

In the
Supreme Court of Ohio

OHIO CITIZEN ACTION,	:	Case No. 2006-2047
	:	
Relator,	:	
	:	
v.	:	Original Writ of Mandamus
	:	
J. KENNETH BLACKWELL, et al,	:	
	:	
Respondent.	:	
	:	

ANSWER OF RESPONDENT J. KENNETH BLACKWELL

For his answer to the Complaint filed by Relator Ohio Citizen Action ("Relator"), Respondent J. Kenneth Blackwell ("Respondent Blackwell") states as follows:

FIRST DEFENSE

1. In response to the allegations contained in paragraph 1 of the Complaint, Respondent Blackwell admits that Relator filed an original action in mandamus. Further answering, Respondent denies the remaining allegations contained in paragraph 1 of the Complaint.
2. Respondent Blackwell denies the allegations set forth in paragraph 2 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations.
3. In response to the allegations contained in paragraph 3 of the Complaint, Respondent Blackwell denies that Relator has no adequate remedy at all. Further answering, Respondent Blackwell denies the remaining allegations set forth in paragraph 3 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations.
4. In response to paragraph 4 of the Complaint, Respondent Blackwell admits that the Summit County Board of Elections and the Cuyahoga County Board of Elections are Respondents in this action. Respondent Blackwell denies any remaining allegations

set forth in paragraph 4 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth or falsity of the allegations.

5. In response to paragraph 5 of the Complaint, Respondent Blackwell admits that he is the Ohio Secretary of State, and that he is named a respondent in his official capacity. Further answering, Respondent Blackwell's numerous duties are codified in the Ohio Revised Code, which include working with local boards of elections, issuing directives and managing the results of the elections. The remaining allegations in paragraph 5 of the Complaint are not susceptible to an admission or denial inasmuch as Relator paraphrases numerous duties of the Ohio Secretary of State, which are codified in Ohio law and speak for themselves.
6. Respondent Blackwell denies the allegations contained in paragraphs 6 and 8 of the Complaint.
7. The allegations in paragraph 7 of the Complaint are not susceptible to an admission or denial inasmuch as Relator paraphrases the numerous provisions of the Ohio Revised Code, including R.C. 3505.30, which speaks for itself.
8. In response to the allegations contained in paragraph 9 of the Complaint, Respondent Blackwell admits that the Secretary of State's office issued a directive on October 4, 2005, which speaks for itself. Further answering, Respondent Blackwell denies the remaining allegations contained in paragraph 9 of the Complaint.
9. In response to the allegations contained in paragraph 10 of the Complaint, Respondent Blackwell admits that he may issue directives under Ohio law. Further answering, Respondent Blackwell denies the remaining allegations contained in paragraph 10 of the Complaint.
10. Respondent denies the allegations contained in paragraphs 11, 12, and 13 of the Complaint.
11. Respondent Blackwell denies each allegation of the Complaint not otherwise expressly admitted.

SECOND DEFENSE

12. Relator's claims are barred by laches.

THIRD DEFENSE

13. Relator lacks standing.

FOURTH DEFENSE

14. Relator has an adequate remedy at law.

FIFTH DEFENSE

15. The Complaint otherwise fails to state a claim upon which relief may be granted.

SIXTH DEFENSE

16. This Court lacks subject matter jurisdiction.

SEVENTH DEFENSE

17. Relator has failed to join parties in accordance with Rule 19 and Rule 19.1 of the Ohio Rules of Civil Procedure.

EIGHTH DEFENSE


18. Relator is estopped from raising the claims set forth in the Complaint.

NINTH DEFENSE

19. Respondent Blackwell reserves the right to assert all other defenses available to him including affirmative defenses.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General of Ohio



Sharon A. Jennings* (0055501)

** Counsel of Record*

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Attorneys for Respondent Ohio

Secretary of State J. Kenneth Blackwell

CERTIFICATE OF SERVICE


I certify that a copy of the foregoing Answer of Respondent J. Kenneth Blackwell was served by U.S. mail and email this 6th day of November, 2006, upon the following counsel:

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SHARON A. JENNINGS
Senior Deputy Attorney General

IN THE SUPREME COURT OF OHIO

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MEMORANDUM IN OPPOSITION TO MOTION TO EXPEDITE

This action was filed late on Friday, November 3, 2006, and Relator filed its Emergency Motion to Expedite this morning, November 6, 2006. The subject of the action, and the Motion to Expedite, is the general election that is scheduled to take place tomorrow, November 7, 2006. And yet the subject of this action is a notice sent out by the Secretary of State on October 4, 2005, over a year ago. See Exhibit B to the Complaint. For this reason alone, this Court should refuse to grant the motion to expedite. Further, as is set forth in the Secretary's Memorandum in Opposition to the Writ of Mandamus, Relator in reality seeks a declaratory judgment action regarding the interpretation of the statute, and it is only Relator's delay in filing this action that has rendered the resolution of this action in that manner impracticable. This Court should refuse to expedite this action, and as set forth in the contemporaneously filed Memorandum in Opposition, also deny the requested writ based on laches. For a more detailed discussion of the merits of this case, please see the Secretary's Memorandum in Opposition to Writ of Mandamus, which is being filed contemporaneously with this Motion.

Respectfully submitted,

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OHIO ATTORNEY GENERAL



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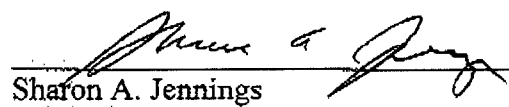
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The undersigned certifies that a copy of the foregoing Memorandum was served this 6th day of November, 2006 upon the following counsel via facsimile:

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MEMORANDUM IN OPPOSITION TO WRIT OF MANDAMUS

I. INTRODUCTION

Relator, an organization that lacks standing, has waited until the day before the election to challenge an action taken by the Secretary of State over a year ago, when he issued a notice to the Boards of Elections regarding R.C. 3505.27. Accordingly, lack of standing and laches bar this action, and laches certainly provides a reason not to rule on the case on an expedited basis. At the same time, the only reason why this matter could not have been resolved in a declaratory judgment action (assuming a party with standing filed the action) is because Relator chose to wait until the virtual eve of the election to bring its claims. Accordingly, this Court should also find that Relator has an adequate remedy at law.

Furthermore, the issue is not as cut and dried as Relator makes it seem. True, one statute, R.C. 3505.30 provides that results shall be posted at the precincts prior to the transmission of the results to local boards. This statute, however, predates Ohio's implementation of electronic voting technology pursuant to the Help America Vote Act ("HAVA"), and the major changes made by House Bill 3. Specifically, R.C. 3505.27, as amended by House Bill 3, now provides that the Board must designate an appropriate office for "[t]he counting and tallying of ballots . . .

in the full view of members of the board and observers.” See R.C. 3505.27, attached. This statute makes sense as most precincts now have greater numbers of different types of voting machines than those used in past elections. Also, depending on the machine utilized, certain steps must be taken to tabulate the results. Accordingly, for reasons related to maintaining the security of the machines and ensuring that they are tabulated properly, the Secretary, in accordance with R.C. 3505.27, provided that all vote totals be accumulated at the Boards’ designated tabulation sites. If vote totals are accumulated at a central location, they cannot first be posted at the precinct level. For more information regarding the tabulation of votes on electronic machines, and the sound reasons in support of the Secretary’s notice, see the attached Affidavit. Accordingly, Relator has no clear legal right.

For all these reasons, this Court should deny the Writ of Mandamus.

II. STATEMENT OF FACTS

Relator, Ohio Citizens Action, filed this mandamus complaint late on November 3, 2006. Ohio Citizens Action asserts that is the State’s largest environmental organization, and sues on behalf of itself and its members. Complaint, at ¶ 2. Relator sues the Secretary of State, as well as the Cuyahoga Board of Elections and the Summit County Board of Elections. Relator has filed a motion to expedite this appeal, and this Court has asked that Respondents respond by 1:00 p.m today. Accordingly, Relator Blackwell is filing this Memorandum in Opposition, an Answer, and a Memorandum in Opposition to the Motion to Expedite.

III. LAW AND ARGUMENT

A. Relator Lacks Standing To File This Action.

As an initial matter, Ohio Citizens Action does not have standing to prosecute this action. “It is well established that before an Ohio Court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.” *State ex rel. Ohio Academy of Trial*

Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 469; *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 329. This standing requirement means that “in order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury.” *Sheward*, 86 Ohio St.3d 451, 469-470. As this Court has explained, the standing doctrine ensures that citizens cannot use the courts to air generalized grievances about governmental policies and actions:

The requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.

Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm. (1986), 28 Ohio St.3d 317, 321.

In this case, Ohio Citizens Action, an environmental group, has filed a writ of mandamus challenging the application of an election statute. Although electors have standing to challenge election procedures, this Court has never held that that broad standing permits any special interest group to file such a challenge. Accordingly, this Court should dismiss this action for lack of standing.

B. This Complaint Was Not Properly Brought In Name of the State.

In addition, Relator did not properly bring this action in the name of the State. “A complaint for a writ of mandamus must be brought in the name of the state, on relation of the person applying. The failure of [relator] to properly caption her complaint for a writ of mandamus warrants dismissal.” *Marcano v. State*, Cuyahoga App. No. 87797, 2006-Ohio-1946, at 2 (citations deleted); see also R.C. 2731.04; but see *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 574 (“when a failure to comply with R.C. 2731.04 is raised and relators file a motion for

leave to amend the caption of the complaint to specify that the mandamus action is brought in the name of the state on their relation, we have granted leave to amend so as to resolve cases on the merits rather than on a pleading deficiency. If, however, a respondent in a mandamus action raises this R.C. 2731.04 defect and relators fail to seek leave to amend their complaint to comply with R.C. 2731.04, the mandamus action must be dismissed" (citations omitted). Accordingly, the instant Complaint is deficient.

C. Laches Bars This Action, And Dictates That This Court Deny The Requested Relief.

"Relators in election cases must exercise the utmost diligence." *State ex rel. Fuller v. Medina Cty. Bd. of Elections* (2002), 97 Ohio St. 3d 211, 2002 Ohio 5922 ¶ 7. "Therefore, relators requesting extraordinary relief in an election-related matter are required to act with the required promptness, and if they fail to do so, laches may bar the action." *Id. citing State ex rel. Newell v. Tuscarawas Cty. Bd. of Elections* (2001), 93 Ohio St. 3d 592, 595, 2001 Ohio 1806.

This Court has always required election cases to be filed promptly. *See, e.g., State ex rel. Landis v. Morrow Cty. Bd. of Elections* (2000), 88 Ohio St. 3d 187, 189, 2000 Ohio 295 ("We have held that a delay as brief as nine days can preclude our consideration of the merits of an expedited election case."); *Carver v. Stankiewicz* (2004), 101 Ohio St. 3d 256, 2004 Ohio 812 (denying an extraordinary writ because the Relators waited 19 days before filing their claim).

In this case, Relator has failed to act promptly to bring its concerns before a Court. The Secretary's notice, setting forth his interpretation of the duties placed on the Boards by R.C. 3505.27 and 3505.30 in light of the changeover in voting technology was issued on October 4, 2005. Thus, Relator had the opportunity to raise this issue over one year ago, and yet we are before this Court on the day before the General Election. In addition, votes were tabulated in this manner during the primary, and the special elections that took place in August and September 2006, so there is no excuse for the delay in filing this claim.

And others will be harmed by an emergency order from this Court. The Boards are set to tabulate the votes tomorrow as instructed by the Secretary, and have trained all of their pollworkers. The public is harmed when interest groups can use last minute litigation to create uncertainty regarding the processes used to administer Ohio's elections.

D. Relator Has No Clear Legal Right To The Relief Sought.

In order to show that it is entitled to relief, Relator must demonstrate that it has a clear legal right to the relief sought, and that the Respondent has a clear legal duty to perform. In this instance, Relator cannot show either.

In this case, R.C. 3505.30 must be read in conjunction with other statutes. R.C. 3505.30 provides that a summary of results must be posted before those results are transmitted to the Board. This statute, however, is contradicted by R.C. 3505.27, as amended by House Bill 3, which requires the Boards to designate a central location for the tabulation of votes, as well as the practical features of the new electronic voting machines. See also R.C. 3506.12, which likewise requires the processing and counting of ballots under the supervision and direction of the board of elections.

In the case of Diebold machines, the results of each machine is printed on the same tape containing the VVPAT tape for each ballot cast, which is the official record now for purposes of recount. Accordingly, these tapes must be secured and transmitted to a centralized location for security purposes, instead of requiring pollworkers at the precincts to open the tape, potentially resulting in spoliation of the information needed for recounts. See attached affidavit. Likewise, the ESS Ivotronic machines can be more readily read at the precinct level, but to do so will take 5 minutes per machine. Thus, Relator's desire to have the summary of the results posted at each precinct before the information is transmitted to the centralized tabulating location will actually delay the certification of results by creating a duplicative step. See attached affidavit.

E. Relator Has An Adequate Remedy At Law.

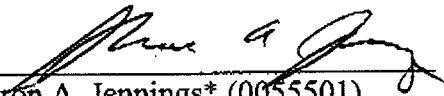
Relator, or someone who actually has standing, can obtain a declaration regarding the interpretation of the various statutes implicated by this Complaint, by filing a declaratory judgment action to clarify the interpretation of the statutes in question. Relator should not be entitled to permit its own lack of diligence to turn what should be a declaratory judgment action into an emergency election matter.

IV. CONCLUSION

This Court should deny the writ of mandamus, deny the motion to expedite, and dismiss this matter.

Respectfully submitted,

Jim Petro (0022096)
OHIO ATTORNEY GENERAL



Sharon A. Jennings* (0055501)

**Counsel of Record*

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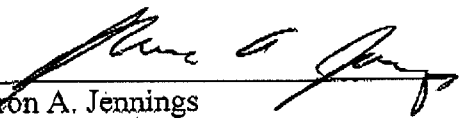
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Sharon A. Jennings

LEXSTAT O.R.C. 3505.27

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* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH OCTOBER 26, 2006 *
* ANNOTATIONS CURRENT THROUGH JULY 1, 2006 *

TITLE 35. ELECTIONS
CHAPTER 3505. GENERAL AND SPECIAL ELECTION BALLOTS
CASTING AND COUNTING BALLOTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 3505 27 (2006)

§ 3505.27. Counting of votes

Unless otherwise ordered by the secretary of state or the board of elections, the counting and tallying of ballots shall be conducted according to procedures prescribed by the board of elections that assure an accurate count of all votes cast and that include all of the following:

(A) The counting and tallying of ballots at the appropriate office, as designated by the board, in the full view of members of the board and observers;

(B) The recording on a worksheet or other appropriate document of the number of votes cast for each candidate and the number of votes cast for and against each question or issue;

(C) The periodic reporting to the public and the office of the secretary of state of the number of votes cast for each candidate and the number of votes cast for and against each question or issue as tallied at the time of the report;

(D) An examination and verification by the appropriate authority, as designated by the board, of the votes so tallied and recorded in the pollbook under *section 3505.26 of the Revised Code*.

The board shall prescribe additional procedures as necessary to assure an accurate count of all votes cast. These procedures shall be followed until all of the ballots that are required to be counted on the day of the election after the close of the polls have been counted.

All work sheets that are prepared at the polling locations shall be preserved and placed inside the pollbook and returned to the board.

If there is any disagreement as to how a ballot should be counted it shall be submitted to the members of the board for a decision on whether or to what extent the ballot should be counted. If three of the members do not agree as to how any part of the ballot shall be counted, only that part of the ballot on which three of the members do agree shall be counted. A notation shall be made upon the ballot indicating what part has not been counted, and the ballot shall be placed in an envelope marked "Disputed Ballots."

HISTORY:

GC § 4785-143; 113 v 307(374), § 143; 118 v 223(236); 124 v 673(698); Bureau of Code Revision, 10-1-53; 125 v 713(760) (Eff 1-1-54); 146 v H 99. Eff 8-22-95; 151 v H 3, § 1, eff. 5-2-06.

NOTES: