

IN THE SUPREME COURT OF OHIO

STATE EX REL. OHIO DEMOCRATIC PARTY, ET AL,	:
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	:
Relators,	: Case No. 2020-0388
	:
v.	: Original Action in Prohibition
	:
OHIO SECRETARY OF STATE FRANK LAROSE,	:
	:
	:
Respondent.	:

MEMORANDUM IN OPPOSITION OF RESPONDENT OHIO SECRETARY OF STATE FRANK LAROSE TO INTERVENOR LIBERTARIAN PARTY OF OHIO

Respectfully submitted,

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MEMORANDUM IN OPPOSITION OF RESPONDENT OHIO SECRETARY OF STATE FRANK LAROSE TO INTERVENOR LIBERTARIAN PARTY OF OHIO

The Libertarian Party of Ohio has not acted with extreme diligence and promptness, its motion to intervene is therefore untimely and should be denied. A party seeking to intervene in an action, either as of right or through permissive intervention, must show that the application is timely. Civ. R. 24. This Court has repeatedly applied laches, the equitable doctrine requiring parties not to delay and sit on their rights, with particular force in elections cases. In elections cases, especially, this Court has required relators to exhibit “[e]xtreme diligence and promptness.” *State ex rel. Ryant Comm. v. Lorain Cty. Bd. of Elections*, 86 Ohio St.3d 107, 113, 712 N.E.2d 696 (1999). Whether laches bars a claim “rests in this Court’s sound discretion.” *State ex rel. Carver v. Hull*, 70 Ohio St.3d 570, 577, 639 N.E.2d 1175 (1994). “The elements of laches are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.” *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 145, 656 N.E.2d 1277 (1995).

Laches bars LPO's motion. The COVID-19 public health emergency has been constantly evolving for several week now and the Ohio Department of Health has worked to keep ahead of the crisis. To protect the public health, the Ohio Department of Health issued its directive closing all polling locations during the evening hours of Monday, March 16, 2020 – more than three days ago. The Ohio Democratic Party filed this original action less than 24 hours later and immediately moved for a briefing scheduled that was even more aggressive than the expedited schedule set forth in S.C.Prac.R. 12.08. Yesterday, this Court issued a briefing schedule that makes this case decisional by Friday, March 27, 2020. 03/18/2020 Case Announcements #3, 2020-Ohio-1021. Meanwhile, the LPO sat by and watched. Now, after the Court has plotted the course and the parties are proceeding with all due speed, LPO seeks to intervene.

The LPO unreasonably waited until today to file its motion despite having known that the elections schedule would be impacted on March 16. Indeed, the LPO had indisputable knowledge, far in advance of today, Thursday, March 19, of “[t]he Libertarian Party’s National Convention [that] begins on May 21, 2020[.]” Complt., ¶ 14. As it acknowledges, the Director of the Ohio Department of Health mandated the closing of primary election polls on Monday, March 16, followed shortly thereafter by the issuance of the Secretary’s Directive 2020-06. Complt., at ¶¶ 11-12. This Court has held parties to a high expectation for timing and considers how long a party waited to bring an action once it knew it should act. As this Court has recognized, laches is appropriate when a relator has “contemporaneous awareness of [an adverse] decision,” but fails to act with due diligence. *State ex rel. Citizens for Responsible Green Govt. v. City of Green*, 155 Ohio St.3d 28, 2018-Ohio-3489, 118 N.E.3d 236, ¶ 19. Here, the LPO fails on this standard as it should have acted days ago, when it learned that its interests may be impacted.

Additionally, the LPO could have filed an action immediately upon the filing of Directive 2020-06. As soon as Secretary's Directive 2020-06 was issued, the LPO almost certainly could have sought a statutory interpretation through a declaratory judgment. See, e.g., *Freedom Rd. Found v. Ohio Dept. of Liquor Control*, 80 Ohio St.3d 202, 204 (1997) (seeking “[j]udicial construction of” a statute would “resolve whether” an agency “correctly interpreted” the statute) (Cook, J.) (plurality opinion). Alternatively, the LPO could have sought an appropriate writ at that point. Regardless, as is clear from this timeline, the LPO should have done something earlier than waiting until now.

Not only did the LPO wait too long, but its delay causes prejudice to the opposing party—the Secretary of State. The Relators waited until March 19, 2020—the day after this Court issued an expedited briefing schedule—to even seek intervention. In similar circumstances, this Court has held that laches bars relators claims because “[i]f relators had acted more diligently, the Secretary of State would have had more time to defend against relators’ claims...[i]nstead, the Secretary of State was forced to defend” under an accelerated briefing schedule. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 27. Here, the LPO’s unreasonable delay puts the Secretary up against expedited briefing deadlines issued by this Court that would require the Secretary to file two briefs in less than one week—prejudice that would have been avoided had the LPO acted with the requisite diligence and promptness. The only alternative outcome would be to stretch out the briefing schedule to allow LPO to catch up and for the Secretary to prepare a second brief – delays that this Court should not grant LPO as a dilatory intervenor.

Perhaps now more than ever before this matter needs a prompt resolution, and the parties here cannot afford any delay simply to allow the LPO to catch up due to its own

unreasonableness. For the reasons set forth above, the Court should deny LPO's motion to intervene.

Respectfully Submitted,

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Ohio Secretary of State Frank Larose

CERTIFICATE OF SERVICE

I hereby certify that *Memorandum in Opposition of Respondent Ohio Secretary of State Frank Larose to Intervenor Libertarian Party of Ohio* was electronically filed and a true and accurate copy was served on March 19, 2020, via email upon the following:

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