Case No: 16-3794

In the United States Court of Appeals for the Eighth Circuit

LIBERTARIAN PARTY OF ARKANSAS,
KRISTIN VAUGHN, ROBERT CHRIS HAYES,
DEBRAH STANDIFORD, and MICHAEL PAKKO

Appellees-Plaintiffs

v.

HONORABLE MARK MARTIN in his
Official capacity as Secretary of State
for the State of Arkansas,

Appellant-Defendant

Appeal from U.S. District Court for the Eastern District of Arkansas
Honorable James Moody Jr.
District Court Case No. 4:15-CV-635-JM

REPLY BRIEF OF DEFENDANT-APPELLANT HONORABLE MARK MARTIN SECRETARY OF STATE

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SUMMARY OF THE ARGUMENT

The Court should reverse the declaratory relief granted as to the implied timing of the new political party convention under Arkansas law. Plaintiff-Appellees failed to demonstrate standing as to the prospective facial relief granted because they made no showing of actual or imminent harm resulting from application of this law at trial. Plaintiff-Appellees successfully held a nominating convention, and successfully nominated seventeen (17) candidates in 2016, with a larger number in 2014. As a result of the individual plaintiffs' failures to file timely for office during the party filing period, for purely personal reasons, Plaintiffs did not show any actual harm caused by the implied timing of the convention. To the contrary, the timing of the Libertarian Party of Arkansas (LPAR) nominating convention in 2016 allowed the LPAR to avoid application of other unchallenged laws which would have significantly limited their ability to field candidates for office.

Given the successful filings of multiple other LPAR candidates in 2014 and 2016, with the same convention requirement implied, facial declaratory relief is prohibited in accordance with clearly-established case law. The Trial Court denied as-applied, injunctive relief; Plaintiffs failed to appeal. The prospective declaratory relief should be vacated, set aside and held for naught.

ARGUMENT

The Court should reverse the declaratory relief. In reviewing the District Court's Judgment after a bench trial, "this [C]ourt reviews 'the court's factual findings for clear error and its legal conclusions de novo.'" *Outdoor Cent., Inc. v. GreatLodge.com, Inc.*, 688 F.3d 938, 941 (8th Cir. 2012) (*quoting Tadlock v. Powell*, 291 F.3d 541, 546 (8th Cir. 2002)); see also Fed. R. Civ. P. 52(a)(6). Defendant-Appellant Secretary asks this Court to vacate and set aside the adverse rulings by the District Court, accordingly.

Plaintiff-Appellees lack standing. Plaintiffs have the burden to prove standing as to each alleged claim. On appeal, this Court "review[s] the district court's conclusion that the plaintiffs had standing ***de novo***." *Constitution Party of South Dakota v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011) (where this Court may consider standing *sua sponte*); (*citing Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) (cert. denied, 549 U.S. 1328 (2007))). Plaintiff-Appellees have failed to meet their burden of proof.

Standing must "persist throughout all stages of litigation," and likewise must be demonstrated "separately for each form of relief sought." *East Iowa Plastics, Inc. v. PI, Inc.*, No. 15-2757; __ F.3d at__, 2016 WL 4245501 *3 (8th Cir. August 11, 2016) (*citing, Hollingsworth v. Perry*, 133 S.Ct. 2652, 2661 (2013)); *see, Bernbeck v. Gale*, 829 F.3d 643, 646-47 (8th

Cir. 2016) (each element of standing must be proven by "a preponderance of evidence" after a bench trial) (ballot access case). At trial, Plaintiffs failed to prove standing for the prospective declaratory relief as to the implied timing of the new political party convention.

Pleadings are not evidence and do not support Plaintiff-Appellees' claims after a bench trial. In their pleadings, Appellees alleged they were entitled to declaratory relief as to the future application of the implied timing of their nominating convention under Arkansas law. The Complaint erroneously claimed Plaintiffs were entitled to relief from the implied timing of the new political party convention requirement "as applied to the Plaintiffs herein for the 2016 Arkansas General Election, and in its previous and subsequent version which was in effect before the 2016 election cycle and will be in effect after December 31, 2016, for all subsequent Arkansas General Elections." **J.A. 012.**

Plaintiffs did not prove future harm at trial, where they instead focused exclusively on the as-applied challenge for 2016 that they insisted was the basis of their claims. Absent the requisite proof, Plaintiffs have failed to show any future harm caused by prospective application of the implied timing of the new political party nominating convention.

Plaintiffs' Complaint does not satisfy the standard of proof required at a bench trial "for the simple reason that *pleadings are not evidence.*" *Shreve and Reed, et al., v. Franklin County, Ohio*, 743 F.3d 126, 136 (6th Cir. 2014) (comparing Fed. R. Civ. P. 8 (defining pleadings) with Fed. R. Evid. 401 (defining relevant evidence)) (emphasis in original). Materials suggested in pleadings do not meet the standard of proof required after a bench trial. *See*, *Bernbeck*, 829 F.3d at 647.

Like the plaintiff in *Bernbeck*, Plaintiff-Appellees have not proven that injury from the implied timing of the new political party convention requirement is an actual prospective injury. It is undisputed that Plaintiff-Appellees never submitted certificates of nomination from nominees who timely submitted a political practices pledge during the party filing period, which certificates were rejected by Appellant Secretary. So "it is not possible for [Defendant-Appellant Secretary of State] to have enforced the" new political party nominating convention requirement by rejecting a timely-filed and submitted candidate for noncompliance with the implied timing requirement. *Bernbeck*, 829 F.3d at 647. No actual harm was proven.

This matter is resolved by application of *Storer v. Brown, Bernbeck v. Gale,* and *Pucket v. Hot Springs School Dist. No. 23-2.* As the District Court stated in its February 25, 2016, Order:

> All party candidates had to decide whether they wanted to run for office by the party filing date on November 9, 2015. Whether Republican, Democrat, or Libertarian . . . none of them can choose to get in a race at this late date. . . . Plaintiffs had the opportunity, the ability, and actually conducted their party convention. They nominated candidates for seventeen state and local races. According to facts introduced at the [preliminary injunction] hearing, the Libertarian party (sic) nominated a similar number of candidates for the 2015 election cycle. This fact supports the Secretary of State's position that [] Plaintiffs have not been harmed by the deadlines set for the 2016 General Election cycle. . . . The statutes at issue do not appear to "freeze the status quo by effectively barring third party or new political party candidates from the ballot." *Libertarian Party of N.D. v. Jaeger*, 659 F.3d 687 (8th Cir. 2011).

Add. 003-004. Given these facts, Plaintiff-Appellees are left with nothing more than the unsubstantiated allegations in their pleadings that they wished to engage in future conduct. "As the Supreme Court made clear in *Lujan*, a wish to engage in future conduct, alone, does not provide the immediacy needed for threatened enforcement of a contested law to constitute an injury in fact." *Bernbeck*, 829 F.3d at 647-48, *citing, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (2009).

This comports with relevant Eighth Circuit and U.S. Supreme Court precedent. "[I]f a plaintiff is required to meet a precondition or follow a certain procedure to engage in an activity or enjoy a benefit and fails to attempt to do so, that plaintiff lacks standing to sue because he or she should have at least taken steps to attempt to satisfy the precondition." *Bernbeck*, 829 F.3d at 648, *citing*, *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1161 (8th Cir. 2008); *accord, Storer v. Brown*, 415 U.S. 724, 736-37 (1974) (candidate validly barred from ballot by one provision of the laws cannot challenge other provisions as applied to other candidates).

Defendant-Appellant asserted as its one of its defenses that the plaintiffs failed to show that they met *other, unchallenged* filing requirements for candidates in the State of Arkansas. Most importantly, Appellant Secretary asserted that Plaintiffs had to file their political practices pledges at the same time as other candidates, but failed to do so in contravention of Ark. Code Ann. § 7-7-203(c)(3) ("A party certificate and the political practices pledge shall be filed with the county clerk or the Secretary of State, as the case may be, during regular office hours during the party filing period.").

As the District Court stated: "... [T]he Court can see the potential state interests for requiring all candidates to commit and pledge to comply

with Arkansas' campaign practice laws during the same filing period and as a prerequisite to nomination by any party." **Add. 011-012**. *Storer* dictates that failing to meet these unchallenged deadlines is fatal to Plaintiff-Appellees' claims. *Storer*, 415 U.S. at 736-37. The Trial Court agreed when it denied all requested as-applied relief.

The Trial Court erred in finding that Defendant Secretary had not articulated any valid interest to support the law (July 15 Order at 6, pp. 10 and 11), **J.A. 644**, and consequently erred in its conclusion that the implied timing of the new political party nominating convention is unconstitutional. **J.A. 644**. Without dispute, Defendant Secretary of State set forth explicit rationale why the implied timing requirement was modified in 2013: part of the rationale was to enforce the prohibition that the state has on sore losers running for office; in part to prevent candidates from jumping from one party to another; in part to help prevent ballot overcrowding; in part to help eliminate frivolous candidacies; in part to help ensure efficiency in the election process; in part to help avoid expensive runoffs; in part to help preserve political parties as viable interest groups. **J.A. 258-59** (direct testimony of Director of Elections, Rob Hammons). The Trial Court understood "that that was the intent of the law or, arguably, that's what was discussed when the law was passed." **J.A. 260**. Plaintiff did not dispute it.

Moreover, Defendant-Appellant showed an absence of harm caused by an early convention deadline, negating an essential element of Plaintiff-Appellees' case. The implied date of the nominating convention – changed as part of Act 1356 of 2013 - helped Libertarian Party of Arkansas field more candidates as Dr. Michael Pakko's testimony showed in Appellant's Brief in Chief. This allowed the LPAR to "sort and categorize [its] candidates really on the fly on the day of the convention," as Dr. Pakko testified. **J.A. 434**.

Having a new political party nominating convention before filing candidates' paperwork with Defendant Secretary allowed Libertarian Party of Arkansas to avoid significant, albeit unchallenged, limitations on its candidates. As Mr. Hammons undisputed testimony showed, Arkansas prohibits filed candidates from running on more than one party label (fusion candidacies prohibited), **J.A. 250**; prohibits sore losers from coming back to run for office again, after having filed and withdrawn or lost **J.A. 251**; prohibits filed candidates from running for more than one office at a time, **J.A. 251**; prohibits filed candidates from changing the position for which they are running once they file for office, **J.A. 263**; and prohibits filed candidates from having multiple nominations for different offices during the same election, **J.A. 263**. Having a nominating convention prior to the end of

the filing period protected Libertarian Party candidates from these limitations, i.e., a substantial benefit.

The Libertarian Party complaint that its "sore losers" were thus free to run in another party's primary is also met by an Arkansas Code provision: Arkansas does not regulate political parties, they are free to govern themselves. **J.A. 261**. If the Libertarian Party of Arkansas wanted to prevent its candidates from running in another political party's primary, it was free to enact a Rule to do so. **J.A. 271**; *see* Ark. Code Ann. §7-7-201(d) (party rules govern in the absence of applicable general election law).

Nothing on the record supports Appellees' assertions of future harm. Therefore Appellees have no standing as to the application of the timing of the new political party nominating convention in future elections.

Appellees conducted both a 2014 and a 2016 nominating convention, and nominated multiple candidates, thereby precluding facial relief. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiffs must prove no set of circumstances under which challenged statute may be valid); *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687, 695 (8th Cir. 2011) (plaintiffs must prove no set of circumstances under which challenged statute may be valid).

No harm was caused by application of the implied timing of the new political party convention in 2016, leading the Trial Court to deny all as-applied relief requested. No proof was competent to show future harm on a purely speculative record.

The Trial Court abused its discretion in denying Defendant-Appellant's Motion to Reconsider. Awarding declaratory relief in the absence of as-applied harm is inexplicable. The Trial Court's failure to explain its denial of Defendant-Appellant's Motion to Reconsider is reversible error because it lacked a rational explanation. *Yang v. Mukasey*, 510 F.3d 793, 796 (8th Cir. 2007).

Appellees' principal cases are distinguishable. Appellees erroneously cite to *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289 (8th Cir. 1995). *Republican Party of Arkansas* addressed the combined effect of Arkansas law requiring "political parties to both conduct and pay for [their own] primary elections as a condition of access to the general election ballot." *Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289, 1291 (8th Cir. 1995). The Republican Party of Arkansas prevailed because, as the Eighth Circuit stated, the law in "combination, made it virtually impossible for any [Republican] candidates to gain access to the ballot

unless he or she was a candidate of [the Democrat majority] party." *Republican Party of Arkansas*, 49 F.3d at 1293.

As shown at trial and the preliminary hearing, the facts are substantially different here. Seventeen (17) Libertarian Party candidates successfully gained access to the 2016 General Election ballot in Arkansas, **J.A. 261**; 19 Libertarian Party candidates timely filed for the ballot in the 2014 election cycle, **J.A. 260-61**. Without dispute, Defendant asserted that the convention method of nomination was constitutional. *American Party of Texas v. White*, 415 U.S. 767 (1974), *cited in*, *Republican Party of Arkansas v. Faulkner County*, *id.* at 1293. So no harm was shown to the Trial Court.

Likewise, Appellees' other district court cases are distinguishable, both on the facts, and on different standards of law that have changed significantly in the U.S. Supreme Court and in the Eighth Circuit, since those cases were written. Appellees' cases are, in any event, not binding precedent on this Court.

This case concerns a single filing deadline for all political parties (unchallenged herein), unlike *Whig Party of Alabama v. Siegelman*, 500 F.Supp. 1195 (N.D. Ala., 1980). *Toporek v. South Carolina State Election Commission*, 362 F.Supp. 613 (D.S.C., 1973) is similarly distinguishable. The timing of filing, at issue in *Toporek*, is not at issue in this appeal, given

the lack of any cross-appeal on adverse rulings against Plaintiff-Appellees below.

Plaintiff-Appellees made no showing of future harm in their case tried as an as-applied challenge. Plaintiff-Appellees had the burden of proof. The Trial Court denied all as-applied relief; all that remained was a generalized grievance. This was insufficient to give Plaintiff-Appellees standing as voters. *Nolles v. State Comm. For Reorg. Of School Districts*, 524 F.3d 892, 900 (8th Cir. 2008). Appellees' case law to the contrary is outdated. *See*, *United States v. Geranis*, 808 F.3d 723 (8th Cir. 2015).

The Trial Court failed to give an explanation for its adverse ruling on Defendant-Appellant's Motion to Reconsider. The prospective declaratory relief concerning the implied timing of the new political party nominating convention is erroneous. Clearly-established law precludes such relief on the record herein. *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011) (application of constitutional standard)(balancing test); *United States v. Salerno*, 481 U.S. 739; *Bernbeck v. Gale*, 829 F.3d 643, 648.

CONCLUSION

Appellant Secretary asks this Court to reverse the District Court's adverse findings and conclusions as to Defendant-Appellant Secretary of State. The District Court Orders of July 15 and September 12, to the extent that they hold unconstitutional the Arkansas statutory scheme and the implied timing of the new political party convention, should be vacated, set aside, and held for naught. The Judgment should be vacated, set aside, and held for naught, as to any and all relief granted against Appellant-Defendant Secretary of State; and the remaining allegations in the Complaint for declaratory relief should be dismissed for lack of standing and lack of subject matter jurisdiction. Alternatively, the Court should reverse the adverse findings and conclusions against Defendant-Appellant Secretary and remand for dismissal of the entire Complaint with prejudice. The award of attorney fees, costs, and expenses, likewise, should be vacated, set aside, and held for naught.

CERTIFICATE OF SERVICE

We, the undersigned counsel, hereby certify that we electronically filed the foregoing Reply Brief of Appellee with the Clerk of Court using the CM/ECF system on the 22nd day of February, 2017, and upon acceptance by the Clerk, caused ten bound copies to be mailed via FedEx to the Eighth Circuit Court; as well as one bound paper copy sent via U.S. Mail to the following:

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CERTIFICATE OF COMPLIANCE

We, the undersigned counsel, hereby certify that this Appellant's Reply Brief has been scanned for viruses and the Brief is virus free. The Brief complies with the type-volume limitation as set by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Times New Roman 14 point font in Microsoft Word 2010 and 2013 was used. The Brief contains 3,364 words.

/s/ AJ Kelly
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