

**In The United States District Court
For The Northern District Of Ohio
Western Division**

Anita Rios, *et al.*,

Plaintiffs,

vs.

Case No. 3:04-CV-7724

J. Kenneth Blackwell,

Judge Carr

Defendant.

Defendant's Reply Brief In Support Of His Motion To Dismiss

I. Introduction

If at first you don't succeed, try and try again. Although that maxim may be a good life philosophy, it should not be a guiding principle for bringing litigation. Unfortunately, the plaintiffs in this case apparently subscribe to that philosophy. After this Court rejected their demand for an injunction ordering the State of Ohio to begin a recount of the 2004 Presidential election, they then improperly filed the same request in front of the Southern District of Ohio. However, they are now asking this Court to keep this case active so that if that Court rejects their legal claims, they can then raise those identical claims in this Court. Such conduct wastes both courts' time and public resources. These failed Presidential candidates should decide if they

want to litigate their case in this Court or in the Southern District. If they cannot or will not reach that simple decision, this Court should aid them by dismissing their action.

II. Law And Argument

A. **Regardless Of How Many Times The Failed Presidential Candidates Want To Raise Their Claims About The Timing Of Ohio's Recount, The Simple Fact Is That Claim Is Moot In This Court And In The Southern District Of Ohio As Well.**

The United States Constitution vests within each State's legislature the exclusive power to determine the manner of choosing a State's Presidential Electors. U.S. Const. Art. I § 2 cls. 2. The Ohio General Assembly exercised that choice by granting the citizens of the State of Ohio the right to vote for President. The General Assembly further granted a limited right to a recount in an election. R.C. § 3515.01 *et seq.* In a candidate election, the *only people who can request a recount* are the candidates who have been certified as losing the election. R.C. § 3515.01. If, however, the election was over an issue in which voters are required to vote either yes or no, any group of five voters who voted on the losing side of the issue can request a recount. *Id.* The first requirement for a recount, however, is that somebody must be officially certified as a winner before the losing candidate can file an application for a recount.

The Presidential candidates who combined received 0.25% of the vote in Ohio want this and other courts to find a constitutional right to a recount in Presidential elections. But more than just seeking the creation of a constitutional right to a recount, these candidates are wasting the judicial resources of several courts because they demand that all of these courts find the constitutional right to a recount begins before a winner has even been certified by the State of Ohio. Such a claim is both moot and has no basis in the Constitution.

1. This Case Is Moot Because There Is No Guarantee That The Timing In Counting Ballots In Future Elections Will Mirror The Timing In The Election Of 2004.

Although the failed Presidential candidates claim that this case is one that is capable of repetition yet evading review, they are completely incorrect. It is true that the recount timeline after the 2004 election was compressed, but there is no guarantee under Ohio statutes that a recount after any other election will be as compressed.

Ohio law requires that the official canvass begin eleven to fifteen days after the election. R.C. § 3505.32. However, there is no specific statutory deadline about *when the official canvass must be completed*. Instead, the official canvass must be completed by the local boards of elections “no later than the date set by the secretary of state....” R.C. 3505.32(A). The Secretary of State must announce that date thirty-five days prior to the election. R.C. § 3501.05(U). Thus, the Plaintiffs are merely speculating that the timing of the official certification of the winner of the Presidential race in Ohio will be the same in 2008 as it was in 2004.

In this particular case, the Plaintiffs seek a generalized declaration that Ohio’s recount statute violates the First and Fourteenth Amendments, apparently because the candidates believe that there is too-compressed a time period between the official certification of the Presidential vote and the date that the electoral college meets. However, they cannot seriously claim that the timing that existed for the 2004 election will be present in the future. Instead, it becomes obvious that this is really an as applied challenge to Ohio’s recount laws. Since the 2004 election is over, this case is moot.

2. Apparently, The Presidential Candidates Concede That None Of The Individual Voters Or Institutional Plaintiffs Have Standing.

Instead of directly addressing whether the individual plaintiffs or institutional plaintiffs have standing to bring this litigation, the failed Presidential candidates simply claim that it does not matter because they have standing to raise a challenge to Ohio's recount statute. It is true that Ohio has not sought to challenge their standing at this point, however, there is no reason for this Court to pass on whether the individual voters or the organization have standing. After all, that was one of the reasons this Court decided to reject the Plaintiffs' motion for a temporary restraining order in the first place.

B. The Plaintiffs Still Have Not Articulated Why This Court Should Retain Jurisdiction Over This Case.

The Plaintiffs are correct – the State of Ohio has repeatedly asked the Southern District Court to transfer the case to this Court because the Defendants in that case have filed an identical claim to the claim they brought in this Court. The Plaintiffs, however, have failed to inform this Court that they have refused to agree to that transfer. Since the Plaintiffs cannot articulate why they are entitled to two cases going forward concerning the same identical claim and since they refuse to consolidate those two cases in front of this Court, this Court should dismiss their case.

C. The Plaintiffs Still Have Failed To Identify Any Constitutional Right To A Recount.

The Plaintiffs claim is simple. They are simply asking this Court to create a constitutional right to a recount in any election. Ohio law details how a recount should occur. Only after a winner has been certified may a loser petition for a recount. R.C. § 3515.01 *et seq.* Of course, the Plaintiffs have failed to demonstrate any place in the United States Constitution where there is a right for the loser of an election to demand a recount. Yet, despite the clear lack of any constitutional requirement for a recount, they want this Court to graft constitutional

requirements for a recount in Ohio's recount statute. Of course, not merely happy with that, they will no doubt demand that the Court then graft a demand that every single ballot cast in the State of Ohio be subject to another hand recount.¹

The Supreme Court has determined that the Constitution demands that a State have a uniform definition of what constitutes a legal vote and that a hanging chad cannot count as a vote in one precinct in the State while it does not count in another. *Bush v. Gore*, 531 U.S. 98 (2000). Yet, there is nothing in the *Bush* case or in any other Supreme Court decision from which a person can find a federal constitutional right that a recount occur and be completed before a specific date. As there is no federal constitutional right to that recount, this Court should dismiss the Plaintiffs' claims.

III. Conclusion

For the foregoing reasons, this Court should dismiss this case.

Respectfully submitted,

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¹ They have already asked Judge Sargus to grant them this relief in the case they have filed in front of him. See Amended Complaint attached as Exh. A.

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 8th day of February, 2005.

/s Richard N. Coglianese
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