

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

ANITA RIOS, et al. Plaintiffs,)	
v.)	Case No. 3:04CV7724(JGC)
KENNETH BLACKWELL, Defendant.)	
DELAWARE COUNTY PROSECUTING ATTORNEY, et al., Plaintiffs,)	
v.)	Case No. 3:05CV7286 (JGC)
NATIONAL VOTING RIGHTS INSTITUTE, et al. Defendants.)	(Consolidated Actions)

**PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION TO DISMISS
FIRST CONSOLIDATED AMENDED COMPLAINT**

Plaintiffs oppose Defendant Secretary Blackwell’s motion to dismiss the First Consolidated Amended Complaint (“the Complaint”).

As detailed in the Complaint, Secretary Blackwell’s misinterpretation of federal and Ohio law with respect to the timing of the 2004 recount of the votes cast for President of the United States created a Catch-22 scenario. Secretary Blackwell took (and continues to take) the position that a Presidential election recount need not be completed until well *after* Presidential electors have been sent from Ohio to the Electoral College to elect the President of the United States, and he scheduled the 2004 recount accordingly. Secretary Blackwell’s misinterpretation of law

makes it impossible to use the recounted votes to determine which Presidential candidate's electors are to be sent by Ohio to the Electoral College, and thus makes a mockery of the recount law, as recognized by Judge Sargus and by commentators throughout the state. The recount was marred by this and a variety of other defects of constitutional magnitude for which the Secretary was directly responsible.

In his motion to dismiss, Secretary Blackwell takes the equally illogical position that his illegalities are incapable of judicial review because the 2004 election is too far in the past and the 2008 election is too far in the future. That absurd proposition is, of course, not the law, and the Secretary's arguments on examination fail.

First, Secretary Blackwell argues that the individual and organizational Plaintiffs lack standing. Memorandum in Support of Defendant's Motion to Dismiss ("Dismiss Memo.") at 1-2 (*Rios* Docket No. 27 and *Delaware County* Docket No. 71). Significantly, Secretary Blackwell does not contest that the Presidential candidate Plaintiffs have standing. We show below that the remainder of the Plaintiffs have standing, but the court need not reach that question. Where, as here, another plaintiff's standing is clear, the court as a matter of judicial economy need not review the standing of the remaining plaintiffs. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("It is clear that members of the Union, one of whom is an appellee here, will sustain injury. . . . We therefore need not consider the standing issue as to the Union or Members of Congress.") (citation omitted).

Second, Secretary Blackwell argues that the dispute is not yet ripe because it is unlikely that the harm alleged by Plaintiffs will come to pass in 2008, the factual record is not sufficiently developed to allow adjudication of issues relating to the 2008 election and the parties have not shown that they will suffer hardship in 2008 if judicial relief is denied now. Dismiss Memo. at

3-7. Secretary Blackwell's argument, however, largely ignores the events of 2004, which powerfully demonstrate the likelihood of future harm and so form the basis for the prospective relief sought. The Complaint pleads (and Plaintiffs are entitled to have taken as true on a motion to dismiss) that the harm inherent in Secretary Blackwell's policies has already come to pass; it alleges the facts of that recount in more than enough detail for the Court to address the legality of those policies; and it pleads abundant hardship to the Plaintiffs in impairing their rights in connection with recounts of the Presidential vote in Ohio. Thus, the parties have a real and full-blown dispute about the Secretary's policies and practices based upon the events of 2004 that is fully ripe for adjudication.

Third and finally, Secretary Blackwell argues that the Eleventh Amendment proscription on actions against States bars the relief sought in the Complaint. But the defendant here is not the State of Ohio, it is Secretary Blackwell. Because Plaintiffs seek only prospective injunctive relief, and declarations in support thereof, a century of Supreme Court precedent makes clear that the Eleventh Amendment is no bar to an action against Secretary Blackwell. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908).¹

FACTS

Because of the complexity of the procedural history of this case, Plaintiffs begin with a brief recital of that procedural history. On November 2, 2004, the general election was held nationwide in which David Cobb and Michael Badnarik were candidates for United States

¹ Consistent with the unopposed motion by Plaintiffs to the Court to realign the parties and modify the style of the case (*Delaware County* Docket No. 67), Presidential candidates Cobb and Badnarik are referred to herein as Plaintiffs, although they were sued and named defendants in *Delaware County*, C.A. No. 3:05CV7286 (JGC), before the complaint against them was dismissed by Order of the Court dated February 14, 2005 (*Delaware County* Docket No. 52). Plaintiffs' counterclaims in *Delaware County* also are pleaded as claims in the Complaint. Likewise, Secretary Blackwell is referred to herein as the Defendant in *Rios* and *Delaware County*.

President. Complaint ¶¶ 5a and 5b (*Rios* Docket No. 22 and *Delaware County* Docket No. 66). Cobb and Badnarik thereafter applied and paid for a 2004 Presidential election recount in Ohio. *Rios* Complaint ¶ 31 (*Rios* Docket No. 1); Complaint ¶ 23.² On November 22, 2004, Plaintiffs sued Secretary Blackwell, and sought emergency relief, to secure an expedited recount to avoid his violation of their constitutional rights in the recount of votes cast in Ohio in the 2004 Presidential election. Plaintiffs' Motion for A Temporary Restraining Order (November 22, 2004) (*Rios* Docket No. 4). Plaintiffs' complaint alleged harms from Secretary Blackwell's violation of their constitutional and other rights by taking actions that would (and ultimately did) prevent the recounted votes from determining the outcome of the Presidential election in Ohio. *Rios* Complaint ¶¶ 22-64; Complaint ¶¶ 12-27. In short, Plaintiffs complained that Secretary Blackwell's published and repeatedly reaffirmed schedule by which he would not certify the Presidential election results before December 6, 2004, did not allow time for a Presidential election recount to be completed before the federal safe harbor deadline of December 7, 2004 or the Electoral College vote on December 13, 2004. *Id.* In fact, Secretary Blackwell did not certify the results of the 2004 Presidential election recount until January 7, 2005. Complaint ¶ 24.³

² When Cobb and Badnarik were not declared elected President in Ohio by Secretary Blackwell on December 6, 2004, they again applied and paid for a Presidential election recount in accordance with ORC § 3515. Complaint ¶ 23.

³ Plaintiffs sue Secretary Blackwell in his official capacity as the chief elections officer for Ohio, and any successor thereto. Complaint ¶ 6. As Secretary of State of Ohio, Kenneth Blackwell is the chief election administrator for Ohio, responsible for administrating all statewide elections, including those for federal office. ORC § 3501.04. As part of Secretary Blackwell's duties as Secretary of State he appoints (and can remove) all members of the county boards of election, issues instructions to the boards as to the proper methods of conducting elections, including recount procedures, and otherwise compels their observance of the requirements of the election laws. *Id. et seq.* Because Secretary Blackwell and his successors are sued in an official capacity, *see* Complaint ¶ 6, the term limits imposed on Secretary Blackwell are irrelevant here. Dismiss Memo. at 4 n.2 (*Rios* Docket No. 27 and *Delaware County* Docket No. 71).

After being sued on November 23, 2004, by the Delaware County Board of Elections in the Delaware County Court of Common Pleas, to stop the recount, Plaintiffs Cobb and Badnarik removed that case to federal court, answered, and counterclaimed against Secretary Blackwell. Notice of Removal (*Delaware County* Docket No. 1); Answer and Counterclaim (*Delaware County* Docket No. 4). Twice again Plaintiffs Cobb and Badnarik sought emergency relief to require Secretary Blackwell to expedite the 2004 Presidential recount and then to conduct the recount with fair, adequate and uniform statewide procedures. Defendants/Counter-Plaintiffs Motion for a Preliminary Injunction, December 2, 2004; Counter-Plaintiffs' Motion for a TRO and Preliminary Injunction, December 10, 2004 (*Delaware County* Docket No. 24).

The federal timetable for the Presidential election process was too short to permit resolution of the merits of Plaintiffs' claims about Secretary Blackwell's Presidential recount procedures prior to the 2004 Presidential recount. While Secretary Blackwell committed to conduct a recount of the votes cast in the Presidential election, Judge Sargus observed, "the recount will in all likelihood . . . proceed after it is impossible to change the effect on the electoral college. And that I am certain was not the intent of the Ohio legislature in providing for a recount." December 3, 2004 Hearing Transcript at 17 and 87 (*Delaware County* Docket No. 38). Then, in declining prior to the recount to impose a temporary restraining order enjoining Secretary Blackwell to provide fair and adequate, uniform statewide Presidential recount procedures, Judge Sargus stated that, "under these circumstances 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 law or federal law, that relief could still be granted at that point."

December 10, 2004 Hearing Transcript at 15 (*Delaware County* Docket No. 38); December 10, 2004 Order (*Delaware County* Docket No. 24).⁴

Following the transfer of the *Delaware County* case to this Court and its consolidation with the *Rios* case, and pursuant to the Court's scheduling order of September 6, 2005, Plaintiffs filed their First Consolidated Amended Complaint. Secretary Blackwell has now moved to dismiss that Complaint.

ARGUMENT

I. Standard of Review.

Absent demonstration by the defendant that "no relief could be granted under any set of facts that could be proved consistent with the allegations" in the complaint, a motion to dismiss must be denied. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citation omitted). The complaint must be considered in the light most favorable to plaintiffs, accepting all factual allegations and permissible inferences from the allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Further, the Sixth Circuit has specifically cautioned against dismissal of civil rights claims on the pleadings. *Jones v. Duncan*, 840 F.2d 359, 361 (6th Cir. 1988) holding that "[d]ismissals of complaints under the civil rights statutes are scrutinized with special care" and reversing dismissal of claim brought under 42 U.S.C. §§ 1983 and 1985).⁵

⁴ While the 2004 Presidential recount in Ohio was in progress, Plaintiffs Cobb and Badnarik submitted newly discovered evidence raising serious questions as to whether a manufacturer of voting machines was tampering with the recount. Notice of Filing of Newly Discovered Evidence in Support of Plaintiffs' Motion for a Preliminary Injunction, December 15, 2004 (*Delaware County* Docket No. 27). They also moved for an order to preserve election records and other materials and to obtain limited expedited discovery regarding voting machine tampering during the recount. Motion for Order to Preserve and Leave to Take Limited Expedited Discovery, December 23, 2004 (*Delaware County* Docket No. 33). Two weeks later, Plaintiffs Cobb and Badnarik filed an amended counterclaim documenting a series of inconsistent standards employed by county boards of elections in conducting the recount and alleging that Secretary Blackwell had violated their constitutional rights by failing to prescribe and require the use of fair, accurate and adequate, uniform statewide recount procedures. Defendants David Cobb and Michael Badnarik's Amended Counter-Claims (December 30, 2004) (*Delaware County*).

⁵ Secretary Blackwell has previously moved to dismiss the complaint in *Rios* and the counterclaims filed in *Delaware County*. Motions to Dismiss (*Rios* Docket No. 12, December 29, 2004 and *Delaware County* Docket No.

II. These Actions Are Ripe For Review.

Secretary Blackwell’s challenge to the Complaint on ripeness grounds ignores controlling Supreme Court precedent and Plaintiffs’ detailed averments of actual harm. Plaintiffs clearly have presented a full-blown controversy over which the Court has jurisdiction.

Courts evaluate actions for ripeness to ensure that an action is not decided until the claims presented have enough context that a court can properly adjudicate them. A case is ripe for purpose of Article III of the United States Constitution, and the Declaratory Judgment Act, when “the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory [relief].” *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (reversing lower court for dismissing complaint); *Railway Mail Ass’n. v. Corsi*, 326 U.S. 88, 93 (1945) (ripe cases “present a real, substantial controversy between parties having adverse legal interests” – they are not “hypothetical or abstract”); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (“avoidance of premature adjudication” is the primary rationale for the ripeness doctrine). Ripeness arises where a plaintiff alleges that harm is threatened. *See, e.g., Briggs v. Ohio Elections Comm’n*, 61 F.3d 487, 493 (6th Cir. 1995) (Due process and First Amendment claims of candidate ripe given *potential* for future injury from Commission’s application of election advertisement statute in light of Commission’s past reprimand of candidate for misrepresentation regarding her incumbency).

Actual harm to a plaintiff “dispenses with any ripeness concerns.” *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1007 n.6 (9th Cir. 2003) (dismissing in a one sentence footnote ripeness challenge to election law where actual harm had already occurred); *Fla. Right to Life*,

42, January 10, 2005). These earlier motions are moot given Plaintiffs’ First Consolidated Amended Complaint, which was filed on September 19, 2005 (*Rios* Docket No. 22 and *Delaware County* Docket No. 66).

Inc. v. Lamar, 273 F.3d 1318, 1323 (11th Cir. 2001) (finding challenge to election laws is ripe where harm exists); *cf. Bush v. Gore*, 531 U.S. 98, 103-06 (2000) (holding that the lack of uniform treatment of ballots in Florida in the 2000 Presidential election violated the Equal Protection Clause of the Fourteenth Amendment).

Ripeness is not an issue here because Plaintiffs have already been injured due to Secretary Blackwell's maladministration of the 2004 Presidential election recount. Plaintiffs provide in the Complaint examples from the 2004 recount of some of the types of defects in Secretary Blackwell's administration of Presidential election recounts:

- The untimely, and impossibility of a timely, Presidential recount under the election schedule set and maintained by Secretary Blackwell (¶¶ 12-27);
- 12 examples from across Ohio of serious breaches in ballot security where ballots were made inaccessible to the public and where ballots and voting machines were altered (¶ 54);
- 11 examples from across Ohio of serious defects in the treatment of recount witnesses and their access to provisional and absentee ballots, poll books and other voting materials (¶¶ 58 and 62);
- nine examples from across Ohio of serious defects in the selection of precincts for the initial 3% hand recount and in providing for a full hand recount when the 3% hand recount twice failed to match the 3% machines recount (¶¶ 45 and 48); and,
- the absence of procedures from Secretary Blackwell to recount votes on Direct Record Electronic voting machines (¶¶ 63-68).

Secretary Blackwell's interpretation of the law continues as the policy and practice of the Ohio Secretary of State, and the procedural defects in the recount of the votes cast for President in Ohio in 2004 are likely to occur again under Secretary Blackwell or his successors, absent judicial intervention and resolution of the issues raised in this action. Complaint ¶¶ 2 and 4.⁶

⁶ Further, this Court's failure to address Plaintiffs' claims of constitutional violations is likely to inhibit Plaintiffs' and others' participation in the democratic process as voters and candidates. This "chilling effect" militates in favor of the court's addressing these claims now rather than later. This follows logically from the Sixth Circuit's *Magaw* decision regarding ripeness in which the court found it critical to address First Amendment claims earlier than other

As is plain to see, Secretary Blackwell's maladministration of the 2004 Presidential election recount has already harmed Plaintiffs because the recounted votes did not determine the outcome of the 2004 Presidential election in Ohio, nor were there fair and adequate, uniform statewide procedures in place and enforced to ensure the integrity of the recount. Secretary Blackwell's Presidential recount policies and practices have not changed (and, in any event, absent judicial relief he would be free to re-impose them). Complaint ¶¶ 27-30. Unless the Court addresses Plaintiffs' claims now, Plaintiffs face further injury at the next Presidential election recount without prospect of having them prevented. Complaint ¶¶ 2 and 4.⁷ Under the well-established Supreme Court precedent discussed above, these cases are ripe.

Nevertheless Secretary Blackwell ignores Plaintiffs' actual harm from his conduct of the 2004 Presidential election recount and asserts that the future is too uncertain for these cases to be heard. In doing so, Secretary Blackwell cites to the Sixth Circuit's three considerations for ripeness:

- 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 Assn' v. United States Dep't of Justice, 71 F.3d 563, 568 (6th Cir. 1995), cited at Dismiss Memo. at 9.

claims because of the "chilling effect" that an unconstitutionally overbroad statute could have on expressive freedoms. *NRA of Am. v. Magaw*, 132 F.3d 272, 284-85 (6th Cir. 1997).

⁷ Badnarik alleges that he is likely to run again for President, and Cobb has stated publicly that he may run for Vice-President with a woman as the Presidential candidate for the Green Party. Complaint ¶ 5 and Exhibit A to Defendant's October 4, 2005 Motion to Dismiss.

With respect to these conditions, Secretary Blackwell first argues that Presidential candidate Plaintiffs cannot show future harm to themselves from a Presidential election recount in Ohio because (1) the timing of the initial certification of the winning Presidential candidate may be different next time, (2) his Directive 2004-58, which set forth in a page his procedures for the 2004 Presidential recount, was limited by its terms to the 2004 Presidential election recount, (3) he cannot serve another term as Secretary of State, and (4) Ohio may replace the Secretary of State with a nine-person board. None of his arguments are of any moment, however, because absent judicial relief, Secretary Blackwell and his successors remain free to conduct future Presidential election recounts just as he did in 2004, and thereby, render the recount meaningless.

Second, Secretary Blackwell argues that no factual record yet exists to allow fair adjudication of the parties' claims regarding Presidential elections in 2008 and beyond. This argument of course ignores the complete factual record that exists from Secretary Blackwell's conduct of the 2004 Presidential election recount, as discussed above. *See supra* pages 3-6 and 8-9. Moreover, contrary to Secretary Blackwell's assertion, Plaintiffs do not "speculat[e] about what the law governing the 2008, 2012, 2016 or 2020 Presidential elections in the State of Ohio will be." Rather they advance their claims under existing law, which laws were applicable to the 2004 Presidential election, and which laws have not been changed. Nor is there any merit to Secretary Blackwell's suggestion that these cases will require judicial consideration of the Ohio election contest provisions, or Congressional power to reject Ohio electors chosen outside the federal safe harbor statute. Plaintiffs' complaint does not contest the 2004 Presidential election. Complaint ¶ 2.

Third, and finally for the ripeness doctrine, Secretary Blackwell erroneously asserts that no one will suffer any harm in the future if the Court dismisses these cases as unripe. Michael Badnarik was on the Ohio ballot as a Presidential candidate in 2004. The same harm that gives him standing makes this case ripe for adjudication now. *See, e.g., Belitskus v. Pizzingrilli*, 343 F.3d 632, 649 n.11 (3d Cir. 2003) (“[A]s other courts have, we conclude that it is reasonable to expect political candidates to seek office again in the future.”); *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 128 (6th Cir. 1995) (potential candidate has standing). Indeed, Michael Badnarik alleges that he will run again for President of the United States. Complaint ¶ 5b. Badnarik’s likelihood of running again for President must be taken as true, and all inferences made in his favor, in opposing a motion to dismiss. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Jones v. Duncan*, 840 F.2d 359, 361 (6th Cir. 1988). Badnarik will be harmed if this case is not heard, and harm to him alone is sufficient for the Court to hear and resolve this dispute.

In addition to Badnarik, David Cobb would also be harmed because he may run for Vice-President on the Green Party ticket in 2008 or for President or Vice-President in Presidential elections thereafter. Complaint ¶ 5a and Dismiss Memo. at Ex. A (news report regarding Cobb’s future intention to be a Vice-Presidential Candidate in 2008). For this reason as well, these cases are ripe for adjudication.

III. The Eleventh Amendment Does Not Bar These Actions.

Secretary Blackwell’s contention that Eleventh Amendment sovereign immunity bars this suit ignores a century of precedent allowing equitable relief against state officials. To prevent Secretary Blackwell’s further violation of their constitutional rights, Plaintiffs seek declaratory judgment that such violations are illegal and prospective relief against Secretary Blackwell to prevent further violations. Complaint ¶¶ 2, 4 and Prayer for Relief. This is a time-honored way

of remedying unconstitutional behavior by state officials authorized by the U.S. Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), and *Edelman v. Jordan*, 415 U.S. 651 (1974). Secretary Blackwell's rhetoric tries unsuccessfully to distort these facts and legal framework.

Secretary Blackwell acknowledges, as he must, that the Eleventh Amendment allows prospective equitable relief, *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645-46 (2002), then ignores that Plaintiffs' Complaint requests such relief. Secretary Blackwell defeats his own argument, however, when he quotes language from the Complaint regarding the prospective declaratory and injunctive relief sought. Dismiss Memo. at 8 (*Rios* Docket No. 27 and *Delaware County* Docket No. 71) (noting that Plaintiffs seek to "prescribe, adopt, administer and enforce uniform, accurate, fair and adequate statewide procedures 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"). As Plaintiffs specifically request remedies for future Presidential elections, they do not seek the relief for past harms that is disallowed under the Eleventh Amendment.

The only retrospective relief sought is a declaratory judgment that the past, as well as the future, violations of Plaintiffs' rights are unconstitutional. Complaint ¶ 24. This is identical to relief the Supreme Court found the Eleventh Amendment permitted in *Verizon Md.*, 535 U.S. at 645-46, which Secretary Blackwell cites with approval in his motion to dismiss. There the plaintiff requested, *inter alia*, declaratory relief regarding the *past and future* actions of the defendant. *Id.* at 646 (stating that Verizon "seeks a declaration of the *past*, as well as the *future*, ineffectiveness of the Commission's action. . . ."). The Court found this was permissible because "no past liability of the State, or of any of its [defendant officials], is at issue. [The requested

relief would not] impose upon the State ‘a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.’” *Id.* (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). As in *Verizon* and *Edelman*, Plaintiffs’ “prayer for declaratory relief adds nothing to the prayer for injunction.” *Id.*

Nor is Secretary Blackwell’s citation to *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), of any moment. Dismiss Memo. at 9-10. *Pennhurst* held only that federal judicial enforcement of purely state law duties against state offices is barred by the Eleventh Amendment. *Id.* at 121. By contrast, the duty Plaintiffs seek to enforce here is a duty authorized by federal law relating to Presidential elections. Title 35 of the Ohio Rev. Code, which provides for election recounts, was created pursuant to the federal power delegated to the state pursuant to Article II, § 1 of the U.S. Constitution, which provides that the states should create a method for determining how they will vote in the Electoral College every four years. This Ohio law is part of the federal legal framework for electing the President and Vice-President of the United States that begins with Article II and includes the safe harbor provisions of Title 3 of the U.S. Code and the Electoral College vote. Claims for relief from Secretary Blackwell’s maladministration of Title 35 in the recount of votes cast in Ohio in Presidential elections thus involve federal questions that the Court has subject-matter jurisdiction over pursuant to 28 U.S.C. §§ 1331 and 1343(1). The Court need not exercise supplemental jurisdiction to reach any of the claims presented.

IV. Standing Is No Bar to Prosecution by Common Cause and the Ohio Voters of Their Claims.

To have standing to prosecute a case in federal court, a plaintiff must demonstrate a personal stake in the resolution of the controversy. *See Baker v. Carr*, 369 U.S. 186, 204 (1962) (finding voter standing for facial challenge to election law). That is, he or she has (1) an “injury

in fact” that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is traceable to the challenged action by defendant; and (3) the injury is likely to be redressed by a favorable decision. *See, e.g., United States v. Hays*, 515 U.S. 737, 743 (1990) (observing that plaintiffs residing within an election district could prosecute claim that the lines for the district were unconstitutionally drawn in violation of equal protection because the line selection would impact their vote); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 523-24 (6th Cir. 2001).⁸

Secretary Blackwell does not dispute that the Presidential candidate Plaintiffs have standing to sue him for failure to provide and enforce uniform statewide procedures for a timely, fair and adequate recount. Plaintiffs Cobb and Badnarik properly applied and paid for the 2004 Presidential election recount that they allege Secretary Blackwell failed to conduct properly. Complaint ¶ 23. In addition to the economic loss Presidential candidates Cobb and Badnarik incurred to pay for the 2004 Presidential election recount in Ohio, as previously discussed, they also have been harmed by Secretary Blackwell’s failure to ensure that the recounted votes were used to determine the outcome in Ohio of the 2004 Presidential election and failure to conduct the recount with fair, adequate, and uniform statewide procedures. The injuries that they have

⁸ With respect to an organizational plaintiff, an organization can have standing to sue on two independent grounds: (1) “organizational standing,” when the action of defendant threatens to substantially impede the purpose or activities of the organization or divert organizational resources, *ACLU of Ohio v. Taft*, 385 F.3d 641, 646 (6th Cir. 2004) (ACLU had standing to challenge Ohio’s refusal to hold special election: “This case addresses citizens’ right to vote and right to equal representation, which falls squarely within the ACLU’s purpose of guaranteeing constitutional and fundamental rights.”); and (2) “associational standing” because members of the organization would have standing to sue in their own right, the interests at stake are germane to each organizations purpose, and the claims asserted and relief requested do not require participation of individual members in the lawsuit. *Sandusky County Dem. Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (organization can represent members when seeking prospective or injunctive relief). Common Cause of Ohio has organizational standing since the maladministration by Secretary Blackwell of Presidential election recounts in Ohio diverts the limited resources, and impedes the activities, of Common Cause Ohio to encourage honest, open and accountable government and public policy, promote citizen participation in government, and protect and safeguard constitutional and civil rights. Complaint ¶ 5d. Common Cause of Ohio, as an association of voters, also has standing to represent the rights of its members who vote in Presidential elections in Ohio. Complaint ¶ 5d; *cf. Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997).

suffered, and that they potentially will suffer again in future Presidential elections, whether as Presidential or (in the case of Cobb) Vice-Presidential candidates, would be redressed by equitable relief that requires Secretary Blackwell to provide and enforce uniform statewide procedures to ensure a timely, fair and adequate recount of the votes cast in Ohio in the Presidential elections. Cobb and Badnarik are the two plaintiffs in *Rios* who were then sued by Delaware County and who counterclaimed against Secretary Blackwell in *Delaware County*. See *supra* page 5. Accordingly, since Cobb and Badnarik are pursuing claims in each case, neither case may be dismissed on the basis of standing.

Courts have repeatedly recognized that as long as one plaintiff has standing to bring claims, the other plaintiffs need not have their own independent standing. See, e.g., *Bowsher*, 478 U.S. at 721; *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 402 n.22 (1982); *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1282 (1st Cir. 1996); *Planned Parenthood of Cincinnati Region v. Taft*, 337 F. Supp. 2d 1040, 1044 (S.D. Ohio 2004). Thus, while Common Cause Ohio and the individual Ohio voter plaintiffs have standing, the Court need not address these particulars since their standing can be pendent on the standing of Presidential candidates Cobb and Badnarik.⁹

⁹ Plaintiff Ohio voters have standing because each has an “injury-in-fact.” Whether or not these Plaintiffs are entitled to request a recount, once a recount is granted under Ohio law, Plaintiff Ohio voters submit that the recount cannot be executed in a manner that violates their constitutional rights. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.”); *Baker*, 369 U.S. at 207-08 (holding plaintiff voters had standing to prosecute allegations that their voting power vis-à-vis voters in other counties was diminished by the state statutes at issue in violation of the Fourteenth Amendment. The Court declared that voters are asserting “a plain, direct and adequate interest in maintaining the effectiveness of their votes.”). Similar to the plaintiffs in *Baker*, Plaintiff Ohio voters allege that Secretary Blackwell maladministers Presidential recounts in a manner that accords disparate treatment of votes between Ohio counties in violation of their equal protection and due process rights under the Fourteenth Amendment. Complaint ¶¶ 59-68. Moreover, Secretary Blackwell does not dispute that the injuries alleged by the Ohio voter Plaintiffs are traceable to his alleged failure to provide and enforce fair, adequate, and uniform statewide Presidential election recount procedures. Dismiss Memo. at 1-2. Finally, Secretary Blackwell neither disputes that the relief sought by Plaintiff Ohio voters would have prevented their injuries due to his maladministration of the recount, if it had been imposed before the recount, nor that further injury to Plaintiff Ohio voters would be avoided if the policies and practices of the 2004 Presidential election were now prohibited. *Id.*

CONCLUSION

For the foregoing reasons, Defendant Secretary Blackwell's Motion to Dismiss should be denied.

Dated: October 24, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 24th day of October, 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
Richard M. Kerger