

**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.

Delaware County Prosecuting Attorney, *et al.*,

Plaintiffs,

vs.

Case No. 3:05-cv-7286

National Voting Rights Institute, *et al.*,

Judge Carr

Defendants.

Defendant's Motion To Dismiss

Defendant J. Kenneth Blackwell moves this Court for an order pursuant to Fed. R. Civ. P. 12(b)(1) and (6) dismissing these cases. A memorandum in support is attached.

Respectfully submitted,

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Memorandum In Support

I. Introduction

The 2004 election is over. The ballots have been cast, counted, recounted, and recounted again.¹ The winners were certified. Ohio's Presidential Electors met in Columbus as directed and cast their votes. Those votes have been opened in a joint session of Congress and were even subject to challenge. Ultimately, those votes were accepted, and a President and Vice President were elected and inaugurated.

Despite all of this, the Plaintiffs in this case lack any standing to sue and have asked this Court to grossly exceed its own jurisdiction by hearing a case that is not ripe. Furthermore, the Plaintiffs have asked this Court to exercise jurisdiction in clear contravention of the Eleventh Amendment. Since this Court is patently without jurisdiction to hear this case and should never issue an advisory opinion to Plaintiffs who lack even a modicum of standing, this Court should grant the Defendant's motion to dismiss.

II. Law And Argument

A. The Individual And Organizational Plaintiffs In This Case Lack Standing To Bring A Claim.

Standing is to be assessed under the facts existing when a complaint is filed. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001). In order for a party to have standing, the plaintiff must show: (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. *Id.* at 523-24 quoting *Friends of the Earth, Inc. v. Laidlaw*

¹ The ballots were counted in an unofficial canvass on election night. They were counted again during the official canvass. Finally, they were counted a third time during the recount. Needless to say, the same candidate won the election all three times.

Envtl. Servs., 528 U.S. 167, 180-81 (2000). Furthermore, for an organization to have standing to sue on behalf of its members, an organization must be able to show that its members “would otherwise have standing to sue in their own right, the interests are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Id.* at 524.

Ohio law is clear as to who can file for a recount in a candidate election. R.C. § 3515.01 specifies that in a candidate election, the only person who can apply for a recount is “any person ... who was not declared elected may file with the board of a county a written application for a recount of the votes cast at such election in any precinct in such county for all candidates for election to such office or position.” Thus, none of the individual plaintiffs or the institutional plaintiff have any standing whatsoever to pursue a claim under R.C. §3515.01.

The individual and institutional Plaintiffs have not suffered any injury in fact that is concrete and particularized. These Plaintiffs have no rights whatsoever under R.C. § 3515.01. They cannot claim any harm under that statute that is unique to them. Thus, they fail to meet this provision of the standing requirement. Similarly, they simply cannot claim that any injury that they might suffer in the future would be readily addressed by a favorable decision. They do not seek any remedial action for the 2004 election. Rather, “they ask the Court to address procedural defects that are of Constitutional magnitude....” (Complaint at ¶ 2).

Since the Plaintiffs have failed to show any injury-in-fact or how that injury would be remedied by a decision in this Court, they lack standing. Since they are without standing, this Court lacks any jurisdiction to hear this case under Art. III.

B. This Court Should Dismiss The Claims Raised By The Former Presidential Candidates As Their Claims Are Not Yet Ripe.

The ripeness doctrine “is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). It recognizes the problem inherent in adjudicating a dispute “anchored in future events that may not occur as anticipated, or at all.” *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997). The ripeness doctrine exists in order “to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985).

In determining whether a claim is ripe, the Court must evaluate “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The Sixth Circuit has noted that there are three considerations courts should examine in order to determine whether a claim is ripe:

- The likelihood that the harm alleged by the Plaintiffs will ever come to pass;
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties’ respective claims; and
- The hardship to the parties if judicial relief is denied at this stage of the proceedings.

Adult Video Ass’n v. United States DOJ, 71 F.3d 563, 568 (6th Cir. 1995); *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 1995). It is clear that the former candidates’ claims in this case are not yet ripe for adjudication.

1. The Plaintiff Candidates Are Completely Unable To Show That Any Harm Will Ever Come To Pass As A Result Of Ohio’s Recount Statute.

The Plaintiffs in this case are completely unable to show that any harm will result from the timing in Ohio’s recount statute. The statute itself allows a recount, but only after a winning

candidate has been certified. R.C. § 3515.01. The only specific timeframe in Ohio's statute for certifying the winner of the Presidential election is that the official canvass of votes for President cannot start less than 11 or more than 15 days after the general election. R.C. § 3505.32.

The Plaintiffs appear to admit through their complaint that they are uncertain whether any harm will ever come as a result of Ohio's recount statute. In the candidates' complaint, they allege that:

On December 7, 2004, Secretary Blackwell issued Directive 2004-58 to all county boards of elections entitled: "Recount for the Presidential Election Only: The November 2, 2004 General Election." The one-page directive summarized rules for the start of the recount.

Complaint at ¶ 28; Intervenor's Complaint at ¶ 28.

Secretary of State Blackwell issued a Directive that specified it only applied to the recount of the 2004 Presidential election. It does not follow that a future Secretary of State² will chose to certify the Presidential election in the same timeframe that the 2004 election was certified. It is speculative that a future Secretary of State³ will chose to follow the 2004 Directive's timeframe for a future recount, or that a future recount will even occur. The Plaintiff candidates are simply speculating that a future Secretary of State will follow the exact timeframe for the 2004 election established by the current Secretary of State. That is not showing future harm. Rather, it is hypothesizing that harm might possibly occur if other things happen.

² The only thing that is certain is that J. Kenneth Blackwell will not be Secretary of State of Ohio for the 2008 Presidential election. Secretary Blackwell is term-limited under the Ohio constitution and cannot serve another term in his current office.

³ In fact, it is even speculation that come the 2008 election, the State of Ohio will have the constitutional office of Secretary of State in its current form. The November 2005 general election ballot will include State Issue 5 which will do away with the Secretary of State's responsibility for elections and place that responsibility in a nine-person board. Thus, the Plaintiffs are even speculating that Secretary of State will have any power to issue Directives come 2008.

2. The Plaintiff Candidates Are Unable To Show That The Factual Record Will Be Developed In Such A Manner As To Allow Fair Adjudication Of The Parties' Claims.

As demonstrated above, the Plaintiffs are simply speculating about what the law governing the 2008, 2012, 2016, or 2020 Presidential elections in the State of Ohio will be. Against such a backdrop, it is impossible for any person to ascertain the state of the law or to adequately formulate claims or defenses.

The Plaintiff candidates base their claims, in part, upon the allegation that “federal law specifies that all controversies regarding the appointment of a state’s Presidential electors should be resolved six days prior to the meeting of the electors....” Complaint at ¶ 17. However, based upon the status of this case, the Court may have to guess about the proper interpretation of federal law as well.

The Plaintiffs base this allegation upon 3 U.S.C. § 5. Under that code provision,

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determinations shall have been made at least six days before the time fixed for the meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

In 2004, Ohio provided for final determination of any controversy or contest concerning the appointment of its Presidential electors at least six days prior to the date of the meeting of the Electoral College.⁴ Despite the fact that Ohio’s electors qualified for this “safe harbor” provision, the United States Congress decided to challenge Ohio’s electors, although that

⁴ None of the Plaintiff candidates actually alleged that had the recount been completed prior to the meeting of the Electoral College, they would have actually been certified as winners in the State of Ohio.

challenge was ultimately defeated. *Democrats Challenge Ohio Electoral Vote Count*, Boston Globe, Jan. 7, 2005, at A2. Thus, to address the Plaintiffs' claims, this Court may well be forced to render an advisory opinion not only upon Ohio's election contest provisions, but also upon whether Congress exceeded its authority under 3 U.S.C. § 5 when it heard a challenge to Ohio's Presidential electors.

Furthermore, the entire federal statutory scheme can be read many different ways about exactly what may or may not be allowed after a State certifies its electors. *See, e.g.*, Stephen A. Siegel, *The Conscientious Congressman's Guide To The Electoral College Act of 1887*, 56 Fla. L. Rev. 541 (2004). Thus, this Court may have to issue numerous advisory opinions that prudence dictates would be best left for a genuine case or controversy.

3. No One Will Suffer Any Harm If This Court Determines This Case Is Not Yet Ripe For Adjudication.

The candidates simply will not suffer any harm whatsoever if this Court determines their claims are not yet ripe for adjudication. It is impossible to determine whether any of these candidates will ever appear on the Ohio Presidential ballot again. Although David Cobb has alleged that he "may run again for President of the United States in 2008" (Complaint at ¶ 5(a)), he has recently announced that he will not run for President in 2008. *See, Cobb Will Not Run for Green Party 2008 Presidential Nomination*, <http://www.scoop.co.nz/stories/HL0510/S00004.htm>, Attached as Exh. A. Likewise, although Michael Badnarik qualified for the Ohio ballot in 2004 as an independent, there is no guarantee that he will be capable of obtaining the 5,000 valid signatures to run as an independent in 2008. *See, e.g., Blankenship v. Blackwell*, 103 Ohio St. 3d 567 (2004) (affirming the determination of the Secretary of State that Ralph Nader did not obtain a sufficient number of signatures to qualify for the Ohio ballot as an independent in 2004). Finally, neither John Kerry nor John Edwards allege that they will ever appear on the Ohio ballot

as candidates for President. Since it appears certain that three of the four candidates will not appear on the Ohio ballot in 2008 (and there is no guarantee that the fourth candidate will qualify even if he decides to run for President), they will suffer no harm whatsoever if this Court determines that their claims are not yet ripe. *See, e.g., Renne v. Geary*, 501 U.S. 312 (1991) (determining that a case does not provide a ripe controversy where any concrete past harm had become moot and potential future harm was too ill-defined to litigate).

C. The Secretary of State Enjoys Eleventh Amendment Immunity From All Of The Plaintiffs Claims.

The Eleventh Amendment provides that “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decision of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not only brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex parte State of New York, 256 U.S. 490, 497 (1921).

There are three different ways for a State’s sovereign immunity under the Eleventh Amendment to be defeated. First, a State can consent to a lawsuit in federal court. *Clark v. Barnard*, 108 U.S. 436, 447 (1883). Second, Congress, pursuant to its power under the Fourteenth Amendment, may abrogate a State’s sovereign immunity. *City of Borne v. Flores*, 521 U.S. 507 (1997). Finally, the *ex parte Young* exception is allowed to the extent that the lawsuit names a State government official in his official capacity and only seeks prospective

injunctive relief against continuing violations of federal law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974).

The Plaintiffs have not alleged, and cannot claim, that the State of Ohio has consented to a lawsuit in federal court. Likewise, the Plaintiffs do not allege that Congress has acted under the Fourteenth Amendment to expressly waive Ohio's sovereign immunity. As a result, this Court will have jurisdiction under the Eleventh Amendment only to the extent that this suit conforms to the requirements of *ex parte Young*.

1. The Plaintiffs Have Failed To Plead An Ongoing Violation Of Federal Law That Requires Prospective Injunctive Relief.

In their complaint, the Plaintiff Candidates allege that:

The calendar fixed by Secretary Blackwell for counting and recounting the votes case in Ohio in the 2004 Presidential election deprived Plaintiff and Counter-Plaintiffs (of) their right to a timely and meaningful recount....

Complaint at ¶ 56. Plaintiffs' claims are predicated on a violation of State and federal law by the Secretary arising from the 2004 election recount. The remedy that the Plaintiffs seek is an injunction requiring Secretaries of State to "prescribe, adopt, administer and enforce uniform, accurate, fair and adequate statewide procedures to ensure the accurate recount of votes in Presidential elections for use in the 2008 Presidential election and thereafter," and "schedule the counting and recounting of the votes in future Presidential elections to provide sufficient time for the recount to be completed and the recounted votes to be used to determine the election of the President of the United States." From the very requests for relief, it becomes clear that the Plaintiffs have not asked for prospective injunctive relief. Rather, the Plaintiffs claims involve claims to remedy prior alleged violations as a result of the 2004 recount, regardless of how they couch their claims. Thus, the Plaintiffs have failed to qualify this lawsuit as an exception to the

State's sovereign immunity and they have failed to state a claim over which this Court may exercise jurisdiction.

“In determining whether the doctrine of *ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’” *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002) quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (O’Connor, J., concurring). The Sixth Circuit has recognized that prospective injunctive relief “includes, for example, reinstatement and an injunction against any further violations of [a person’s] rights.” *See, e.g., Williams v. Commonwealth of Kentucky*, 1997 U.S App. LEXIS 23939 at *37 (6th Cir. Sept. 9, 1997) Attached as Exh. B. Although the Plaintiffs have asked for an injunction regarding the 2008 election, they have failed to identify any ongoing violation of federal law by state officials. Instead, they merely speculate that future government officials might violate federal law and have asked the Court to issue a pre-emptive order prohibiting them from doing so. Thus, their request for future injunctive relief for the 2008 election is a sham request.

In this case, the Plaintiff Candidates do not seek vindication of federal rights in the future. Rather, they are simply asking for a vindication of an alleged prior harm. Because of that, the Eleventh Amendment and Ohio’s sovereign immunity prohibit this Court from exercising any jurisdiction whatsoever over the Plaintiffs’ claims.

2. Similarly, the Eleventh Amendment Prohibits This Court From Hearing Any Claim That The Secretary Violated Ohio Law In The Manner In Which The 2004 Presidential Recount Was Conducted.

In a claim that borders upon frivolous, the Plaintiffs have alleged that this Court has supplemental jurisdiction to hear their allegations that the Secretary of State violated Ohio law in

the conduct of the 2004 recount. (Complaint at ¶ 9). Furthermore, the Plaintiffs then allege that all three of their counts are for violations of Title 35 of the Ohio Revised Code.

The United States Supreme Court has held that “a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.” *Pennhurst*, 465 U.S. at 121. Thus, to the extent that the Plaintiff candidates’ claims rest upon any perceived violation of Ohio Revised Code Title 35, this Court is patently without jurisdiction to hear the claim and it should be dismissed.

III. Conclusion

For the foregoing reasons, this Court is without jurisdiction to hear this claim and it should be dismissed.

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 4th day of October, 2005.

/s Richard N. Coglianesi
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