

STATE OF LOUISIANA
COURT OF APPEAL
FOURTH CIRCUIT

No. 2004-CA-1432 c/w 2004-CA-1473

FORUM FOR EQUALITY PAC, ETC., ET AL.,

(Plaintiffs-Appellees and Appellants)

versus

CITY OF NEW ORLEANS, ET AL.,

(Defendants-Appellants and Appellees)

A Civil Proceeding on Appeal from
The Orleans Parish Civil District Court
in and for the Parish of Orleans, State of Louisiana
(No. 2004-11324, Division "J-13"; and No. 11325, Division "C"),
The Honorable Nadine M. Ramsey, Judge, Presiding, and
The Honorable Christopher J. Bruno, Pro Tempore Judge, Presiding

**Original Brief of Appellee in 2004-CA-1432 and
Supplemental Brief of Appellant in 2004-CA-1473
by W. Fox McKeithen, in His Official Capacity
as Secretary of State of Louisiana**

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The Louisiana legislature passed Act 926 of the 2004 Regular Session of the Louisiana Legislature, a joint resolution of the legislature proposing a constitutional amendment to the Louisiana Constitution, to enact Article 12, Section 15 relative to marriage. As required by Article 13, Section 1 of the Louisiana Constitution, the joint resolution provided that the proposed constitutional amendment be submitted to the voters of this state for ratification at the regularly scheduled statewide election on September 18, 2004.

The Plaintiffs, appellants in 2004-CA-1432, filed a "Petition Objecting to Election Upon Proposed Constitutional Amendment" in the Civil District Court for the Parish of Orleans seeking to prohibit the Secretary of State from including the proposed constitutional amendment on the ballot for the September 18, 2004 election. The petition alleged that the proposed constitutional amendment was invalid on both substantive and procedural grounds. The plaintiffs sought and obtained an expedited hearing in the district court. Defendant W. Fox McKeithen, Secretary of State of Louisiana, filed various exceptions to the petition, including an exception of improper venue.

In 2004-CA-1473, the very same plaintiffs brought suit against the very same defendants in a petition also filed in Orleans Parish Civil District Court (but allotted to another division) seeking declaratory and injunctive relief to prohibit the Secretary of State from including the proposed constitutional amendment on the ballot for the September 18, 2004 election. Defendants filed exceptions of no right of action and no cause of action and defended against a preliminary injunction and then the permanent injunction. Defendants filed its appellant brief in that case on August 20, 2004, prior

to the District Court's judgment granting declaratory relief and issuing a permanent injunction.

ACTION OF THE TRIAL COURT

In 2004-CA-1432, the matter was set for hearing on August 10, 2004. The trial court requested that the parties address the issue of venue as raised in the exception filed by the defendant. The court concluded that pursuant to R.S. 18:1402 C, venue was proper only in East Baton Rouge parish. Upon request by the plaintiffs' counsel, the court dismissed the matter instead of transferring the matter to the proper venue in East Baton Rouge parish. Plaintiffs, after rejecting transferral of the case to the proper venue and demanding dismissal, both appealed this judgment to this Honorable Court and filed a new lawsuit in the proper venue, East Baton Rouge Parish.

In 2004-CA-1473, the trial court overruled the exceptions and granted a preliminary injunction on August 13, 2004, from which the defendants-appellants took a suspensive appeal. On August 20, 2004, the trial court granted a final judgment recognizing declaratory relief and issuing a permanent injunction to prohibit the Secretary of State from including the proposed constitutional amendment on the ballot for the September 18, 2004 election. In addition to adopting the reasons given for the preliminary injunction, the trial court added, for the permanent injunction, the reason that the constitutional amendment proposal did not meet the single object requirement of Article 13, Section 1 of the Constitution. Defendant intends to file an appeal from this later judgment immediately after filing this brief by 9:00 a.m. on August 23, 2004.

ISSUES PRESENTED FOR REVIEW

In 2004-CA-1432, although the plaintiffs-appellants raise numerous assignments of error concerning the merits of their claim, the only issue addressed by the district court is the exception of improper venue. Therefore, the only appropriate issue before the court in this appeal is whether the trial court erred in granting the exception of

improper venue.

In 2004-CA-1473, the only issue is whether the trial court erred in continuing his ruling on merits of the preliminary injunction, adding an additional ground therefor, and in granting the judgment recognizing declaratory relief and issuing a permanent injunction.

ARGUMENT

In 2004-CA-1432, this brief is presented to this Honorable Court addressing only the actual ruling made by the trial court, i.e. that the only venue for the appellants' purported election contest suit brought pursuant to the Election Code is in East Baton Rouge Parish. The appellants assert as additional assignments of error the district court not denying the other exceptions brought by defendant-appellee McKeithen, and the district court not ruling in their favor on the merits of their petition. Since those additional issues are identical to the ones raised in the appeal No. 2004-CA-1473, consolidated with this case on appeal, appellee herein adopts by reference the argument contain in his brief previously filed in that matter addressing those arguments. The rest of this brief pertaining to 2004-CA-1432 will be limited to addressing the venue exception granted by the district court in 2004-CA-1432.

Also, it is important to note that the plaintiffs in 2004-CA-1432 requested that the district court dismiss this case, in lieu of the district court transferring the matter to the proper venue in East Baton Rouge parish. Subsequently, the plaintiffs then filed the same petition in the 19th Judicial District Court for the Parish of East Baton Rouge. The district court there ruled that the plaintiffs' claim was premature, because, under the specific provisions of the election code, the time for bringing a challenge to an election proposing a constitutional amendment is ten days after the promulgation of the election results by the secretary of state. The plaintiffs-appellants have appealed that decision to the First Circuit Court of Appeal, which has scheduled the hearing of that

appeal for Monday, August 23, 2004 at 10:00 a.m.

Because the plaintiffs chose to request dismissal rather than transfer of the case, and then subsequently filed the identical suit in East Baton Rouge parish, which is currently on appeal, it is respectfully suggested that the actions of the plaintiffs have rendered this appeal moot, or alternatively subject to *lis pendens*. For either reason, appellees suggest that this appeal, in the interest of justice, should be dismissed.

The trial court in 2004-CA-1432 was correct in finding that this suit was filed in an improper venue.

A. The Election Code provides that the exclusive venue for contesting an election on a proposed constitutional amendment is East Baton Rouge Parish

The plaintiffs purport to bring this suit pursuant to the state Election Code as enacted by the legislature in Title 18 of the Revised Statutes. They specifically seek to avail themselves of the procedures found in R.S. 18:1401 *et seq*, entitled "Procedure for Objections to Candidacy and Election Contests." R.S. 18:1401 *et seq* contains specific provisions as to who may bring an action thereunder, who must be sued and when and where such suits must be brought. Pertinent here is the venue provision found in R.S. 18:1404 C. It reads:

C. An action contesting an election upon a proposed constitutional amendment **shall** be brought in the district court for the parish where the state capitol is situated. (Emphasis added.)

By this statute's use of the mandatory word "shall", it establishes East Baton Rouge Parish as the exclusive venue for an action contesting an election for a proposed constitutional amendment. The appellants contend that this provision does not apply to their action because they are not seeking to bring a post-election challenge to which they contend R.S.18:1404C applies, but rather they assert that they can bring this pre-election challenge under the general venue articles because R.S. 18:1404C does not provide for the venue for such an action.

The one problem with the appellants' argument is that R.S. 18:1401 *et seq* does

not authorize a pre-election challenge to a proposed constitutional amendment. The only authorization for a challenge to a proposed constitutional amendment is found in R.S. 18:1405C, which states:

An action contesting an election on a proposed constitutional amendment shall be instituted within ten days after promulgation of the results of the election by the secretary of state.

This was the basis for the district court in East Baton Rouge finding that the appellants' suit was premature. It is part of the specific, limited procedure that the legislation authorizes and which must followed in actions brought pursuant to R.S. 18:1401 *et seq.* The suit must be brought only in East Baton Rouge Parish, R.S. 18:1402C, against the secretary of state, R.S. 18:1402B(1)(a), after the election takes place, R.S. 18:1405C. In order for the appellants to avail themselves of the procedure set forth in R.S. 18:1401 *et seq.*, each of these requirements must be satisfied. The trial court properly found that the appellants failed to satisfy the venue requirement and sustained the exception of improper venue, and upon request of the appellants dismissed rather than transferred the case to the proper venue.

B. There are no exceptions to the requirement that venue is in East Baton Rouge Parish

The plaintiffs cannot claim that R.S. 13:5104 applies to this action. R.S. 13:5104(A) provides: "All suits filed against the state of Louisiana or any state agency may be instituted before the district court of the judicial district in which the state capitol is located or in the district court having jurisdiction in the parish in which the cause of action arises." The Plaintiffs have named the City of New Orleans as a Defendant to this action. However, this is an action to challenge the placing of the constitutional amendment on the ballot and the City of New Orleans is not a proper party to this proceeding, nor has any action occurred in Orleans Parish.

The Plaintiffs are attempting to prevent the Secretary of State from performing

a ministerial function. La. R.S. 18:551 provides the mandatory duty for the Secretary of State to prepare and certify the absentee ballots and the ballots to be used on the voting machines. In *Ferrington v. Van Sickle*, 545 So.2d 719 (La.App. 2 Cir. 1989) the court determined that the proper venue for plaintiffs' mandamus action against the secretary to perform her ministerial duty is in the parish of the official domicile of the secretary. See also *Abshire v. State, Through Dept. of Ins.*, 636 So.2d 627, 629, 93-923 (La. App. 3 Cir. 4/6/94) where the court stated as to the state defendants: "... when it is their ministerial actions that are called into question, Baton Rouge offers the only appropriate forum. The language and intentment of LSA-R.S. 13:5104(A) permits of no other interpretation." In accord, see also *St. Tammany Parish Council v. Brown*, 443 So.2d 1 (La. App. 1st Cir. 1983).

The trial court in 2004-CA-1473 erred in granting declaratory relief and in issuing a permanent injunction.

In 2004-CA-1473, the trial court, after the hearing on the claims for declaratory judgment and permanent injunction, agreed with its own decision granting the preliminary injunction and said that the September 18, 2004, election was not a "statewide election" within the meaning of La. Const. (1974) art. 13, §1. In addition, the trial court also agreed with plaintiffs that Act 926 of 2004 did not meet the single object requirement of La. Const. (1974) art. 13, §1. For those two reasons, the trial court issued a final judgment declaring Act 926 of 2004 unconstitutional and granted a permanent injunction prohibiting the Secretary of State from including the proposed constitutional amendment on the ballot for the September 18, 2004 election.

Both of these reasons are erroneous and were actually briefed in defendant's previous appellant brief in 2004-CA-1473. That argument is adopted herein as though written out *in extenso*. In supplement thereto, the defendant also adopts the arguments in the brief of Intervenors Hainkel et al. concerning these erroneous trial court reasons.

CONCLUSION

In 2004-CA-1432, the trial court correctly held that under R.S. 18:1402C, East Baton Rouge Parish is the exclusive venue for a suit challenging an election for a proposed constitutional amendment. The trial court's decision sustaining the appellee's exception of improper venue should therefore be affirmed.

In 2004-CA-1473, the trial court erred in overruling exceptions and in granting declaratory and preliminary and permanent injunctive relief and should be reversed at plaintiffs' costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon opposing counsel of record by fax and by depositing the same in the United States Mail, postage prepaid, and properly addressed as follows:

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Baton Rouge, Louisiana, this 23rd day of August, 2004.



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