

IN THE SUPREME COURT
OF THE UNITED STATES

LIBERTARIAN PARTY OF OHIO, KEVIN KNEDLER,
CHARLES EARL and AARON HARRIS,

Petitioners,

v.

Case No. 16A181

JON HUSTED,
in his Official Capacity as Ohio
Secretary of State,

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Sixth Circuit¹

Respondent,

STATE OF OHIO,

Intervenor-Respondent,

and

GREGORY FELSOCI,

Intervenor-Respondent.

**RESPONSE OF INTERVENOR-RESPONDENT GREGORY FELSOCI
IN OPPOSITION TO PETITIONERS' APPLICATION FOR STAY
AND EMERGENCY INUNCTION ADDRESSED TO JUSTICE KAGAN**

Petitioners' application for emergency relief relates to three claims: (1) Petitioner's claim that Ohio election legislation (Senate Bill 193 of the 129th Ohio General Assembly) violates the United States Constitution, (2) Petitioners' claim that Senate Bill 193 violates the Ohio Constitution, and (3) Petitioner's claim, pursuant to 42 U.S.C. § 1983, that the removal of the 2014 Libertarian candidate for governor from the ballot following an election protest amounted

¹ While the caption of Petitioners' application states that this case is "on petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit," the undersigned is unaware of such a petition having been filed.

to unconstitutional selective enforcement of an Ohio election law. Only the third claim relates to Intervenor-Respondent Gregory Felsoci, so this response only addresses Petitioners' arguments relating to that claim.

In Petitioners' application for emergency relief from Circuit Justice Kagan, Petitioners advance only one argument relating to their selective enforcement claim: that the Ohio Republican Party ("ORP") was a state actor for purposes of this case because it allegedly has been assigned an "integral role" in the primary election process in Ohio. [Application, Section I.B.] In support, Petitioners rely on three decisions from this Court: *Smith v. Allwright*, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461 (1953) (plurality); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality).

Petitioners' cases do not support their state action theory. As the Sixth Circuit correctly observed, "[t]he cases upon which the Libertarian Party relies, however, are meaningfully different from the case at hand." *Libertarian Party of Ohio v. Husted*, No. 16-3537, 2016 WL 4056398, at *8 (6th Cir. July 29, 2016).

Petitioners' cases each involved elections or nomination conventions that were actually conducted by the political organization in question. See *Smith v. Allwright*, 321 U.S. at 663 ("Primary elections are conducted by the [political] party under state statutory authority.... The party takes its character as a state agency from the duties imposed upon it by state statute....") (paragraph break omitted); *Terry v. Adams*, 345 U.S. at 484 (Clark, J.) ("when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards in play"); *Morse v. Republican Party of Virginia*, 517 U.S. at 223 (Stevens, J.) (treating a political party as subject to the preclearance

requirement of the Voting Rights Act because “the Party exercises delegated power over the electoral process when it charges a fee for the right to vote for its candidates [at a nomination convention]”).²

Here, by contrast, Ohio has not delegated to ORP the traditionally exclusive public function to conduct a primary election. Unlike Texas in *Smith and Terry*, and unlike Virginia in *Morse*, primary elections in Ohio are not conducted by political parties. Rather, they are conducted by county boards of elections under the supervision of the Ohio Secretary of State. *See generally* Ohio Rev. Code §§ 3513.01, *et seq.* While Petitioners contend that the ORP plays an “‘integral role’ in the primary process,” [Application, pg. 20], the Court is left to guess at what role ORP supposedly plays. Instead of identifying any “integral role” in the electoral process played by ORP, Petitioners list supposed “perks” ORP receives from the electoral process such as “control[ing] the Ohio General Assembly” or “hold[ing] the Governor’s Mansion.” [Application, pg. 22] These “perks” are, in reality, nothing more than the result of electors casting their votes at the ballot-box. But more importantly, these “perks” have nothing to do with ORP’s alleged conduct at issue in this case.

As the Sixth Circuit noted in its opinion, this Court’s cases (particularly *Smith and Terry*) hold that a state or local political party is a state actor only to the extent that the political party’s

² The cases Petitioners cite from other courts either involve instances where the political party has been delegated a public function – *see Texas Democratic Party v. Benkiser*, 459 F.3d 582, 585 (5th Cir. 2006) (defendant chair of political party “acted under the Texas Election Code provision that allows a party chair to declare a candidate ineligible”), *Wilson v. Hosemann*, 185 So. 3d 370, 372 (Miss. 2016) (addressing statute where certain candidates “who wish their names to appear on the primary ballots may file petitions with that [political] party’s state executive committee” for certification), and *Bentman v. Seventh Ward Democratic Exec. Comm.*, 218 A.2d 261, 266 (Pa. 1966) (“[i]n our Commonwealth, the legislature has seen fit to impose upon political party organizations the performance of certain public functions which directly affect the public and our government”) – or simply do not address state action – *see Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347 (3d Cir. 2014).

conduct at issue reflects a traditionally exclusive public function that the state has delegated to the political party. *Libertarian Party of Ohio v. Husted*, 2016 WL 4056398, at *9 (“our Circuit has explained that the Court in *Terry* did not assert that the Jaybirds had become a state actor for every purpose, but rather the Court held that the private club was a state actor insofar as they had been assigned an ‘integral part’ in the election process, a governmental function, by the state”) (quotations, citation omitted). Those facts are not present in the instant case. Here, ORP’s conduct at issue is its alleged support of an election protest filed by Mr. Felsoci pursuant to Ohio Rev. Code § 3513.05. But Petitioners do not and cannot contend that ORP’s actions alleged were delegated to ORP by the State of Ohio. To the contrary, as the Sixth Circuit observed, filing and prosecuting a statutory election protest is not a traditionally exclusive public function; rather, it is a right of all private citizens with standing. *Id.* Under the facts here, Petitioners have simply failed to establish that ORP is a state actor so their selective enforcement claim cannot serve as a basis for awarding emergency injunctive relief.

In addition to Petitioners’ inability to satisfy the state action requirement of their selective enforcement claim, Petitioners’ application should also be denied (at least as to their selective enforcement claim) because Petitioners have not even attempted to carry their burden as to the remaining elements of a selective enforcement claim under § 1983. To be entitled to an injunction pending appeal to this Court, Petitioners must demonstrate that their right to the relief requested is “indisputably clear.” *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643, 184 L. Ed. 2d 448 (2012) (Sotomayor, J., in chambers). The District Court – the court most intimately familiar with the record evidence in this case – has been clear that “there is no evidence of selective enforcement here.” *Libertarian Party of Ohio v. Husted*, No. 2:13-CV-953, 2016 WL 2977286, at *7 (S.D. Ohio May 20, 2016) (noting that “there is no direct evidence of

discriminatory intent or political animus on behalf of a state actor” and describing evidence refuting any suggestion of disparate treatment). Even though Petitioners have a high burden to demonstrate indisputable clarity as to their right to relief, they have essentially asked this Court to ignore the elements of required proof because they offer nothing to fill this glaring (and fatal) omission in their application.

For all of these reasons, Petitioners’ application for emergency relief should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Zeiger", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify, on this 25th day of August 2016, a copy of the foregoing was served via United States mail, first-class postage prepaid, and via electronic mail to each of the following:

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