. (*Id.* at p. 152, Page ID # 5371). He testified that his relationship with Mr. Casey did not influence how he handled the protests in any way. (*Id.* at p. 249, Page ID # 5468).

There can be no conspiracy between Mr. Damschroder and others when the undisputed evidence establishes that Mr. Damschroder was not even aware of Mr. Casey's plan to remove

Earl from the ballot and, therefore, could not have agreed to assist with that plan. *See Moore v. City of Paducah*, 890 F.2d 831, 835 (6th Cir. 1989) ("The evidence proffered in this case could not reasonably support a finding that an agreement existed. Absent such a finding, there can be no conspiracy."). While a coconspirator need not know "all of the details of the illegal plan," there still must be a plan and the alleged coconspirator must have "shared in the general conspiratorial objective" and committed "an overt act. . . in furtherance of the conspiracy that caused injury to the complainant." *Hooks*, 771 F.2d at 943. There is no evidence whatsoever that there was any plan shared by Mr. Damschroder and anyone else Plaintiffs allege to be part of the conspiracy. Plaintiffs do not even bother trying to claim that he committed an overt act in furtherance of any alleged conspiracy. Plaintiffs' unsupported, conclusory accusations of a conspiracy are insufficient as a matter of law. *Wilkerson*, 545 F. App'x at 411 ("Because there is no evidence in the record of an agreement and concerted action taken by Lloyd[, a private actor,] and Officer Warner and also no evidence that HVA[, a private employer,] and the police departments at issue had any arrangement, the district court was correct in finding Wilkerson's allegations conclusory.").

5. Terry Casey, the ORP, and the Kasich campaign are not state actors.

Terry Casey's conduct in initiating the protest as well as the conduct of other private actors who may have assisted may not be imputed to the Secretary. Plaintiffs seek to rely upon the public function test to claim that these private actors' conduct constitute state action. Under the public function test, private conduct is attributable to the state if "the private entity exercise[s] powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain." *Lansing*, 202 F.3d at 828 (internal citations omitted). Here, the state has not delegated a power traditionally reserved to the state to Felsoci, Casey, or any other private actor. Statutory law provides Felsoci with the ability to file a protest against a candidate.

Ohio Rev. Code § 3513.05. The law does not grant him or any other private entity the authority to decide the protest or determine whether the protested candidate will appear on the ballot. And, the statute does not delegate to a private party the ability to actually conduct an election. *Smith v. Allwright*, 321 U.S. 649, 663 (1944) ("Primary elections are conducted by the party under state statutory authority. . . . We think that this statutory scheme. . . makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election."). Neither Casey, the ORP, nor the Kasich campaign determined or applied the law and had no role in actually conducting any election. Their alleged conduct does not constitute state action. Relying on *Banchy v. Republican Party of Hamilton Cnty.*, 898 F.2d 1192, 1195-96 (6th Cir. 1990) and *Nader v. McAuliffe*, 593 F.Supp.2d 95, 102 (D.D.C. 2009), this Court has already concluded "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." (Doc. 260, Page ID # 7095).

Plaintiffs also contend that Mr. Casey is a state actor because he chairs Ohio's Personnel Board of Review. (Doc. 335-1, Page ID # 8319). They also appear to claim that individuals associated with the Governor's Office were state actors with respect to the protest by virtue of their affiliation with a state office. But "acting under color of state law requires that a defendant in a § 1983 action have exercised the power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed by the authority of state law.'" *Memphis Tenn. Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 903 (6th Cir. 2004), quoting *West v. Atkins*, 487 U.S. 42, 48. Nothing about Mr. Casey's role as chair of the Personnel Board of Review or anyone's association with the Governor's office had anything to do with these protests or provided them with the ability to do what they did. That these

individuals may have completely unrelated state positions does not make them state actors for purposes of this case.

III. The Secretary is entitled to summary judgment on Count Seven.

The Secretary has already briefed his entitlement to summary judgment on Count Seven. (Doc. 267, Page ID # 7217-7218). The Secretary incorporates by reference that briefing. No new evidence has been uncovered that warrants a different analysis. In sum, Plaintiffs have failed to demonstrate the existence of a genuine issue of fact for trial. As explained more fully above, they have failed to proffer any evidence satisfying the three elements of their selective prosecution claim set forth in *Anderson.* As explained more fully above, the undisputed facts are that there are no similarly situated individuals against whom the Ohio's payor disclosure law has not been enforced, Secretary Husted was the sole decision-maker regarding the protests, he was not improperly influenced, and he enforced Ohio's payor disclosure law against Earl and Linnabary because that is what the law required of him. (Doc. 203-1, Husted depo., Page ID # 4181, 4206, 4215, 4248, 4222, 4225, 4249). There is also no evidence whatsoever that the Secretary or anyone in his office was engaged in any joint activity or committed any overt act to further the alleged conspiracy to remove Plaintiff-Earl from the ballot. The conduct of other private actors in allegedly orchestrating such a scheme does not constitute state action as a matter of law. There is no genuine issue of material fact that Secretary Husted did not selectively enforce the law against Plaintiffs.

IV. Conclusion.

No new material evidence has been uncovered since this Court ruled a year ago that Plaintiffs were unlikely to succeed on their selective enforcement claim. The fact remains that Plaintiffs' circulators failed to comply with Ohio law and, as a result, Earl and Linnabary did not have enough signatures to qualify for the ballot. The Secretary removed them from the ballot

because that is what the law required. There remains no genuine issue of material fact that Secretary Husted was the protests' sole decision-maker and that he was not improperly influenced. Secretary Husted is entitled to judgment as a matter of law in his favor on Count Seven of Plaintiffs' *Third Amended Complaint.*

Respectfully Submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Halli Brownfield Watson
Bridget C. Coontz (0072919)
Halli Brownfield Watson (0082466)
Assistant Attorneys General
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: 614-466-2872; Fax: 614-728-7592
bridget.coontz@ohioattorneygeneral.gov
halli.watson@ohioattorneygeneral.gov

Counsel for Secretary of State Jon Husted

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically on October 30, 2015. 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/ Halli Brownfield Watson
HALLI BROWNFIELD WATSON (0082466)
Assistant Attorney General