Case No. 06-293

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO
CASE NO. 2005 CA 00123

City of North Canton, Ohio,
Appellant,

v.

City of Canton, Ohio, et al.,
Appellees.

Merit Brief of Appellees City of Canton, Samuel Sliman, and Debra Vanckunas

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Statement of the Case and Facts

This discretionary appeal stems from the North Canton's attempt to challenge an annexation to which it was not a party. Specifically, North Canton is asking this Court to expand settled Ohio law regarding standing to challenge the constitutionality of a statute on equal protection grounds, which is currently limited to parties against whom the statute is alleged to be unconstitutionally applied. North Canton claims that standing should also include those whose rights are "adversely affected." But that is not all. North Canton is asking this Court to ignore Ohio law that a political subdivision is prohibited from invoking the protection provided by the Constitution against its own state.

The facts in this case are undisputed. In a September 28, 2004 Resolution, the Stark County Commissioners ("Commissioners") granted Canton's petition to annex railroad property located entirely in Plain Township, Stark County. The land was owned exclusively by Metro Regional Transit Authority ("Metro"). North Canton was not a party to the annexation proceeding, nor was it entitled to be. The only relationship North Canton had to the proceeding was an unrelated contract between it and Metro.

The 124th General Assembly overhauled Ohio's annexations laws with the enactment of Senate Bill 5, which, it is not disputed governs this case. Of the five types of annexation available under the new law, this case involves an Expedited Type-2 annexation. In an Expedited Type-2 Annexation, the petition must be signed by all of the property owners in the territory proposed to be annexed. In this case, there was only one property owner: Metro.

But under S.B. 5, railroads are now specifically *excluded* from the definition of "owner," and therefore, Metro's signature was not required on the petition.

Even though it was not a party to the annexation, and despite the new law, North Canton filed a request for injunctive relief and declaratory judgment in the Stark County Court of Common Pleas on October 14, 2004.[1] North Canton asked the court to reverse the decision of the Stark County Commissioners to grant Canton's annexation petition on two grounds: first, because it contained errors and therefore did not comply with the statute governing Expedited Type-2 Annexations, R.C. 709.023; and second, because North Canton claimed the statute excluding railroad owners from the definition of "owner" violated Metro's – not North Canton's – right to equal protection of the law.

Canton filed a motion to dismiss, which the trial court granted in its Judgment Entry filed April 14, 2005. In it, the court determined that it lacked subject matter jurisdiction because R.C. 709.023 prohibits appeals from Expedited Type-2 annexations. Further, the trial court recognized that even if this case involved a type of annexation from which an appeal could be taken, North Canton would not be one of the parties authorized to do so in accordance with R.C. 709.07(A). Finally, the trial court determined that North Canton did

[1] In addition to the city of Canton, North Canton named Samuel J. Sliman, who is Canton's Annexation Director, and Debra Vanckunas, who is the clerk for Canton City Council (collectively, "Canton").

not have standing to challenge the constitutionality of the new annexation laws as they applied to Metro.[2]

North Canton appealed to the Stark County Court of Appeals for the Fifth Appellate District. In its decision filed December 27, 2005, the Fifth Appellate District unanimously rejected North Canton's argument and affirmed the trial court's ruling based upon this Court's holding in *Palazzi v. Estate of Gardner*,[3] which held that the constitutionality of a statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied.[4] In addition, the Fifth Appellate District pointed out that a political subdivision does not receive any protection from the Equal Protection and Due Process Clauses against the state.[5]

This Court declined North Canton's discretionary appeal but accepted jurisdiction after North Canton filed a motion for reconsideration.

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[2] Appendix ("Apx."), at 12. In accordance with S.Ct. Prac. R. VI, §3(A), Canton will not duplicate the materials provided by North Canton in its Appendix. Instead, all references by Canton to the Appendix will be to the one attached to North Canton's merit brief.

[3] (1987), 32 Ohio St.3d 169.

[4] *City of North Canton v. City of Canton, et al.*, 5th Dist. No. 2005-CA-00123, 2005-Ohio-6593, at ¶11.

[5] Id., citing *Avon Lake City School Dist. v. Limbaugh* (1988), 35 Ohio St.3d 118, 121-122.

Argument

Response to Appellant's Proposition of Law:

A litigant does not have standing to challenge the constitutionality of a statute unless it belongs to the class against whom the operation of the statute is alleged to have been unconstitutionally applied.

Although a petition for an Expedited Type 2 Annexation must be signed by all the property owners within the area proposed to be annexed, the definition of "owners" set forth in R.C. 709.02(E) specifically excludes those holding an ownership interest in railroads. This exception, North Canton claims, creates "disparately treated classes of property owners for the purposes of annexation procedures" and is therefore unconstitutional because it violates Metro's right of equal protection of the law. North Canton's argument, however, should be rejected because, as the trial court and the Fifth Appellate District correctly concluded, it does not enjoy standing to challenge the statute on constitutional grounds because it does not belong to the class of persons against whom the statute is alleged to have been unconstitutionally applied.

It is well-established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing.[6] The issue of standing is a threshold test that must be satisfied before a court may determine the merits of the questions

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[6] *Wiley Organics, Inc. v. Ankrom,* 5th Dist. No. 03CA12, 2004-Ohio-6362, at ¶15, citing *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994-Ohio-183.

presented.[7] One of the prudential limits on standing that must be met is that a litigant must assert his own legal interests rather than those of third parties.[8]

The doctrine of standing in federal court is based on both the limitation on federal court jurisdiction embodied in the "case or controversy" requirement of Clause 1, Section 2, Article III, United States Constitution and prudential limitations on the exercise of that jurisdiction.[9]

Although state courts are not bound by the federal doctrine of standing, this Court follows federal court decisions on standing.[10] In *Palazzi v. Estate of Gardner*, for example, this Court cited federal law to support its holding that the "constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision."[11]

In this case, North Canton is not asserting its own rights but those of a third party, Metro. North Canton's constitutional claim is that the definition of "owner" in R.C. 709.02(E) violates *Metro's* right to equal protection by treating Metro, an owner of a railroad,

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[7] Id, citing *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312.

[8] *Phillips Petroleum Co. v. Shutts* (1985), 472 U.S. 797.

[9] See, e.g. *Cincinnati City Sch. Dist. v. State Bd. of Educ.* (1996), 113 Ohio App.3d 305, citing *Warth v. Seldin* (1975), 422 U.S. 490, 498.

[10] Id.

[11] (1987), 32 Ohio St.3d 169, 175; see also, *Leppla v. Sprintcom, Inc.* 156 Ohio App.3d 498, 2004-Ohio-1309, at ¶31.

differently from other property owners by requiring the signatures of one and not the other. North Canton, however, has failed to allege that the statute is unconstitutionally applied to North Canton. Accordingly, North Canton does not have standing to challenge the constitutionality of the statute on equal protection grounds.

North Canton sidesteps this line of cases, though, and claims that its contract gives it a "necessary stake in the outcome" of the annexation which confers North Canton with standing to assert Metro's constitutional rights. In support of its claim, North Canton cites *Cleveland Firefighters v. Jenkins*.[12] That case, however, involved a quo warranto action, not an equal protection challenge and is therefore not relevant here.

Ohio Academy of Nursing Homes v. Barry,[13] another case relied upon by North Canton, is equally irrelevant. That case involved a due process challenge, not an equal protection challenge. Also, the nursing homes that were challenging the constitutionality of the statutes were doing so on their own behalf, not on the behalf of third parties.

Another case referenced by North Canton, *Cleveland v. Shaker Heights*, did not even involve a constitutional challenge, let alone a challenge based upon equal protection grounds.[14]

In short, North Canton has not provided this Court any authority that a party may assert a third party's right to equal protection of the law.

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[12] 96 Ohio St.3d 68, 2002-Ohio-3527.

[13] (1990), 56 Ohio St.3d 120.

[14] (1987), 30 Ohio St.3d 51.

Instead of providing this Court with relevant case law, North Canton relies on other arguments not relevant to the constitutional issue at hand. For example, although North Canton correctly observes – twice – that the "merits of this case are not before the Court at this time," it still devotes a sizeable portion of its brief arguing them. North Canton claims that Canton's petition was "replete with multiple defects and deficiencies, on its face and in its configuration, which should have resulted in the petition being denied by the Commissioners." (North Canton's merit brief, p. 2). But North Canton is again ignoring the clear language of Ohio's annexation statutes. R.C. 709.21, entitled, "Errors not fatal to proceedings" states that errors, irregularities or defects are not fatal. Further, R.C. 709.015 states that the procedural requirements in an annexation proceeding are "directory in nature," that only "substantial compliance" is required, and that, in fact, the Commissioners are directed to "cure" any alleged defects.

North Canton advances another argument that is both irrelevant and ironic. It claims that one of the hallmarks of annexation law is to afford the owner of property the freedom to choose which political subdivision to which their properties will be annexed. North Canton claims that its contract with Metro evidences Metro's desire to be annexed to it. North Canton's argument is belied by the fact that Metro has not filed a single challenge to the annexation. It is this failure by Metro to mount any challenge to the annexation itself or to the constitutionality of the statute that permitted it that precludes North Canton's attempt to do so.

In addition to North Canton's failure to advance solid reasons for this Court to expand settled law regarding a party's standing to challenge a statute on equal protection grounds, its appeal should fail for another reason. As the unanimous Fifth Appellate District held, this Court has held that a political subdivision may not invoke the protection provided by the Constitution against its own state and is prevented from attacking the constitutionality of state legislation on the grounds that its own rights had been impaired.[15] That is exactly what North Canton seeks to do here. North Canton's argument that it has standing to challenge Ohio's annexation statutes and the reason it challenged the annexation in the first place is because its own rights have been impaired: specifically, its ability to complete the contract with Metro. But this Court's holding in *Avon Lake* prohibits North Canton's attempt to mount an equal protection challenge to Ohio's annexation statutes and should therefore be denied.

The Eleventh Appellate District applied this principle to an annexation case in *In re: Annexation of 2.33 Acres.*[16] There, Howland Township claimed one of Ohio's annexation statutes violated the Equal Protection clause because the statute prohibited the Township from filing an administrative appeal while allowing others to do so. The court rejected the Township's constitutional challenge based upon this Court's holding *Avon Lake,* holding, "a

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[15] *Avon Lake City School Dist. v. Limbach* (1988), 35 Ohio St.3d 118, 121-122.

[16] (June 16, 2000), 11th Dist. No. 99-T-0024.

political subdivision receives no protection from the Equal Protection . . .Clause[ ] against its creating state."[17]

Finally, North Canton's appeal should fail for another reason: its challenge is moot. If an injunction or order staying further action is not obtained before the legislative authority adopts an ordinance accepting annexation, the action to prevent the annexation is rendered moot.[18] In *Gaverick*, this Court recognized the need for "government territorial stability," and that "once annexation had been completed and persons residing in the annexed territory have become citizens of the municipality, considerations of public policy preclude "de-annexation."[19]

Here, North Canton did not obtain a stay, and therefore, Canton City Council has already passed an ordinance approving the annexation. The annexation statutes specifically provide that a notice of appeal, in accordance with R.C. 2506, filed with the clerk of the county commissioners operates as a stay of execution. But North Canton failed to observe the appellate procedure for annexations outlined by the General Assembly, and as such, the annexation is complete and North Canton's challenge to it is moot.

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[17] Id., at *10, citing *Avon Lake*, 35 Ohio St.3d at 122..

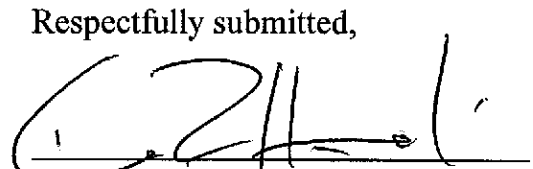
[18] *State ex rel. Bd. of Trustees v. Davis* (1982), 2 Ohio St.3d 108, 111; *Gaverick v. Hoffman* (1970), 23 Ohio St.2d 74, 81.

[19] *Gaverick* at 81.

Conclusion

North Canton's appeal should be denied for several reasons. First, it has failed to supply this Court with case law to support its argument that standing to challenge statutes on equal protection grounds should be expanded from a finite and discernible group – those actually belonging to the class against whom the operation of the statute is alleged to have been unconstitutionally applied – to a more infinite and nebulous one – those whose rights might be "adversely affected." Second, North Canton cannot receive protection from the Equal Protection Clause against its creating state. Finally, because Canton has already annexed the property, North Canton's challenge is moot. For these reasons, Canton respectfully requests that this Court deny North Canton's appeal.

Respectfully submitted,



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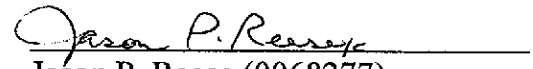

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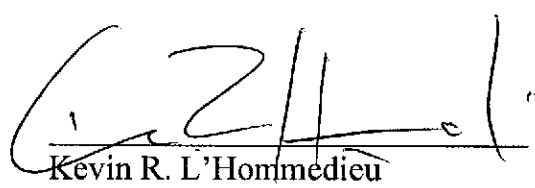

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