IN THE SUPREME COURT OF OHIO

STATE *ex rel.* FOCKLER, et al.,

Relators,

V.

CASE NO. 2016-1863

ORIGINAL ACTION IN MANDAMUS

HUSTED,

Respondent.

RELATORS' SUPREME COURT PRACTICE RULE 18.02 MOTION FOR RECONSIDERATION

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INTRODUCTION

Relators filed their Verified Complaint with attached Exhibits this Court seeking emergency mandamus relief on December 19, 2016. On December 21, 2016 the Court directed that Relators' Original Action for Writ of Mandamus proceed under Supreme Court Practice Rule 12.04. Relators filed a motion to expedite with this Court so that the case might be resolved before the February 1, 2017 filing deadline. On December 28, 2016, this Court granted an alternative writ directing the parties to brief the merits of the case on an expedited basis. *See 12/28/2016 Case Announcements #3*, 2016-Ohio-8459.

On January 20, 2017, the Court issued its decision on the merits. *See State ex rel. Fockler v. Husted*, slip op., 2017-Ohio-224. In that opinion, the Court ruled that R.C. § 3517.01(A)(1)(a) does not extend to "groups of voters" that do not already constitute "political parties" the right to meet Ohio's vote test and become "political parties."

Relators respectfully seek reconsideration. Supreme Court Practice Rule 18.02(A) states that Motions for Reconsideration may be filed within ten days of the Court's entry of judgment. The present case proceeded under Supreme Court Practice Rule 12.04 and final judgment was entered on January 20, 2017. Relators' Motion for Reconsideration is timely.

Supreme Court Practice Rule 18.02(B) authorizes motions for reconsideration "with respect to ... [a] decision on the merits of a case." The Court's January 20, 2017 judgment was a decision on the merits of the case. Relators' basis for seeking reconsideration is not a re-argument of the case, but relies on: (1) a factual mistake, (2) an evidentiary mistake, and (3) a statutory mistake, all of which are described below. Relators express a good faith belief that these errors run afoul of existing precedent and support reconsideration.

ARGUMENT

I. The Court Factually Erred in Concluding that R.C. § 3517.01(A)'s Vote Test Was Invalidated in *Blackwell*.

The Court concluded that R.C. § 3517.01(A)(1)(a)'s vote test does not apply to "any group of voters" supporting an independent presidential ticket. To reach this conclusion, the Court rejected Relators' historical claim that R.C. § 3517.01(A)(1)(a)'s extension of Ohio's vote test to "any group of voters," including those supporting independent gubernatorial and presidential candidates, has existed in one fashion or another in Ohio since 1914. The Court stated:

> But the statute that Winger and Fockler cite as being "continuously" in effect was invalidated in 2006. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). Therefore, a vote-percentage process for groups of voters to establish political parties has not been in continuous effect since 1914.

State ex rel. Fockler v. Husted, slip op., 2017-Ohio-224, at 8-9.

The Court is factually mistaken. *Blackwell* had nothing to do with Ohio's vote test for independent candidates. The Sixth Circuit's holding did not purport to address Ohio's vote test for maintaining political party status, let alone its application to independent candidates. The Sixth Circuit in *Blackwell*, 462 F.3d at 595, did not invalidate all of what was then R.C. § 3517.01(A). The Sixth Circuit in *Blackwell*, by its own terms, only invalidated R.C. § 3517.01(A) to the extent it established Ohio's "filing deadline and primary requirement" for "minor party qualification." *Id*. at 495.

In *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 1006, 1009-10 (S.D. Ohio 2008), the Court explained the Sixth Circuit's decision in *Blackwell*:

> In *Blackwell* the Court of Appeals considered the Libertarian Party's challenge to Ohio's ballot access requirements, and held that collectively the statutes created an unconstitutional burden on First Amendment rights. The early filing deadline requiring minor parties to gather 40,227 signatures one year in advance of a general election

> imposed a "severe burden" that was not "narrowly drawn to advance a state interest of compelling importance."

(Citing *Blackwell*, 462 F.3d at 593). The Sixth Circuit in *Blackwell*, according to the District Court in *Brunner*, said nothing about the vote test found in R.C. § 3517.01(A) (which was where the vote test for political parties and "any group of voters" was codified at the time). As a result, the Secretary following the Court's decision in *Brunner* agreed to recognize LPO as political party until Ohio passed a constitutional law with reasonable deadlines and signature requirements.

This settlement was implemented by a number of Directives issued by Respondent recognizing LPO and other minor political parties (including the Green, Socialist and Constitution Parties) as fully qualified political parties in Ohio. None of these Directives said anything about Ohio's vote test; indeed, the assumption at the conclusion of that litigation was that any of the minor parties that met Ohio's vote test (5% at that time) before Ohio passed a new, constitutional signature requirement and filing deadline would remain a political party for four years according to R.C. § 3517.01(A).

Respondent has never claimed anything to the contrary. Indeed, Respondent conceded in this very case that "neither of these cases [*Blackwell* and *Husted*] expressly addressed the [vote test] issue presented here ...." Respondent's Merit Brief at 12.[1] Respondent never claimed in this case that Ohio's vote test became obsolete because of *Blackwell* and has never claimed that *Blackwell* somehow interrupted the vote test now found in R.C. § 3517.01(A)(1)(a).

[1] No minor party met this 5% vote test in either 2008, 2010 or 2012. he Green Party of Ohio met the interim 2 % test put in place by S.B. 193 in 2014 but only because the federal District Court in *Libertarian Party of Ohio v. Husted*, No. 13-953 (S.D. Ohio, Jan. 7, 2014), preliminarily enjoined enforcement of S.B. 193 and ordered that that Green Party remain a political party for the 2014 election.

This is reinforced by events in subsequent federal litigation over Ohio's access law for new parties. Three years after *Brunner*, the Southern District of Ohio in *Libertarian Party of Ohio v. Husted*, 2011 WL 3957259 * 1 (S.D. Ohio 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012), invalidated another Ohio law that required signature collection several months before Ohio's election. In so holding, the Court reiterated that *Blackwell* invalidated only the combination of Ohio's filing deadline and signature collection requirement:

> In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), the Sixth Circuit found that the combination of Ohio's November filing deadline for new political parties and its signature requirement that new parties submit signatures from voters equal to 1% of the total vote cast in the last election for President or Governor was unconstitutional.

Contrary to this Court's factual statement that *Blackwell* invalidated all of R.C. § 3517.01(A), two federal judges sitting in the Southern District of Ohio, and the Respondent as well, have recognized that *Blackwell* only invalidated the combination of Ohio's signature collection requirement and early filing deadline for minor parties. No case has ever before mentioned invalidating all of R.C. § 3517.01(A), let alone the vote test found therein. Indeed, if Ohio's vote test were invalidated in *Blackwell* in 2006, that would mean that neither the Democratic nor Republican Parties could have remained recognized political parties under R.C. § 3517.01 after 2010. Their status would have expired and the vote test mechanism in R.C. § 3517.01 would not have existed to allow them to renew that status.

That Ohio's law (in effect since 1914) allowing "groups of voters" to use a vote test to become political parties was believed to have ceased to exist in 2006 was obviously an important component in this Court's conclusion that the current version of R.C. § 3517.01(A) does not extend a vote test to "groups of voters." This factual mistake likely contributed to this Court's conclusion that R.C. §3517.01(A)(1)(a), in its current form, precludes independent candidates from creating political parties.

This mistake also led the Court to believe it could properly consider the Legislative Service Commission's 2013 Report on S.B. 193 proffered by Respondent. If R.C. § 3517.01(A)'s vote test were being passed following a seven year hiatus, one might argue that this legislative history were relevant. Because of the vote test's continuous existence, however, the only legislative history that could be relevant is that accompanying its initial enactment. *See United States v. Wood,* 134 S. Ct. 557, 568 (2013) ("[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). Respondent has cited no such legislative history. Rather, when Ohio's vote test was passed it was plainly intended to extend to "political associations" and "groups of voters" that were not already "political parties."

Relators believe that the Court's factual mistake unduly impacted its interpretation of R.C. § 3517.01(A)(1)(a). They respectfully request reconsideration.

II. The Court Mistakenly Extended Rule 12.06's Personal Knowledge Requirement to Expert Witnesses.

The Court ruled that Relators' expert's (Winger) affidavit had "not been properly sworn," *State ex rel. Fockler v. Husted*, slip op., 2017-Ohio-224, at 8, noting that "Winger's affidavit fails to satisfy the requirements of S.Ct.Prac.R. 12.06, which requires affidavits to be made on personal knowledge." *Id*. at 8 n.3. This lack of personal knowledge was obviously important to the Court's conclusion, as it cast a measure of doubt in the Court's eyes about Winger's testimony.

The Court erred in extending Rule 12.06's reach to Winger's affidavit. Winger was not tendered as a fact witness. He was proffered as an expert. Unlike fact witnesses, expert testimony need not be based on "personal knowledge." The Court in *Burens v. Industrial Commission*, (1955) 162 Ohio St. 549, 553, 124 N.E.2d 724, 727, stated that "[i]t is similarly

well recognized that *qualified expert witnesses are not confined in their testimony to facts which are within their own personal knowledge* ...." (Emphasis added).

In *Miller v. Bike Athletic Co*., 80 Ohio St.3d 607, 616, 1998-Ohio-178, 687 N.E.2d 735, 743, the Court further observed that "Evid. R. 703 and 705 provide that an expert's opinion may be based on facts *or data perceived by him* or admitted into evidence." (Emphasis added) (citing *State v Solomon*, (1991) 59 Ohio St.3d 124, 570 N.E.2d 1118). In *Solomon*, 59 Ohio St.3d at 126, 570 N.E.2d at 1120, the Court explained:

> we find that where an expert bases his opinion, in whole or in major part, on *facts or data perceived by him*, the requirement of Evid. R. 703 has been satisfied. It is important to note that Evid. R. 703 is written in the disjunctive. *Opinions may be based on perceptions or facts or data admitted in evidence*.

(Emphasis added).

Winger's affidavit was offered as that of an expert. He need not have possessed personal knowledge. It is sufficient that as an expert he relied on either his "perceptions" or on "data perceived by him." Winger's testimony was based on his expertise, perceptions of facts and Ohio's historical laws.[2] Indeed, Winger could not swear that his testimony was based on his personal knowledge because he could not have personal knowledge of what happened a century ago. Reading Supreme Court Rule of Practice 12.06 to demand that affidavits of experts be based on "personal knowledge" not only overrides Ohio's Rules of Evidence (and contradicts numerous opinions of this Court), it also precludes this Court from entertaining expert evidence

[2] To the extent one wishes to argue that Winger is not an expert or should not be allowed to testify as such under Ohio's Rules of Evidence, Winger's affidavit demonstrates his expert qualifications. Relators pointed out in the Reply Merit Brief, moreover, that numerous Courts (including the Sixth Circuit) have rejected claims that Winger is not an expert. Indeed, Respondent himself has used Winger as an expert witness. In the event, this Court did not question Winger's status as an expert witness.

in original mandamus actions filed with this Court. That could not be the intent behind Rule 12.06.

Winger's lack of "personal knowledge" was obviously important to the Court's rejection of Relators' historical argument. Reconsideration is necessary in order to fully assess Winger's expert testimony in the context of this original action.

III. The Court Misstated the Literal Language of R.C. § 3501.01(F).

In linking R.C. § 3517.01(A)(1)(a) to the definitions of "political parties" in R.C. § 3501.01(F), the Court stated:

> R.C. 3501.01(F) defines "political party" as any group of voters who meet the requirements of R.C. 3517.01 for the formation and existence of a political party.

State ex rel. Fockler v. Husted, slip op., 2017-Ohio-224, at 4.

Relators respectfully submit that this statement is literally incorrect. "Minor political party" in R.C. § 3501.01(F)(2) is defined as <u>either</u> (a) a political party whose candidate won in the prior election won 3% of the vote for Governor or President (with no mention of R.C. § 3517.01), <u>or</u> (b) a group that had filed a petition with a sufficient number of signatures with the Secretary under R.C. § 3517.01. R.C. § 3501.01(F)(2) only mentions R.C. § 3517.01 in the specific context of nomination-by-petition, which is not at issue here. The vote test mentioned in R.C. § 3501.01(F) is not linked in any fashion to R.C. § 3517.01(A). Nor is the vote test in R.C. § 3517.01(A) linked in any fashion to R.C. § 3501.01(F).

Because this incorrect literal link is the lynchpin to the Court's conclusion that R.C. § 3517.01(A)(1)(a)'s qualification process is tied to R.C. § 3501.01(F)'s definition of "minor political party," Relators believe it compromised the Court's ultimate conclusion. Reconsideration is in order under a proper literal comparison of the two statutes.

Given the absence of the link mistakenly described by the Court, the Court is obligated to "accord full application to each of these statutes unless they are irreconcilable and in hopeless conflict." *State ex rel. Gains v. Rossi*, 86 Ohio St.3d 620, 622, 1999-Ohio-213, 716 N.E.2d 204, 207. Full application means that R.C. § 3517.01(A)(1)(a)'s terms must be given full effect separate and apart from those of R.C. § 3501.01(F).

Further, the absence of the literal link erroneously attributed to the two statutes, to the extent an ambiguity is created, requires that R.C. § 3517.01(A)(1)(a) and R.C. § 3501.01(F) be interpreted liberally in favor of free and competitive elections. *See State ex rel. Mirlisena v. Hamilton County Board of Elections*, (1993) 67 Ohio St.3d 597, 599, 622 N.E.2d 329, 330 ("[i]t is the duty of any court, when construing a statute, to give effect to all of the pronouncements of the statute and to render the statute compatible (to harmonize) with other and related enactments whenever and wherever possible."); *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328, 332, 2008-Ohio-5097, 899 N.E.2d 120, 124 (stating that a court "must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections"). Reconsideration, Relators believe, is in order.

CONCLUSION

For the foregoing reasons, Relators respectfully request reconsideration under Supreme Court Practice Rule 18.02.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served by electronic mail and United States Mail on the date of filing to Halli Watson, Associate Attorney General, Counsel for Respondent, at halli.watson@ohioattorneygeneral.gov, 30 E. Broad Street, 16th Floor, Columbus, OH 43215.

*s/ Mark R. Brown*_____
Mark R. Brown