IN THE OHIO TENTH DISTRICT
COURT OF APPEALS

Franklin County, Ohio

NO. 16APE-07-496

REGULAR CALENDAR

LIBERTARIAN PARTY OF OHIO,

Appellant,

VS.

OHIO SECRETARY OF STATE, et al.,

Appellees.

On Appeal from the Franklin County
Court of Common Pleas

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I. The Sixth Circuit's Legal Conclusion Precludes Appellees From Claiming that Article V, § 7 Does Not Require Primaries for Political Parties.

Appellees argue that the Sixth Circuit's ruling in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), has no preclusive effect because of the Eleventh Amendment. *See* Brief of Appellees at 22-23. Appellees are wrong. While the Eleventh Amendment prohibits States from being forced to litigate state-law issues in federal court, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120 (1984), it does not prevent a State from voluntarily raising state law in federal court as a claim or defense. *See Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002). Ohio voluntarily raised Article V, § 7 to justify its early-filing deadline in *Libertarian Party of Ohio v. Blackwell*. It cannot now claim that the Sixth Circuit did not have jurisdiction to address it.

In *Lapides* the Supreme Court ruled that a State's voluntary invocation of federal jurisdiction by removing a case to federal court waived its Eleventh Amendment immunity. Courts across the country,

including the Supreme Court, have extended this principle to all sorts of voluntary litigation conduct practiced by States in federal court. *See, e.g., Ku v. State of Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003) (holding that Tennessee's active defense in federal court waived its Eleventh Amendment immunity); *Beckham v. National Railroad Passenger Corp*., 569 F. Supp.2d 542, 552 (D. Md. 2008) ("Unlike in a case of waiver by statute, waiver by litigation conduct does not require a showing of clear intent").

In *Libertarian Party of Ohio v. Blackwell* Ohio (through its Secretary of State) argued that its early-filing deadline for minor parties was justified by Ohio's Constitution -- specifically Article V, §7. That provision, Ohio argued, required that minor parties conduct primaries. Because primaries were held months before the general election, Ohio argued, minor parties needed to qualify early.

LPO contested Ohio's state constitutional defense, but to no avail. The Sixth Circuit agreed with Ohio that Article V, § 7 requires that all political parties conduct primaries. This issue was fully litigated by adverse parties. It was fully considered by the Sixth Circuit. No one

forced Ohio to make that argument. The two parties to that proceeding, LPO and Ohio's Secretary of State, are bound by the Sixth Circuit's legal conclusion.

Appellees argue that LPO waived its argument under *Libertarian Party of Ohio v. Blackwell* because it "made no such argument in the trial court and is barred from doing so here." Brief of Appellees at 24. Appellees are incorrect. LPO alleged in its Complaint that "[t]he United States Court of Appeals for the Sixth Circuit recognized and ruled in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006), that the Ohio 'Constitution requires that <u>all political parties, including minor parties, nominate their candidates at primary elections</u>.'" *See* Doc. No. 5 (0C863-M68) (emphasis in Complaint original). LPO specifically argued *Libertarian Party of Ohio v. Blackwell* in its motion for preliminary injunction, *see* Doc. No. 6 (0C863-N8), as well as in its response to Appellees' motion for summary judgment. *See* Doc. No. 76 (0C936-F56). The issue was fully preserved.

II. Senate Bill 193 Violates Article V, § 7.

Appellees argue that *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913), supports their defense. *Fitzgerald*, Appellees claim, ruled that Article V, § 7's "nomination clause has no primary requirement." Brief of Appellees at 22. Appellees are wrong.

Fitzgerald involved a municipal charter adopted under Ohio's new Home Rule Amendment found in Article XVIII, § 3 of Ohio's 1912 Constitution. The Cleveland charter provided that municipal elections would be non-partisan -- that is, the candidates would not be identified with political parties on the election ballots -- and that the candidates would be nominated by petition. The Ohio Supreme Court ruled that the Home Rule Amendment authorized Cleveland to use non-partisan elections for local office. "Conceding that section 7, article V, applies to nominations for officers in cities which have adopted charters," the Court stated, "a charter which provides for such nomination by petition is a compliance with the requirement of that section." *Id*. at 354, 103 N.E. at 516.

Appellees would have this Court believe that the *Fitzgerald* Court ruled that Article V, § 7 authorizes the selection of partisan candidates (who would be identified as such) by political parties for general elections through nominating petitions, conventions or caucuses. Nothing could be farther from the truth. Article V, § 7 was designed (during the Progressive Era) to prevent party bosses from dictating who could and who could not run for office. It was designed to empower the electorate. It required that political parties use popular primaries to select partisan candidates.

This was explained by Justice Wannamaker in his concurring opinion. Justice Wannamaker pointed out that the Cleveland charter provision creating non-partisan elections was consistent with Article V, §7 and Article XVIII, § 3 because it was designed to "free [voters] from party domination, [and] free [them] from boss control, by cutting out of its charter party primaries." *Id*. at 521, 103 N.E. at 371 (Wannamaker, J., concurring). The last thing the *Fitzgerald* Court would have wanted was to authorize the use of political party conventions, caucuses and nominating petitions to select political party candidates.

Appellees also argue that *State ex rel. Connor v. Noctor*, 106 Ohio St. 516, 140 N.E. 878 (1922), "undercuts" LPO's case. *See* Brief of Appellees at 26. Appellees are again mistaken. The question in *Noctor* was whether a candidate could legally qualify for the ballot as an independent using nominating petitions when no statute authorized the practice. *Id*. at 519, 140 N.E. at 879. The legislature had inadvertently failed to authorize this practice in municipalities with more than 2000 inhabitants even though it had authorized the practice for those with fewer residents. The Ohio Supreme Court ruled that because Article V, § 7 is not self-executing, the lack of legislative authorization doomed the candidate's case.

Noctor says nothing about whether the legislature may authorize political parties to nominate their candidates by petition, caucus or convention. It does not "undercut" LPO's case. LPO has never claimed that Article V, § 7 is self-executing. Regardless of whether it is self-executing, Article V, § 7 still places limits on what Ohio's legislature can do with nominating petitions. And one of those limits is that the legislature cannot return Ohio to "boss rule" by authorizing the

nomination of political party candidates by petition, caucus and convention.

III. Article V, § 7 is Justiciable.

Far from supporting Appellees' case, the *Fitzgerald* Court's decision both supports LPO's interpretation of Article V, § 7 and proves that Article V, § 7 is justiciable. The *Fitzgerald* Court, after all, had no problem measuring Cleveland's adoption of non-partisan elections against the language and meaning of Article V, § 7. It never stated that Article V, § 7 was non- justiciable, even though the members of the Court agree that it was not self-executing.[1]

Indeed, the *Fitzgerald* Court even concluded that one state statute (§ 4963), which did not "provide for nominations by direct primaries of candidates for state and district offices but d[id] provide for such nominations of candidates for county offices and for all municipal

[1] Sister states have reached similar results about justiciability. For instance, state constitutional provisions authorizing expenditures, though themselves not self-executing, have been ruled justiciable "to the extent of prohibiting legislative action inconsistent with [their] provisions ...." *Hendee v. Dewhurst*, 228 S.W.3d 354, 372 (Tex. App. 2007).

offices," *id*. at 358, 103 N.E. at 517, was unconstitutional under Article V, § 7. "This law ... as to state and district officers and as to cities and villages of less than 2,000 population, is invalid because inconsistent with section 7, article V, of the Constitution." *Id*. Consequently, *Fitzgerald* established as early as 1913 that Article V, § 7 is justiciable and prohibits Ohio from eliminating primaries.

IV. LPO Did Not Waive Its Right to Present Evidence.

Appellees argue that LPO somehow waived its right to present the affidavit of Richard Winger describing the history surrounding the adoption of Article V, § 7. Brief of Appellees at 24. Appellees argument apparently is that LPO was absolutely required to file the Winger affidavit before it responded to Appellees' motion for summary judgment. Appellees cite no authority for this proposition.

The Court of Common Pleas in its April 18, 2016 Order denying LPO's Rule 56(F) motion for a continuance advised LPO that it did not need discovery because it could submit its proof by affidavit. *See* Doc. No.96 (0D006-Q82). Though it objected to this procedure, this is exactly

what LPO did. LPO cannot be charged with waiver for following the instructions of the Court of Common Pleas.

Further, Appellees had a full and fair opportunity to challenge Winger's affidavit. LPO filed its Rule 56(F) motion on March 2, 2016. *See* Doc. No. 74 (0C936-F34). On March 28, 2016, LPO filed Winger's affidavit with the Court. *See* Doc. No 86 (0C976-P1). Appellees had a full and fair opportunity to challenge Winger's qualifications and claims at the April 5, 2016 evidentiary hearing. Having successfully forced LPO to (1) forego discovery, (2) immediately respond to a premature summary judgment motion filed nine months before the close of discovery, and (3) present whatever evidence LPO could quickly muster through affidavits, Appellees are hardly in a position to complain that LPO complied with the Court's Order and submitted its proof through affidavits.

V. The Court of Common Pleas Erred by Holding that LPO's Claims Are Governed By Federal Standards.

Appellees suggest that the Ohio Supreme Court's decision in *State ex rel. Brown v. Ashtabula County Board of Elections*, 142 Ohio St. 3d

370, 2014-Ohio-4022, 31 N.E.3d 596, establishes that *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), govern challenges to election laws that are pressed under Ohio's Constitution. *See* Brief of Appellees at 29. Appellees are wrong; *Ashtabula* says no such thing.

Ashtabula was an extraordinary challenge by writ of mandamus to Ohio's "sore loser" law under the First Amendment. The Ohio Supreme Court applied *Anderson*/*Burdick* and rejected the challenger's federal First Amendment challenge. The Court never identified any Ohio Constitutional provision at stake and never stated that *Anderson*/*Burdick* applies to challenges brought under Ohio's equal protection guarantee (or any other provision in Ohio's Constitution).

Appellees are so intent on applying federal standards, including those found in *Anderson* and *Burdick*, that they go so far as to argue that LPO has waived arguments to the contrary: "Having failed to articulate what test it contends is the appropriate test below, the LPO has waived its ability to do here." Brief of Appellees at 33. This argument fails for a

number of reasons, not the least of which is that LPO articulated a different test that should be applied.

First, LPO argued in its response to Appellees' motion for summary judgment that the federal cases relied on by Appellees, including *Anderson* and *Burdick*, did not provide the proper tests for claims made under Ohio's Constitution. *See* Doc. No. 76 (0C936-F49). Second, LPO argued that S.B. 193 violated the protections found in Article V, § 7 and Article I, § 2 of Ohio's Constitution because "Senate Bill 193 cannot pass any level of scrutiny." *Id*. (0C936-F56). Article V, § 7, after all, is definitional; it has no test. Third, LPO argued that even assuming that *Anderson* and *Burdick* did control, the proper test under those precedents is not a rational basis test but is intermediate scrutiny. *See id*. (0C936-F57).

Last, LPO presented to the Court of Common Pleas the Ohio Supreme Court's decision in *State v. Mole*, __ Ohio St. 3d __, 2016-Ohio-5124, __ N.E.2d __, 2016 WL 4009975 (July 28, 2016), which was not handed down until after the Court of Common Pleas awarded Appellees summary judgment and after the Court of Common Pleas

stayed LPO's motion for a new trial on July 7, 2016. *See* Doc. No.120 (0D130-U97). LPO immediately brought this case to the Court of Common Pleas' attention, *see* Doc. No. 130 (0D173-U77) -- which Appellees immediately moved to strike, *see* Doc. No. 131 (0D178-H30) -- but the Court of Common Pleas on September 1, 2016 stated that it "has reviewed *State v. Mole*, 2016-Ohio-5124 and finds it unpersuasive." Doc. No. 136 (0D211-C42).

In sum, LPO has not waived any part of its challenge to the erroneous analysis employed by the Court of Common Pleas. It has raised objections to the Court of Common Pleas' analysis at every juncture and argues the precise points here that it argued in the Court of Common Pleas.

VI. Senate Bill 193 Denies Official Political Party Membership to New Parties While Providing it to Established Parties.

Appellees argue that "S.B. 193 does not deny minor parties any benefit available to major parties ...." Brief of Appellees at 53. This is not true. Appellees also argue that "Ohio law does not govern party membership in general." Brief of Appellees at 8. While this is true in

part -- political parties are free to unofficially register members -- it does not change the fact that in Ohio the only official way to register with a political party is by voting in that party's primary.

Appellees concede in their Brief that official membership in Ohio is defined by primaries when they attempted to distinguish federal cases that have invalidated discriminatory political party membership laws: "Unlike in *Baer* and *Green Party of New York State*, Ohio voters do not declare a part upon registering to vote and they may affiliate with any recognized party at a partisan primary election." Brief of Appellees at 52.

Contrary to Appellees' claims, S.B. 193 supplies established parties with benefits that are not available to new parties. Ohio Revised Code § 3513.05 states that "an elector is considered to be a member of a political party if the elector voted in that party's primary election within the preceding two calendar years." Secretary Husted's official web page, meanwhile, stated as late as July 10, 2016 that "Under Ohio election law, you declare your political party affiliation by requesting the ballot of a political party in a partisan primary election." OHIO SECRETARY OF

STATE, FREQUENTLY ASKED QUESTIONS: GENERAL VOTING & VOTER REGISTRATION (2015).[2]

Primary registration supplies established parties with two unique benefits: official members and official membership lists. As explained by LPO in its initial Brief, a majority of federal courts, including the Supreme Court, have concluded that this sort of discrimination violates the federal Equal Protection Clause.

VII. The Court of Common Pleas Erred By Refusing LPO's Reasonable Request to Begin Discovery.

Appellees insisted in the Court of Common Pleas that discovery was unnecessary. They continue to make that argument here, even though they complain that they did not have a proper opportunity to challenge Richard Winger's affidavit. The premise of Appellees'

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2 http://www.sos.state.oh.us/elections/Voters/FAQ/genFAQs.aspx#declare (last visited July 10, 2016). This web page was apparently taken down sometime after July 10, 2016 and can no longer be located. Local election boards, however, continue to repeat exactly what the Secretary's web page stated. *See, e.g.*, CUYAHOGA COUNTY BOARD OF ELECTIONS, HOW DO I DECLARE OR CHANGE POLITICAL PARTY AFFILIATION?, http://boe.cuyahogacounty.us/en-us/declareorchangeparty.aspx (last visited Nov. 15, 2016).

argument is that LPO's state-law claims are identical to its federal claims. And because LPO should have conducted more thorough discovery on those federal claims in federal court, they should be precluded from conducing discovery here.

As LPO argued in its initial Brief, Appellees' premise is incorrect. LPO's state-law claims are distinct from the federal claims LPO made in federal court. But even if LPO's state-law claims were identical to LPO's federal claims, neither the Appellees nor the Court of Common Pleas cites to any case holding that a complete denial of discovery can be justified in the face of a Rule 56(F) motion. Indeed, the only cases that have sustained Courts of Common Pleas' rulings rejecting Rule 56(F) motions have been cases where parties sought to conduct more discovery or sought more time following discovery that had already taken place.

In *Ford Motor Credit Co. v. Ryan*, 189 Ohio App.3d 560, 600, 2010-Ohio-4061, 939 N.E.2d 891, 929 (10th Dist.), for example, discovery had been ongoing for three years and the discovery deadline had already passed when the Rule 56(F) motion was filed. In *Fields v.*

Buehrer, 10th Dist., 2014-Ohio-1382, 2014 WL 1347155 *3, the Rule 56(F) motion was filed just one day before the discovery cut-off date. Extensive discovery had already taken place.

By way of contrast, in *Galland v. Meridia Health System*, 9th Dist., 2004-Ohio-1416, 2004 WL 573831 *3, the Ninth District reversed for abuse of discretion a trial court's refusal to allow the completion of discovery. No court in Ohio has ever ruled that a complete denial of discovery is proper when a party moves under Rule 56(F) for time to conduct discovery.

"The party seeking the Civ. R. 56(F) continuance bears the burden of establishing why the party cannot present sufficient facts to justify its opposition to a motion for summary judgment without a continuance." *Ford Motor Credit Co.*, 189 Ohio App.3d at 600, 2010-Ohio-4061, 939 N.E.2d at 929. Still, "[u]nder Civ. R. 56(F), '[a] party who seeks a continuance for further discovery is not required to specify what facts he hopes to discover, especially where the facts are in the control of the party moving for summary judgment'." *Drake Construction Co. v. Kemper House Mentor, Inc.*, 170 Ohio App.3d 19, 24, 2007-Ohio-120,

865 N.E.2d 938, 942 (11th Dist.). "Generally, ... the trial court should exercise its discretion in favor of a party seeking further time for discovery under Civ. R. 56(F)." *Id*. (citation omitted).

Here, LPO clearly satisfied its burden of establishing why discovery was necessary. LPO pointed out that its Complaint had only been filed one month before Appellees' filed their Answer and Motion for Summary Judgment. Discovery had not commenced and was not scheduled for completion for another nine months. Appellees, meanwhile, denied practically every allegation in the Complaint. As LPO argued in its Rule 56(F) motion, Appellees expressly "den[ied] the allegations in Paragraphs 12, 13, 14, 15, 16, 27, 31, 33, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 63, 64, 66, 67, and 68," Doc. No. 74 (0C936-F36), "den[ied] for lack of knowledge or information the allegations contained in Paragraphs 5, 6, 21, and 24," *id*., and "den[ied] for 'want of knowledge' allegations in paragraphs 19 and 20 of the Plaintiff's Verified Complaint." *Id*. "These denials," LPO argued, "create a large number of genuine issues of material fact." *Id*. (0C936-F37).

Among their many denials, Appellees disputed (1) that Senate Bill 193 denied to LPO the authority to hold primaries, (2) that Ohio registered party membership through primaries, (3) that LPO had at one time been a recognized political party in Ohio, (4) that LPO had attempted to run candidates in the 2015 and 2016 primaries, (5) that S.B. 193 had prevented LPO from running its candidates in the 2015 and 2016 primaries, and (6) that "[t]he United States Court of Appeals for the Sixth Circuit recognized and ruled in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 582 (6th Cir. 2006), that the Ohio 'Constitution requires that all political parties, including minor parties, nominate their candidates at primary elections.'" Doc. No. 5 (0C863-M68). LPO pointed to many additional remaining factual issues created by Appellees' denials in its Rule 56(F) motion. *See* Doc. No. 74 (0C936-F37).

LPO attached an affidavit from its chair, Robert Bridges, asserting that none of the evidence and/or information supporting Appellees' many denials was within his or LPO's possession or knowledge. *See*

Doc. No. 75 (0C936-F42). The only way to respond to Appellees' denials and obtain the needed information was through discovery.

Additionally, LPO argued that if Appellees' claim that the *Anderson*/*Burdick* balancing test completely controlled the outcome in this case were correct, discovery was needed to ascertain the actual objective behind S.B. 193. *Anderson*/*Burdick*, LPO argued in its response to Appellees' motion for summary judgment, does not accept post hoc rationalizations. Evidence of actual intent is required. *See Libertarian Party of New Hampshire v. Gardner*, 126 F. Supp.3d 194 (D.N.H. 2015). If S.B. 193 were passed for political reasons, no reason at all, or insubstantial reasons, it would not satisfy *Anderson* and *Burdick*. *See* Doc. No. 74 (0C936-F39). Discovery was essential.

LPO's Rule 56(F) motion, its contemporaneous response to Appellees' motion for summary judgment, and its reply to Appellees' response, were thorough and extensive. LPO's supporting affidavit established that LPO did not possess any of the needed information. The Court of Common Pleas plainly erred by refusing LPO time to conduct

discovery. It abused its discretion. There was simply no need to rush to summary judgment without any form of discovery.

CONCLUSION

For the foregoing reasons, the Court of Common Pleas' summary judgment should be **REVERSED.**

Respectfully submitted,

s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I hereby certify that this Reply Brief was filed using the Court's E-Flex electronic transmission service and will be served on counsel of all parties of record. This Brief is also being electronically mailed pursuant to Local Rule 2(E) to Halli Brownfield Watson, Associate Assistant Attorney General, Constitutional Offices, Ohio Attorney General, at Halli.Watson@ohioattorneygeneral.gov, Jordan Berman, Ohio Attorney General's Office, at jordan.berman@ohioattorneygeneral.gov, and Sarah Pierce, Ohio Attorney General's Office, at sarah.pierce@ohioattorneygeneral.gov, this 16th day of November, 2016.

s/ Mark R. Brown
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