

**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
)	The Honorable James G. Carr
J. KENNETH BLACKWELL,)	
)	
Defendant.)	
_____)	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

Plaintiffs, seven of whom voted in Ohio for president of the United States, two of whom were presidential candidates in 2004, and one of which is a non-partisan, non-profit organization in Ohio committed to free and fair elections, respectfully oppose defendant Blackwell's December 29, 2004 motion to dismiss. Plaintiffs request the Court to defer consideration of such motion until a determination is made whether the recount litigation now pending in the Southern District of Ohio, *State Ex. Rel. Yost v. National Voting Rights Institute*, Civ. No. C2-04-1139 (ES/TK) (hereinafter "Yost" case), should be transferred to this Court and consolidated with this action. Secretary Blackwell has on at least four occasions suggested in papers filed in the *Yost* case that the case should be

transferred to this Court and consolidated with this case, which was the first recount case filed.¹

Moreover, as plaintiffs establish below, they have standing to pursue their constitutional right to a recount, and the issues raised in their complaint are not moot. In addition, plaintiffs have not abandoned their claims. Accordingly, plaintiffs' claims should not be dismissed.

A. Plaintiffs have standing to pursue these claims.

Secretary Blackwell contends that “none of the individual voters, or the members of the organizational plaintiff, have a legal right in Ohio to request a recount, [thus] they lack standing to bring any claims concerning the date upon which the recount could start.” *See* Memorandum in Support of Motion to Dismiss, at p. 2. Notably, Secretary Blackwell does not contend that plaintiffs David Cobb, the Green Party 2004 presidential candidate, and Michael Badnarik, the Libertarian Party 2004 presidential candidate, lack standing to challenge Secretary Blackwell's determination to schedule the certification of the winner of the presidential election in Ohio so as to deny Cobb and Badnarik their legal right to a recount as part of the process by which Ohio determines its presidential electors for the Electoral College. Because plaintiffs Cobb and Badnarik have standing to pursue such claims, the Court need not determine whether the other plaintiffs lack standing.

Courts have repeatedly recognized that as long as one plaintiff has standing to bring claims, the standing of all other plaintiffs is irrelevant. *See, e.g., General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402 n. 22 (1982) (stating that if one plaintiff has standing, there is “Art. III jurisdiction to entertain those common issues

¹ *See* Exs. A-D (copies of briefs in which Secretary Blackwell suggests, at pages 4, 1, 2, and 1, respectively, that the *Yost* case should be transferred to this Court and consolidated with this case for further proceedings).

presented by all plaintiffs”); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (“Because we find California has standing, we do not consider the standing of the other plaintiffs.”); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 n. 9 (1977); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1282 (1st Cir. 1996) (“[T]he court need not determine the standing of all plaintiffs if at least one plaintiff has standing to maintain each claim.”).

As one Ohio District Court recently stressed:

[O]nce the court determined that at least one plaintiff . . . had standing, the court dispensed with a standing inquiry regarding the other plaintiffs and permitted all plaintiffs to proceed. Thus, if the Court determines that any one of the Plaintiffs has standing, the Court has jurisdiction and may proceed with the case.

Planned Parenthood Cincinnati Region v. Taft, 337 F. Supp. 2d 1040, 1044 (S.D. Ohio 2004). There is no doubt that Cobb and Badnarik, as Secretary Blackwell concedes, have standing ? they suffered a clear injury as a result of Secretary Blackwell’s actions which frustrated and delayed a timely and meaningful recount of the presidential votes cast in Ohio, a right granted by the Ohio legislature to all candidates running for political office. This Court can redress the candidates’ injuries by declaring that Secretary Blackwell’s application and interpretation of Ohio’s recount provisions violated Article II and the Equal Protection and Due Process Clauses of the Constitution. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Svcs., Inc.*, 528 U.S. 167, 179 (2000) (the three elements for standing include injury, causation, and redressability). The standing of the individual voters and the organizational plaintiffs is thus immaterial.²

² The individual voter plaintiffs, who each cast votes for presidential candidates on a variety of voting machines across Ohio in the 2004 election, *see* Complaint ¶¶ 6-15, all suffered the requisite “injury in fact” required to establish standing when their votes were not meaningfully recounted before Ohio’s official certification of its vote to the electoral college. Because the Ohio legislature has granted a statutory right to

B. Plaintiffs' claims are capable of repetition yet evading review, and therefore are not moot.

Secretary Blackwell also alleges that because the presidential vote in Ohio has already been certified, and the state's 20 electoral votes have already been cast by the state's presidential electors in favor of George Bush and Dick Cheney, plaintiffs' claims regarding the timing of the recount in Ohio are now moot.

However, claims may not be dismissed where either relief may still be granted on the allegations, or, as an exception to the mootness doctrine, a claim is capable of repetition yet is evading review. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 496 (1969); *United States v. A.D.*, 28 F.3d 1353, 1355 n.1 (3rd Cir. 1994). “[T]he capable-of-repetition doctrine applies . . . where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Spencer v. Kemna*, 523 U.S. 1, 17 (U.S. 1998) (quotations and citations omitted).

Challenges involving elections and voting issues have repeatedly fallen within this exception to the mootness doctrine. *See, e.g., Morse v. Republican Party of Virginia*,

a recount, Secretary Blackwell cannot deny voters the right to a timely and meaningful recount. As the Supreme Court has consistently stressed, the right to have one's vote counted belongs to the individual voter, not the candidate. “It has been repeatedly recognized that *all qualified voters* have a constitutionally protected right to vote, and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554 (U.S. 1964) (citations omitted) (emphasis added). As Ohio courts have likewise held, the legislature has determined that “[a] recount pursuant to O.R.C. § 3515.13 is the only fair and equitable procedure to ensure the correct tally of all the votes.” *Matter of Issue 27 Election on November 4, 1997*, 693 N.E.2d 1190, 1193 (Ohio C.P. 1998). After presidential candidates Cobb and Badnarik sought a recount in November, and once it became clear that Secretary Blackwell was intentionally delaying and frustrating any meaningful recount, the right of individual voters to have their votes properly recounted was violated. Thus, the individual voter plaintiffs have standing to challenge Secretary Blackwell's attempts to frustrate the recount. Likewise, Common Cause of Ohio, as an association of voters, has standing to represent the rights of its members who voted in the presidential election in Ohio in 2004. *See, e.g., Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (“An organizational plaintiff . . . may have standing to sue on its own behalf to vindicate whatever rights and immunities the association itself may enjoy or, under proper conditions, to sue on behalf of its members asserting the members' individual rights.”) (quotations omitted).

517 U.S. 186, 235 n.48 (1996) (“Like other cases challenging electoral practices, therefore, this controversy is not moot because it is ‘capable of repetition, yet evading review.’”); *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.3 (1983) (holding that the challenge to Ohio’s early filing deadline for independent candidates was not moot “even though the 1980 election is over,” as the constitutional injury was nevertheless capable of repetition yet evaded review); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (“The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is capable of repetition, yet evading review.”); *Suster v. Marshall*, 149 F.3d 523, 527 (6th Cir. 1998) (“Although the 1996 election is over, all of the parties assert that this action [raising constitutional challenge regarding campaign expenditures in judicial elections] is not moot as the controversy is ‘capable of repetition, yet evading review’”). In light of the very tight timeframe Secretary Blackwell imposed for conducting and completing any recount, there was not enough time to fully litigate these constitutional issues before Ohio’s electors cast their votes for president in the Electoral College.

Plaintiffs, moreover, are likely to run up against similar recount issues in future elections. Michael Badnarik has publicly stated that he is likely to run again for president in 2008, and David Cobb has stated that he may run again as well. *See State Ex. Rel. Yost*

v. National Voting Rights Institute, Civ. No. C2-04-1139 (ES/TK), Amended Counterclaims, December 30, 2004, ¶¶ 4-5.³

Secretary Blackwell further contends that the recount has occurred and thus the relief sought by plaintiffs is moot. *See* Def. Motion to Dismiss at 3. Yet, as Judge Sargus of the Southern District recently stated in the *Yost* case concerning any recount that violated constitutional standards, “I don’t know of any reason why a month from now, if it turns out that there has been some type of violation, just for the sake of argument, by a board of elections, that an updated recount couldn’t be ordered.” *See State Ex. Rel. Yost v. National Voting Rights Institute*, Civ. No. C2-04-1139 (ES/TK), Tr. of Dec. 10, 2004 Telephonic Hearing at pp. 14-15 (attached as Ex. E). As Judge Sargus reiterated, “it does not seem to me impractical to be able to say that at a later date, if there are some violations of how the recount is conducted according to state or federal law, that relief could still be granted at that point.” *Id.* Indeed, as the prayer for relief in the complaint makes clear, plaintiffs ask this Court to declare that Ohio’s recount provisions, as applied by Secretary Blackwell, are unconstitutional. *See* Complaint, Prayer for Relief, p. 20, ¶ 1. Thus, relief may still be granted to plaintiffs to rectify any violations of their constitutional right to a timely and meaningful recount. As a result, plaintiffs’ claims and the relief they request are not moot.

C. Plaintiffs have not abandoned the claims raised in their complaint.

Secretary Blackwell alleges that plaintiffs have abandoned their claims here and sought to litigate them in the *Yost* case before Judge Sargus in the Southern District of Ohio. This is simply not the case; in fact, Secretary Blackwell himself asserted with

³ As previously noted, in the *Yost* case before Judge Sargus, Secretary Blackwell has repeatedly asked Judge Sargus to transfer the *Yost* case from the Southern District of Ohio to the Northern District Court of Ohio, and consolidate it with this case. *See infra* pp. 7-9.

Judge Sargus that any claims related to the recount of Ohio's votes from the 2004 presidential election should be consolidated and resolved here, in this Court and in this case. *See supra* n. 1. Secretary Blackwell cannot have it both ways.

First, Secretary Blackwell paints a misleading picture of the two parallel cases currently in litigation involving the Ohio recount. Presidential candidates Cobb and Badnarik, along with eight other plaintiffs, first brought suit in this Court on November 22, 2004, seeking immediate injunctive relief that would require a timely and meaningful recount of all votes cast for president in Ohio. The following day, despite this well-publicized litigation in the Northern District of Ohio seeking an immediate recount, the Delaware County Board of Elections ? who were selected and appointed by Secretary Blackwell ? brought a separate lawsuit in the Delaware County Court of Common Pleas, seeking to stop the recount sought by candidates' Cobb and Badnarik, naming them as defendants in that state court action. In light of the serious constitutional issues implicated by any effort to prevent a recount, Cobb and Badnarik removed the state case to the appropriate federal court in the Southern District of Ohio, before Judge Edmund Sargus. In an effort to ensure that a meaningful recount would be conducted, Cobb and Badnarik asserted certain counter-claims against the Delaware County Board of Election in the *Yost* case before Judge Sargus, including constitutional claims which parallel claims raised by the plaintiffs here. Secretary Blackwell would have this Court believe that plaintiffs initiated two separate lawsuits regarding the Ohio recount, one in the Northern District of Ohio, the other in the Southern District, seeking two bites of the same apple. What Secretary Blackwell purposefully omits is the fact that the Delaware County Board of Election ? *not* Cobb and Badnarik ? initiated the competing lawsuit in

Yost seeking to stop the recount. In raising counter-claims asserting violations of the candidates' constitutional rights, Cobb and Badnarik were not abandoning their original claims brought in this Court, but were rightfully protecting their interests in the face of this rogue lawsuit intentionally brought in state court in an attempt to deny the candidates' a federal forum.

More importantly, Secretary Blackwell, who was named as a counter-defendant in the Delaware County lawsuit, urged Judge Sargus to dismiss those counter-claims raised by candidates Cobb and Badnarik, arguing that the claims in the *Yost* case should be litigated in the Northern District of Ohio, *in this Court*, where plaintiffs first brought suit over the recount. Referring to the *Yost* case, Secretary Blackwell stated that "this case must be heard in the Northern District [of Ohio], as that was where the first [recount] lawsuit was filed and where the specific relief prayed for in the complaint was initially denied." *See* Ex. B, *State Ex. Rel. Yost v. National Voting Rights Institute*, Civ. No. C2-04-1139 (ES/TK), Secretary of State's Memorandum Contra Counter-Plaintiffs' Motion for a Temporary Restraining Order, Dec. 16, 2004, at p. 3. Secretary Blackwell argued that "[w]hen duplicative lawsuits are pending in separate federal courts, the entire action should be decided by the court in which the action was first filed." *Id.* He added that "[s]ince Cobb and Badnarik first filed this litigation in the United States District Court for the Northern District of Ohio, this motion for a temporary restraining order is not properly before this Court and *this case should be transferred to the Northern District.*" *Id.* (emphasis added). Even more recently, Secretary Blackwell asserted in a separate pleading in *Yost* that Judge Sargus "lack[ed] jurisdiction over [the *Yost*] litigation as the two unsuccessful Presidential candidates filed an identical lawsuit in the Northern

District of Ohio, thereby granting that court jurisdiction under the first-filed rules.” *See* Ex. D, *Secretary of State Blackwell’s Motion to Dismiss Amended Complaint*, Jan. 10, 2005, at p. 1.

The briefing on the various motions before Judge Sargus will not be complete until sometime in February, and it is unclear when Judge Sargus will rule on those pending motions. Given Secretary Blackwell’s assertions before Judge Sargus that the proper forum for constitutional claims relating to Ohio’s recount is in this Court here in the Northern District of Ohio, this Court should refrain from ruling on Secretary Blackwell’s motion to dismiss at issue here until Judge Sargus rules on the motions pending in the Southern District of Ohio.

Moreover, while presidential candidates Cobb and Badnarik are plaintiffs in this action as well as counter-plaintiffs in *Yost*, the seven individual voter plaintiffs here, along with plaintiff Ohio Common Cause, are *not* parties to the *Yost* litigation. The individual voter plaintiffs and Ohio Common Cause further have under consideration here remedies specific to the wrongs that they have suffered as voters in federal elections in Ohio and as an organization representing the interests of Ohio voters. Understandably, these plaintiffs would like to preserve their ability to pursue such relief at the appropriate time in this action. In short, plaintiffs have in no way abandoned the claims raised in their complaint here.

CONCLUSION

For the reasons stated herein, Secretary Blackwell's Motion to Dismiss plaintiffs' complaint should be denied.

Dated: January 27, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 27th day of January, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Richard M. Kerger