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

Defendants Bob Taft and J. Kenneth Blackwell, pursuant to Fed. R. Civ. P. 62 and 28 U.S.C. § 1292, ask this Court to stay all proceedings pending the outcome of the Defendants' appeal of right. A memorandum in support is attached.

Respectfully submitted,

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Memorandum In Support

Statement Of Facts

For purposes of the record, the Defendants set forth a summary of the pertinent procedural facts of this case. On July 28, 2005, the Plaintiffs filed a complaint in which they appeared to allege that the State of Ohio has failed to hold a constitutional election since 1971. (R. 1 Complaint). The entire basis of one of the Plaintiff's claims was that she was somehow obligated to remove a t-shirt that contained a Presidential candidate's logo when she arrived at a polling place during the 2004 election. (R. 1, Complaint at ¶ 24). She raised this complaint despite the fact that the Sixth Circuit had previously upheld Ohio's statute prohibiting any election campaigning within 100 feet of a polling place. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004). Likewise, a disabled Plaintiff complained that she was not allowed to vote in the 2004 election by means of a curbside ballot after a Franklin County poll worker mistakenly provided that information to her sister. (R. 1 Complaint at ¶ 14). Yet the local board of election had informed this plaintiff that the local county board employee was mistaken and she should return to her polling place because they would allow her to vote by curbside ballot. Despite this assurance, this Plaintiff chose not to vote on Election Day because she was mad at the mistaken advice. (R. 188, Dyson Depo. at 25-26). Other complaints center on claims that "election observers" complained that voting

machines were not properly allocated during the 2004 election.[1] The Plaintiffs go so far as to allege that "[a]t least one voter in Franklin County paid an unimaginable price to cast her vote when her husband died alone while she waited for four hours to cast her vote." (R. 1 Complaint at ¶ 115). The Plaintiffs also complain that the Sixth Circuit overruled this Court's decision recognizing that in order for provisional ballots to be counted, they need to be cast in the proper precinct. (R. 1 Complaint at ¶¶ 141-43). Finally, the Plaintiffs raise allegations that in prior elections some unidentified voters were disenfranchised because they attempted to cast ballots at locations that were not polling places and that a 1973 Government Accounting Office report criticized the manner in which elections were held in two Ohio counties. (R.1 Complaint at ¶¶ 147-49).

On August 29, 2005, the Defendants filed a motion to dismiss this complaint ("original complaint') (R. 25, Motion To Dismiss). The Defendants filed a motion for leave to file a supplemental motion to dismiss on November 14, 2005. (R. 186). On November 30, 2005, the Plaintiffs filed an amended complaint which merely restated their incredibly vague factual allegations concerning Ohio's election system ("amended complaint.") (R. 200 Amended Complaint). In this amended complaint, the Plaintiffs asked this Court to issue a declaratory judgment that Ohio's entire voting system violates the Plaintiffs' rights to Equal Protection, and Substantive and Procedural Due Process. (R. 200 Amended Complaint at Prayer for Relief). They also asked this Court to become the *de facto* Secretary of State in Ohio by demanding the Court to order injunctive relief concerning the manner in which Ohio conducts voter registration, provides absentee ballots, deploys and calibrates voting machines, determines the exact manner in which voters are allowed to cast ballots in their precincts, determines the number of poll

[1] It appears as though these "election observers" were agents of one of the law firms representing the Plaintiffs. Casas Depo. (R. 190) at 63-65.

workers hired and how they are trained, determines the manner in which precincts are organized, and requires reports and audits to be done of every local county board of elections, among other far-reaching relief. (R. 200 Amended Complaint at Prayer for Relief ¶ 5).

Several days after the Plaintiffs filed this amended complaint, this Court issued an order on December 2, 2006 denying the Defendants' motion to dismiss the original complaint. (R. 202 Order). Meanwhile, the Defendants timely filed a motion to dismiss the Plaintiffs' amended complaint and, at the direction of the District Court, also filed a motion for leave to take an interlocutory appeal of the district court's decision of December 2, 2005 denying the motion to dismiss the original complaint.

The centerpiece of both the motion to dismiss the amended complaint and the motion for leave to take an interlocutory appeal was that the Plaintiffs had failed to plead sufficient facts to show they have been denied their constitutional rights. (R. 213, Motion to Dismiss Amended Complaint). The Defendants argued that since the Plaintiffs have not alleged a violation of their constitutional rights, they enjoyed Eleventh Amendment immunity and this Court lacked subject matter jurisdiction to hear the case. In the order granting the Defendants to take an interlocutory appeal, this Court recognized that "there are substantial ground for disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236 Order at 4).

However, within minutes of issuing an opinion that recognized that substantial ground exists under which lawyers and courts could disagree with this Court's decision that the Plaintiffs have stated a cognizable constitutional violation, this Court issued a second decision denying the Defendants' motion to dismiss the Plaintiffs' amended complaint. (R. 237). In that order, this Court issued an advisory opinion determining that *if* the Defendants decided to exercise their constitutional right to an interlocutory review, this Court determined that such an appeal is

frivolous and would attempt to maintain jurisdiction over this case. Since the Defendants have an absolute constitutional right to avoid litigation in federal court unless the Plaintiffs have properly pled an ongoing *constitutional* violation and since this Court has already determined that "there are substantial ground for disagreement with regard to whether plaintiffs' constitutional claims are cognizable," this Court should respect the Defendants' proper interlocutory appeal and stay any attempt to exercise jurisdiction unless and until such time as the Court of Appeals remands this case.

Law And Argument

I. This Court Has Improperly Determined That If The Defendants Exercise Their Constitutional Right To File An Interlocutory Appeal They Would Be Acting In A Frivolous Manner.

It is well established that a defendant has an absolute right to file an interlocutory appeal from the denial of a motion to dismiss grounded on a claim of Eleventh Amendment immunity. *Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The underlying reason for such an interlocutory appeal is that "the value to the States of their Eleventh Amendment immunity … is for the most part lost as litigation proceeds past motion practice." *Id.* at 145. Thus, by taking an interlocutory appeal States and their officials gain swift access to appellate review of denials of Eleventh Amendment immunity and also avoid "the costs and general consequences of subjecting public officials to the risks of discovery and trial." *Id.* at 143-44. The constitutional right enjoyed by the States and their officials to avoid such unnecessary discovery and trial would irretrievably perish whenever a case is erroneously allowed to proceed to trial.

In incredibly rare circumstances, a trial court might be able to regain jurisdiction of a case after a notice of appeal is filed if "after a hearing and for clear and reasoned findings … it

certifies that the appeal is frivolous or forfeited." *Kickapoo Tribe of Indians v. State of Kansas*, 1993 U.S. Dist. Lexis 8148 at * 15 (D. Kas. May 19, 1993). Here, this Court's premature attempt to retain jurisdiction through its February 10, 2006 order must be stayed if for no other reason than this Court issued merely issued an advisory opinion about possible future events.[2]

This Court's February 10, 2006 order attempting to retain jurisdiction over this case should be stayed for other reasons as well. That order completely contradicts this Court's order issued the exact same day authorizing an interlocutory appeal. (R. 236). In addition, that order is based upon completely novel theories. Thus, for these simple reasons, this Court must stay its February 10, 2006 order.

A. This Court has already determined that "there are substantial grounds for disagreement with regard to whether plaintiffs' constitutional claims are cognizable," thus making any determination that an Eleventh Amendment appeal is frivolous inconsistent and contradictory.

On February 10, in an order authorizing an interlocutory appeal, this Court specifically stated "there are substantial grounds for disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236 Order at 4). The basis of the Eleventh Amendment is that States and their officials are immune from litigation unless, under the *ex parte Young* exception, a Plaintiff has alleged the government officials *have violated their constitutional rights. See, e.g., Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc).

In *Death Row Prisoners of Pennsylvania v. Ridge*, 948 F. Supp. 1282 (E.D. Pa. 1996), the District Court dealt with a lawsuit by a group of death row inmates over whether the State of Pennsylvania was an opt-in jurisdiction for purposes of the Antiterrorism and Effective Death

[2] Elemental notions of Article III jurisdiction dictate that this Court cannot attempt to issue an opinion retaining jurisdiction in the event the Defendants file a notice of appeal prior to the Defendants actually acting. For, by this Court determining on February 10, 2006, that if the Defendants were to file a notice of appeal, as is their constitutional right, they would be acting frivolously, this Court issued an advisory opinion in contravention of Article III

Penalty Act of 1996. The Court had previously rejected the State's motion to dismiss on the basis of Eleventh Amendment immunity. After the State had filed a notice of appeal, the Plaintiffs had asked the Court to find the State's appeal to be frivolous. The *Ridge* court correctly noted that the filing of a timely notice of appeal "divests the district court of any further authority over those aspects of the case on appeal." *Id.* at 1285 *citing Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). In discussing the frivolousness exception, the *Ridge* court noted that "a matter is not frivolous if any of the legal points are arguable on their merits." *Id.* at 1286 (citations omitted).

The *Ridge* court properly recognized that "analysis of the Eleventh Amendment issue necessarily requires revisiting the question as to whether Plaintiffs have 'established the existence of any constitutional right at all.'" *Id.* at 1287. Thus, the State argued that because the Plaintiffs' allegation that they had a particular constitutional right at issue in the litigation, that very question as a matter of law made their appeal nonfrivolous. The Court, therefore, determined that "the question is whether it is frivolous to suggest that on appeal of an adverse Eleventh Amendment ruling, the circuit court will review the underlying constitutional right that forms the foundation for the application of *Ex parte Young*. I believe the answer is no." *Id.* Since, by necessisity, the Court of Appeals would be obligated to determine whether the Plaintiffs actually alleged a constitutional violation, any interlocutory appeal on that matter could not be frivolous so long as the State had any non-frivolous basis to argue that no such constitutional right existed.

In our case, this Court has already determined 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). This Court even went so far as to state "[t]he dispute in this case involves fundamental issues of paramount importance as to which there is no controlling precedent clearly or directly on point, *and as to which substantial disagreement not only about the merits, but the propriety of federal court intervention and the reach of such intervention can, and in my view, does exist.*" (R. 236 at 4 n.1) (emphasis added).

This case, therefore, is identical to the *Ridge* case. Just like *Ridge*, this Court has recognized that the constitutional issue underlying the Plaintiffs' claim is one over which there is substantial ground for disagreement. Therefore, this Court should recognize, in the same manner the *Ridge* Court recognized, that any Eleventh Amendment appeal cannot be frivolous as a matter of law and it must immediately stay its February 10, 2006 opinion.

B. This Court's Determination That Any Appeal By The Defendants Is Frivolous Is Based Upon Erroneous Application Of Law And Must Be Stayed.

This Court apparently based its premature determination of frivolousness upon a misunderstanding of several legal principles. Since this Court erred in reaching these legal determinations, it must stay its premature finding that the Defendants' appeal is frivolous.

1. This Court Improperly Determined That An Amended Complaint Does Not Supersede A Previously Filed Complaint.

The first basis upon which this Court rested its determination of frivolousness was the erroneous decision that the Plaintiffs' original complaint was not superseded by their amended complaint. All courts have recognized that "[p]laintiffs' amended complaint supersedes the original complaint, thus making the motion to dismiss the original complaint moot." *Kentucky Press Ass'n v. Commonwealth of Kentucky*, 355 F. Supp. 2d 853, 857 (E.D. Ky. 2005) *citing Parry v. Mohawk Motors of Mich., Inc.*, 236 F.2d 299, 306 (6th Cir. 2000). In fact, the Sixth

Circuit has stated, "'an amended pleading supersedes the original, the latter being treated as nonexistent.'" *Klyce v. Ramirez*, 852 F.2d 568, 1988 U.S. App. Lexis 9788 at *9 (6th Cir. July 19, 1988) *citing Bullen v. B De Bretteville Treasure Co.*, 239 F.2d 824, 833 (9th Cir. 1956). In *Klyce*, the Court of Appeals also recognized that "'[u]nder the Federal Rules, an amended complaint supersedes the original complaint.'" *Id. citing Fritz v. Standard Sec. Life Ins. Co.*, 676 F.2d 1356, 1358 (11th Cir. 1982); *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977); *Varnes v. Local 91 Glass Bottle Blowers Ass'n*, 674 F.2d 1365, 1370 n. 6 (11th Cir. 1982); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5th Cir. 1981); *Clark v. Tarrant County*, 798 F.2d 736, 740 (5th Cir. 1986).

Although operating under the Ohio, instead of Federal, Rules, the Ohio Supreme Court has recognized that "'it is elementary law that when a party substitutes an amended petition for an earlier one, this constitutes an abandonment of the earlier pleading and a reliance upon the amended one. The earlier pleading becomes *functus officio*.'" *Grimm v. Modest*, 135 Ohio St. 275, 276 (1939) *quoting State ex rel. Talaba v. Moreland, Judge*, 132 Ohio St. 71.

In fact, this very Court recently issued an order recognizing that the filing of an amended complaint moots the filing of a motion to dismiss the original complaint. *Mack v. Holcomb*, Case No. 3:06-cv-7028 (Feb. 21, 2006) (Attached as Exh. B). Most interesting, perhaps, is that the sequence of filings in *Mack* mirrors the filings in this very case. After filing an initial motion to dismiss, the Defendants filed a supplemental motion to dismiss arguing immunity. The Plaintiffs then filed an amended complaint which, by operation of law and this Court's order, vacated both the initial complaint and the original motion to dismiss.

Thus, since this Court based its finding of frivolousness, in part, upon its incorrect determination that it had any ability to issue its decision denying the Defendants' motion to dismiss the Plaintiffs' original complaint, it must stay that decision.

2. This Court improperly determined that law of the case applied to its December 2, 2005 order.

As demonstrated above, this Court was completely without any authority whatsoever to issue its order of December 2, 2005 (R. 202) denying the Defendants' motion to dismiss since that motion to dismiss became void upon the filing of the Plaintiffs' amended complaint. Even, however, if that order were properly issued, law of the case is simply inapplicable to that decision.

Law of the case applies when an appellate court remands a case to a district court. *See, e.g., McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 512-13 (6th Cir. 2000). Thus, a district court becomes powerless to revisit an issue that "was expressly or impliedly decided by an appellate court." *Id.* Since the Defendants first appealed the February 10, 2006 decision today, law of the case is not applicable to this Court's advisory opinion issued on December 2, 2005. Thus, law of the case cannot be used to support any determination of frivolousness.

3. This Court has failed to find any action by the Defendants which would meet the threshold for a frivolous appeal.

Although no court has given a checklist of what needs to be present in order to find an interlocutory appeal frivolous, most courts have found that the appeal must be baseless. *See, e.g., Andre v. Castor*, 963 F. Supp. 1169, 1170 (M.D. Fla. 1997) *citing Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989). The common theme that appears on findings of baseless appeals is

when district judges have failed to resolve a question of immunity prior to the interlocutory appeal. *Id.*

Other situations in which district courts have found the government defendant to have acted frivolously have been when the defendants have waited too long to raise an immunity defense. In *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), the defendant waited five years after the case was filed to first raise qualified immunity and then only raised the defense and filed an appeal on the eve of trial. Yet, even in that situation, the district court did not certify the defendant's interlocutory appeal as frivolous. Although the Sixth Circuit noted that "the presentation of a qualified immunity defense on the eve of trial, five years after the initial filing, must be examined critically." *Id.* at 449. But, even in that situation, after noting that the district court did not find the defendant's actions to be frivolous, the Court also declined to dismiss the appeal on waiver grounds.

Finally, the Sixth Circuit itself has never explicitly adopted the frivolous appeal doctrine. *See, e.g., Blair v. City of Cleveland*, 148 F. Supp. 2d 919, 921 (N.D. Ohio 2000). In fact, the Defendants are unaware of any court ever applying the frivolousness doctrine to an interlocutory appeal based on Eleventh Amendment immunity.

As noted above, this Court has already determined 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 another. Consequently, there is substantial ground for disagreement with regard to *whether plaintiffs' constitutional claims are cognizable.*" (R. 236 Order at 4) (emphasis added). Likewise, this Court has already recognized that "The dispute in this case involves fundamental issues of paramount importance as to which there is no controlling precedent clearly or directly on point, and as to which substantial disagreements not

only about the merits, but the propriety of federal court intervention and the reach of such intervention can, and in my view, does exist." *Id.* at n. 1. Finally, this Court has allowed an interlocutory appeal on the question of whether the Plaintiffs' have stated a constitutional violation in their pleading – the very identical issue that must be resolved in the appeal of right under the Eleventh Amendment. Thus, it is impossible for this very question to be worthy of an extraordinary remedy on the one hand, yet frivolous when the State exercises it's appeal as a matter of right on the other. Thus, there is no ground upon which this Court can find the Defendants are acting frivolously by taking an appeal which they have as a matter of constitutional right.

II. Conclusion

For the foregoing reasons, the Defendants ask this Court to stay its decision that it retains jurisdiction in the event that the Defendants exercised their constitutional right to an interlocutory appeal of their Eleventh Amendment defense.

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 27th day of February, 2006.

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