In The United States District Court
For The Northern District Of Ohio
Western Division

League of Women Voters of Ohio, *et al.*,

Plaintiffs,

vs. **Case No. 3:05-CV-7309**

J. Kenneth Blackwell, *et al.*, **Judge Carr**

Defendants.

Defendants' Reply In Support Of Their Motion To Stay This Court's Order Of February 10, 2006 Concerning Its Determination That Discovery Is To Proceed

The most interesting portion of the Plaintiffs' memorandum is the fact that they have simply chosen to ignore this Court's determination that "there are substantial ground for disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236 Order at 4). Likewise, the Plaintiffs' memorandum in opposition also failed to address this Court's determination that "there is substantial disagreement as to how I have platted this *as yet largely unexplored uncharted constitutional territory; certainly no precedent compels one outcome over other.* Consequently, there is substantial ground for disagreement with regard to *whether plaintiffs' constitutional claims are cognizable*." (R. 236 at 4) (emphasis added).

Instead, the Plaintiffs have failed to address the central issue surrounding the State's appeal and have misrepresented Supreme Court precedent in an attempt to have this Court assert jurisdiction that it no longer has as a result of the State's appeal as of right. Therefore, this Court should stay all proceedings pending an appeal in which this Court itself stated that "there are substantial ground for disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236 Order at 4).

In their attempt to rely on *Verizon MD,. Inc. v. Public Serv. Comm'n of MD.*, 535 U.S. 635 (2002), the Plaintiffs have simply misstated the holding of that case. In *Verizon*, the Court reiterated a truism that when examining whether a claim meets the *Ex parte Young* exception to Eleventh Amendment immunity, a court "need only conduct a 'straight forward inquiry into whether [the] complaint alleges an ongoing *violation of federal law* and seeks relief properly characterized as prospective.'" *Id.* at 645 *quoting Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor J.) (emphasis added).

Based upon the Plaintiffs' reading of the *Verizon* case, this Court would have jurisdiction over a claim brought under State law against a State official so long as the prayer for relief included a request for an injunction. Contrary to the Plaintiffs' assertion, however, it is not enough for a federal court to exercise jurisdiction in any case if a Plaintiff simply asks for an injunction in the prayer for relief. Rather, as has been well established, the Plaintiff must plead facts sufficient to show that the State has violated the Plaintiffs federal constitutional rights and that such violation is ongoing. Thus, as the *Ridge* court found, since there is a good faith basis to argue that the Plaintiffs had failed to articulate a constitutional claim, a District Court is patently without jurisdiction to proceed with a case once a notice of appeal is filed.

Likewise, the Plaintiffs have apparently conceded that no District Court has ever found an Eleventh Amendment appeal to be frivolous. They have simply failed to cite *any case* that has ever found a state to act frivolously when exercising its constitutional right to an immediate appeal. Thus, there is simply no basis whatsoever for the Plaintiffs to claim that this Court can retain jurisdiction over this case after the Defendants filed their notice of appeal.

The simple fact of the Defendants appeal is that "there are substantial ground for disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236 Order at 4). Furthermore, regardless of what the Plaintiffs want to claim, "there is substantial disagreement as to how I have platted this *as yet largely unexplored uncharted constitutional territory; certainly no precedent compels one outcome over other*. Consequently, there is substantial ground for disagreement with regard to *whether plaintiffs' constitutional claims are cognizable*." (R. 236 at 4) (emphasis added). As long as this Court has made those findings, no appeal that raises the question of whether the Plaintiffs have stated a constitutional claim can possibly be frivolous. Thus, for that reason, this Court has lost jurisdiction over this case and cannot authorize any discovery from proceeding.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 8th day of March, 2006.

/s Richard N. Coglianese
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Deputy Attorney General