

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

King Lincoln Bronzeville	:	
Neighborhood Association, et al.,	:	
	:	
Plaintiffs,	:	Case No. 2:06-cv-745
	:	
vs.	:	Judge Marbley
	:	
Jennifer Brunner, et al.,	:	Magistrate Judge Kemp
	:	
Defendants.	:	

**BRIEF OF SECRETARY OF STATE HUSTED ADDRESSING
THE QUESTIONS THIS COURT RAISED IN ITS
MAY 25, 2011 ORDER**

The Plaintiffs filed this complaint almost six years ago against former Secretary of State Ken Blackwell and several other defendants. The Plaintiffs have yet to perfect service on any of those additional defendants. This case had been stayed for the past four years but Secretary of State Husted asked for a status conference. After that conference, the Court issued an order posing three questions:

- Whether the Eleventh Amendment precludes subject matter jurisdiction;
- The factual and legal bases for deposing local Chamber of Commerce members;
and
- The evidentiary basis for requiring the Secretary of State to continue to store ballots from the 2004 general election.

The Plaintiffs have failed to articulate any basis that this Court has jurisdiction of this case, reasons why discovery should go forward involving members of the Ohio Chamber of

Commerce, or why the Secretary of State should be required to maintain ballots from the 2004 general election.

I. The Eleventh Amendment Prohibits This Court from Adjudicating the Plaintiffs' Claims.

A State's immunity from suit in federal court "flows from the nature of sovereignty itself as well as the Tenth and Eleventh Amendments to the United States Constitution." *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (en banc). The only exception to this immunity at issue in this present case would be *Ex parte Young*. Under that exception, a federal court "can issue prospective injunctive and declaratory relief compelling a state official to comply with federal law. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10 (1989).

The Plaintiffs have failed to demonstrate that they are seeking any type of prospective injunctive relief. Their complaint concerns their allegations that the 2004 Presidential and Ohio Supreme Court Chief Justice elections were stolen by an as of yet unidentified conspiracy apparently headquartered in Alabama. Their brief on this question heavily quoted newspapers and magazines. It failed to support its more unbelievable allegations with any admissible evidence. However, even if the Plaintiffs had incontrovertible proof that the 2004 election in Ohio was stolen, that would not change the fact that this Court lacks jurisdiction to hear the case. That claim is purely a retrospective claim and the relief attached to such a claim is purely retrospective relief.

At the center of the Plaintiffs' theory are two companies that worked for the Secretary of State in the past. Those companies are called GovTech and SmarTech. (Brief at 11-14). Apparently, these companies provided computer services that allowed this unidentified conspiracy to alter votes cast in the 2004 Presidential election. This claim is not properly before this Court. The Plaintiffs admit that these companies no longer provide any computer services

for the State of Ohio. (Brief at 19). Thus, this theory does not advance Plaintiffs' invocation of jurisdiction because it simply focuses on prior actions and seeks a retrospective remedy. That is something this Court cannot do and has no jurisdiction to hear.

Apparently recognizing the jurisdictional problem they face, the Plaintiffs' brief contains various arguments and assertions about electronic voting machines. However, that is not part of the Plaintiffs' complaint and as such cannot be used as a basis to claim this Court has jurisdiction over this case.

The last attempt that Plaintiffs use to assert jurisdiction in this Court is a yet unfiled state law RICO claim. Brief at 21. Even if that claim were pled, the Eleventh Amendment would bar this Court from hearing it. The Supreme Court has recognized that federal courts are without jurisdiction to hear pendent state law claims against state officials. *Pennhurst State Sch. V. Halderman*, 465 U.S. 89, 117-21 (1984). Since the Plaintiffs' claims concern the 2004 general election and they do not seek prospective relief, the Eleventh Amendment prohibits this Court from exercising jurisdiction over this case and it should dismiss it.¹

II. The Plaintiffs Have Not Set Forth Any Bases to Conduct Discovery.

The Plaintiffs propose conducting discovery on members of the Ohio Chamber of Commerce on the basis of that group's political advertising. The claims as raised in the Plaintiffs' complaint do not allege any activity concerning illegally coordinated expenditures. However, even if the Plaintiffs could bring such a claim, jurisdiction does not reside in this Court. If the Plaintiffs believe that the Ohio Chamber of Commerce is illegally coordinating its contributions in violation of Ohio law, the Ohio Elections Commission has exclusive jurisdiction over that claim. *See, e.g., State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246

¹ The Plaintiffs mention their possible RICO claim in terms of a future claim they may bring against parties who are not currently defendants. Such a claim, however, is not part of this case and cannot be pled against the only served Defendant.

(2006). To the extent that the Plaintiffs believe that the coordination is in violation of federal law, the Federal Elections Commission has exclusive jurisdiction to hear that claim. *See, e.g.*, 2 U.S.C. § 437c; *see also Fieger v. United States Attorney General*, 2008 U.S. App. LEXIS 19550 (6th Cir. 2008). Since this Court does not have the jurisdiction to hear that claim, it should not allow Plaintiffs to conduct discovery on those issues.

III. The Plaintiffs Have Failed To Put Forth Any Basis Why The Secretary Of State Should Be Required To Maintain Ballots From The 2004 General Election.

Both Ohio and federal law mandate that ballots from a federal election be kept for 22 months. RC 3505.31, 42 USC § 1974. The Plaintiffs appear to offer two justifications as to why this Court should require the Secretary to continue to hold ballots from the 2004 election five years after they should have been destroyed. First, the Plaintiffs believe that these ballots will prove that the 2004 election for President in Ohio was stolen. Second, the Plaintiffs believe that the ballots should be preserved due to alleged historical interest in allowing researchers to conduct further investigations into the 2004 election even after this litigation is completed. Neither of these purported justifications is sufficient.

The Eleventh Amendment prohibits the Plaintiffs from litigating the 2004 general election. Furthermore, in 2004 the vast majority of Ohioans voted on punch card ballots. To comply with the requirements under the Help America Vote Act, Ohio no longer uses punch card ballots. Thus, even if the Plaintiffs had attempted to challenge any aspect of Ohio's current voting system in their complaint – which they did not – evidence about the punch card system used in 2004 is irrelevant and would only serve to focus on retrospective relief.

Second, alleged historical interest in ballots cast in Ohio in 2004 cannot serve as a basis for ordering the Secretary of State to spend \$12,000 a year to preserve ballots. This Court must base its orders on the litigation brought before it. The litigation that the Plaintiffs have attempted

to bring is barred by the Eleventh Amendment. Since this Court has no jurisdiction to hear the case brought by the Plaintiffs, it cannot order the Secretary to continue to preserve ballots.

IV. Conclusion

For the foregoing reasons, this Court should dismiss this litigation, refuse to allow the Plaintiffs to conduct any discovery, and allow the Secretary of State to dispose of the ballots from the 2004 general election in conformity with State and federal law.

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 5th day of August, 2011.

/s Richard N. Coglianese

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