Supreme Court of Ohio Clerk of Court - Filed March 26, 2020 - Case No. 2020-0388

IN THE SUPREME COURT OF OHIO
CASE NO. 2020-0388

Original Action in Prohibition

Election Matter filed Pursuant to S. Ct. Rule 12.04 and Expedited Under Rule 12.08

STATE OF OHIO EX REL. DEMOCRATIC PARTY,
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Relators

STATE EX REL. LIBERTARIAN PARTY OF OHIO
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Intervener-Relator

V.

FRANK LAROSE, in his official capacity as Secretary of States,
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Respondent

INTERVENER-RELATOR'S REPLY BRIEF PURSUANT TO RULE 12.08

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ARGUMENT

I. Respondent Concedes that the General Assembly Has Not Delegated to Respondent Nor Any Other Executive Agent the Authority to Cancel, Extend Change or Postpone Elections.

Respondent concedes that the General Assembly has not delegated authority to Respondent, nor any other executive agent, to cancel, postpone, or extend elections: "The General Assembly has failed to provide any procedure or mechanism in the Revised Code for an election to be extended or postponed by an executive officer of the state in the event of an unforeseen public health crisis, natural disaster, or emergency declared on or just before a scheduled election day." Respondent's Merits Brief at page 8.[1]

Still, notwithstanding this concession, Respondent continues to assert that the Department of Health can do just that. Not only that, Respondent claims, the Department of Health had the authority to order Respondent to do so. Respondent is wrong.

Respondent cites no authority beyond the vague language in R.C. § 3701.13 to support his claim. He ignores, moreover, language found in other statutes that counsels against such an unrestrained reading of executive license: "none of these authorities says anything about the Director's authority under R.C. § 3701.13, a wholly different statute." Respondent's Merits Brief at 20 n.5. Respondent cites no authority, however, for his proposition that a limitation on executive authority can be ignored because it is contained in "a wholly different statute." Indeed, this Court's opinion in *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health*, 96 Ohio St.3d

[1] Respondent also correctly observes that R.C. § 161.09 has no application to this case. First, there has been no enemy attack. Second, even if there were one R.C. § 161.09 does not empower the Governor to postpone federal, as opposed to state, elections.

250, 773 N.E.2d 536 (2002), which relief on limitations in "wholly different statutes" to support its conclusion proves this cannot be the case.

Respondent addresses the specific limit R.C. § 3707.05[2] places on interfering with the duties of public officials in that same short footnote: "R.C. 3707.05 specifically allows the Director to 'interfere' with public officials when they are, as here, directly exposed to a contagious or infectious disease." Respondent's Merits Brief at 20 n.5. Respondent does not deny that this limitation applies to the Department of Health. He instead simply asserts that it is not relevant here because public officials have (he claims) been "directly exposed" to disease. Respondent fails to explain, however, what public officials have been afflicted and whether Respondent or any other relevant official has been "directly exposed." Is Respondent quarantined? If he has been directly exposed, he should be. But there is no evidence cited by Respondent supporting the claim. And even if Respondent was ill or exposed, one assumes his Office would still conduct its business. In the absence of any claim that Respondent and his Office have been afflicted or directly exposed, R.C. § 3707.05 prohibits the Department of Health from interfering with their duties.

Ohio law does not allow the Executive branch to seize dictatorial power and shut down the rest of government. Nor does the Guarantee Clause found in Article IV of the Constitution. The Constitution guarantees "a Republican Form of Government." U.S. Const., art. IV, § 4. If Respondent is to be believed, he, the Governor and the Department of Health could seize control of the General Assembly, shut it down, and prohibit it from conducting its business. They could close this Court and cancel its arguments. The claim is mind-boggling. It is frightening to hear responsible public servants even suggest that this could be constitutionally proper. As Chief

[2] Section 3707.05 states that health officials "shall not … interfere with public officers not afflicted with or directly exposed to a contagious or infectious disease, in the discharge of their official duties …."

Justice Marshall said so poignantly in *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819), the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." (Emphasis original). It was not meant to be jettisoned, as Respondent argues, when times get tough.

Justice Robert Jackson made this point again in his concurring opinion in the famous *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 650 (1952) (Jackson, concurring), case: the Constitution's only "express provision for exercise of extraordinary authority because of a crisis," is found in the Suspension Clause of Article I, § 9, cl. 2, which allows Congress to suspend the Writ of Habeas Corpus. Nothing in the Constitution allows the suspension of the Constitution during a health crisis, no matter how severe.

Even if Ohio law could be interpreted in this fashion -- which would be a tremendous and dangerous reach -- such an interpretation could not survive the demands of Articles I and II of the federal Constitution. Even if the Department of Health has wide, unimaginable powers to protect the public health, it cannot regulate the time and manner of federal elections. That is exactly what it has done; and that action is plainly unconstitutional. Amicus Stephens is certainly correct on this point:

> Director of Health Amy Acton's March 16, 2020 order did not authorize the Directive. The Ohio Constitution provides, "No power of suspending laws shall ever be exercised, except by the General Assembly." *See* Ohio Constitution, Article I, Section 18. So the General Assembly regulates primary elections, and the Generally Assembly—not the Executive Branch— may suspend them. *Id*. There is no exception for a pandemic.

Brief of Amicus Curiae Jason Stephens at 6.

II. Respondent Ignores this Court's Obligation to Entertain Federal Claims and its Authority to Act Under Articles I and II of the Constitution.

Respondent ignores the wealth of authority cited by Intervener-Relator in support of its claim that this Court must entertain federal constitutional challenges. Instead, he goes so far as

to assert that those claims only fall under this Court's jurisdiction on appeal. He is, of course, incorrect, as this Court regularly entertains federal constitutional arguments in original actions -- including election cases. *See*, *e.g.*, *State ex rel. Brown v. Ashtabula County Board of Elections*, 142 Ohio St.3d 370, 31 N.E.3d 596 (2014) (First Amendment claim in ballot access case).

This Court plainly has the authority to entertain Intervener-Relator's claims under the Constitution of the United States. Indeed, because it cannot discriminate against federal claims it must entertain them. In the absence of valid legislation in the context of federal elections, moreover, the Court has a federal constitutional obligation to do so in order to insure the State's federal elections proceed under Articles I and II. In *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (2003) (en banc), the Colorado Supreme Court said just that; it ruled that it was "constitutionally required" to insure that federal elections in Colorado properly proceeded "when the legislature fails to do so." *Id.* at 1232.

In the present case, it is not at all clear that the General Assembly has enacted or will timely enact valid legislation correcting Respondent's unlawful violation. The proposed legislation sent to the Governor, in particular, does not properly extend the registration deadline for federal elections as required by federal law. Even should the Governor sign the measure, it would not be in compliance with federal law or a proper exercise of the General Assembly's authority under Articles I, § 4 of the United States Constitution. That provision states that "Congress may at any time by Law make or alter such Regulations" enacted by State Legislatures that direct the time and manner of holding congressional elections. It vests in Congress the authority to "alter" State "Regulations" of congressional elections, which is exactly what Congress has done with registration requirements that exceed thirty days.

The General Assembly's proposed legislation of an election without a thirty day prior

registration "Regulation" is therefore ultra vires and void. It falls outside the General Assembly's Article I authority, is superseded by Congressional regulation, and cannot be supported by any provision in the Ohio Constitution, since the delegation of power to regulate federal elections comes straight from Articles I and II of the federal Constitution. (It is also pre-empted, as made clear by Amici Curiae League of Women Voters of Ohio and Ohio A. Philip Randolph Institute's Brief.)

In the absence of valid legislation, Ohio remains in violation of the Elections Clauses and the legislation Congress passed to enforce them. In the absence of valid State legislation, this Court has an obligation to timely act to insure that Ohio properly fulfills its role to conduct federal elections in a timely fashion. It should not wait for the General Assembly any longer. Time is short and Ohioans are suffering continuing losses of their constitutional freedoms and First Amendment rights. Even brief delays placed on First Amendment rights cause irreparable injuries. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Court should fulfill Ohio's obligation by ordering a timely and procedurally proper election -- one that complies with federal law.

III. Intervener-Relator Possesses Standing on its Own Behalf and that of its Members.

Respondent argues that notwithstanding the fact that he (Respondent) canceled Intervener-Relator's primary election, Intervener-Relator cannot complain. Intervener-Relator, Respondent claims, lacks standing. Respondent is, of course, quite wrong.

Ohio law incorporates the Article III standing requirement found in the federal Constitution. In *Moore v. City of Middleton*, 133 Ohio St.3d 55, 61, 975 N.E.2d 977, 982 (2012), for example, this Court stated:

> To succeed in establishing standing, plaintiffs must show that they suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3)

> likely to be redressed by the requested relief. These three factors—injury, causation, and redressability—constitute "the irreducible constitutional minimum of standing."

(Citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561(1992)). Because Articles III's requirements and those under Ohio law are mirror images, *see*, *e.g*., *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (one must "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision"), federal precedents and state precedents on standing are generally interchangeable. And federal precedents make clear that Intervener-Relator possesses several different specific, concrete injuries supporting its standing in this case.

Respondent's complaint about Intervener-Relator's standing is not exactly clear. He seems to believe that canceling First Amendment activity does not cause any harm or concrete injury, either for the group holding the First Amendment event or those in attendance. According to Respondent's creative theory about standing, a Catholic Church cannot complain about executive action disrupting, canceling or closing their Sunday services. Nor could candidates complain about governmental disruptions, closings and cancellations of their debates and rallies. No specific, concrete events and injuries are caused to anyone in any of these situations -- according to Respondent.

Obviously, to state such a claim is to refute it. Religious groups can challenge orders shutting down their services. Political parties can challenge executive orders shutting down their meetings, rallies and debates. And a political party can challenge executive orders shutting down its primaries, the results of which impact not only the political party's existing internal structure,[3] but also its candidates, its future meetings, its national platform, and its political existence.

[3] Minor political parties, including Intervener-Relator, elect controlling committees during the primaries conducted in even-numbered years, like the one scheduled for March 17, 2020. *See* R.C. § 3517.03.

Contrary to Respondent's position, the very organization whose First Amendment activities are canceled and closed by executive order most certainly has something to complain about. It has been injured directly through interference with its constitutional rights -- in particular its First Amendment rights. That injury is caused by being shut down, canceled, or even simply delayed. "The loss of First Amendment freedoms, for even minimal periods of time," after all "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added).

For its part, Intervener-Relator has routinely been found to possess standing to challenge rules, directives and laws that interfere with its and its members First Amendment and other constitutional rights. *See*, *e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, 2014 WL 11515569 (S.D. Ohio 2014). Respondent was on the losing end in all of these cases, so he must know that the Libertarian Party of Ohio has standing, on its own behalf and on behalf of its members, to successfully challenge restrictions placed by Respondent on its constitutional rights.

Intervener-Relator clearly has standing (in addition to asserting its own rights) to assert the constitutional rights -- including the First Amendment rights -- of its members. The Supreme Court long ago stated:

> There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties.

Warth v. Seldin, 422 U.S. 490, 511 (1975). "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id*. (citations omitted).

In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), the Court elaborated the requirement for associational standing:

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

All of these requirements are readily met here. Intervener-Relator's members -- registered voters in Ohio -- would obviously have standing to challenge Respondent's action on their own, a fact that Respondent concedes. Intervener-Relator here seeks to protect their constitutional rights, interests that are certainly germane to the organization's political purpose. Respondent only seeks prospective relief, rather than money damages, so there is no need to join individual members. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544 (1996).

Contrary to Respondent's claim, moreover, there is no requirement that an Association (like Intervener-Relator) include individual members or their identities in their suits. Indeed, one of the reasons associational standing is so valuable in First Amendment litigation and voting rights cases is that shields voters from having to disclose their political associations and preferences and "out" themselves to the Internet. The "individual participation" of an organization's members is “not normally necessary when an association seeks prospective or injunctive relief for its members.” *Brown Group*, 517 U.S. at 546. Further, an association need not specifically name or identify any single member in order to possess associational standing. *See*, *e.g*., *Nationwide Insurance Independent Contractors Ass'n v. Nationwide Mutual Insurance Co*., 2011 WL 13237611, *2 (W.D. Tex. 2011) ("the Court notes it is skeptical of Nationwide's argument that, to demonstrate associational standing, NIICA must not only identify individual members by name, but also provide affidavits from these members.");

National Franchise Ass'n v. Burger King Corp., 715 F. Supp.2d 1232, 1239 (S.D. Fla. 2010) ("BKC's argument that the NFA lacks standing because it has failed to identify a single franchisee that has standing also fails."); *Joseph H. v. Hogan*, 561 F. Supp.2d 280, 309 (E.D.N.Y. 2008) ("defendants argue that plaintiffs fail to identify an individual with mental illness currently in a psychiatric ward or hospital who is at-risk of being discharged to a nursing home. Defendants contend that this failure is fatal to plaintiffs' allegation of associational standing. Plaintiffs, however, are not required to identify in their complaint specific individuals who may in the future be placed in a nursing home.") (citing *Sandusky County Democratic Party v. Blackwell,* 387 F.3d 565, 574 (6th Cir. 2004)).

Here, it is undisputed that Intervener-Relator is a recognized, ballot-qualified political party in Ohio. *See* Verified Complaint, ¶ 4; Answer ¶ 4. Next, it is admitted that Intervener-Relator is required by Ohio law and was scheduled to conduct its 2020 primary election for its congressional and state-office candidates on March 17, 2020. Verified Complaint ¶ 9; Answer ¶ 9. As a matter of Ohio law, Intervener-Relator uses this primary mechanism to select its controlling members. *See* R.C. § 3517.03. Under Ohio law, Intervener-Relator's non-presidential candidates must qualify for the general election ballot through this primary mechanism. *See* § R.C. 3513.05.

The Libertarian National Convention, meanwhile, was scheduled to begin on May 21, 2020, well-after the conclusion of Intervener-Relator's primary in Ohio. Verified Complaint ¶ 14; Answer ¶ 14 (denying for lack of information but not contesting). Intervener-Relator participates in this National Convention, and "it is important to Intervener-Relator that its Ohio primary be concluded no later than the beginning of this National Convention." Verified Complaint ¶ 14.

Respondent on March 16 and 17, 2020 canceled Intervener-Relator's primary, along with those of the other two political parties, and substituted a delayed and different electoral process. Verified Complaint ¶ ¶ 10, 11, 12, 13. Respondent rescheduled all three primaries for June 2, 2020, which is roughly two weeks after the conclusion of Intervener-Relator's National Convention. *Id.* Respondent's cancelling of this primary (if Amicus-Stephens is correct) and/or postponing of it (if Respondent is believed) directly and concretely injured Intervener-Relator's First Amendment and other constitutional rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that even short delays of First Amendment activities constitutes irreparable injury).

Second, Respondent's action also deprived Intervener-Relator of timely information derived from the electoral results that is crucial to Intervener-Relator's exercising its First Amendment rights at the Libertarian National Convention. Informational injuries, especially those in the context of voting, have been recognized as sufficiently concrete and specific to support standing. *See Federal Election Commission v. Akins*, 524 U.S. 11, 24-25 (1998) ("the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific"). Respondent's action in "moving the goalposts" on the eve of the election injures Interverner-Relator's interest in having timely, accurate information when it is needed most -- during its National Convention.

Next, Respondent's action violates the First and Fourteenth Amendment voting rights of Intervener-Relators' many members and candidates, who woke up on March 17, 2020 expecting the election. Libertarians, like Democrats and Republicans, expected to vote in that election. They all had First and Fourteenth Amendment rights to do so. Intervener-Relator has as much standing to represent its members in this regard as both the Republican and Democratic Parties.

CONCLUSION

Intervener-Relator respectfully requests this Court for emergency relief. The Court should issue a Writ or any other kind of appropriate relief declaring Respondent's action unlawful, scheduling a timely election to conclude no later than May 20, 2020, and ordering lawful voting practices, including continuing timely voter registration, to be followed during the election. As previously stated, Intervener-Relator is ready and willing to work together with all interested persons, groups and parties to construct a lawful path forward during this time of constitutional and social crisis.

Respectfully submitted,

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