

**n 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.

Defendants' Reply Brief In Support Of His Motion To Dismiss

I. Introduction

In this case, the Plaintiffs and the Intervenors misapply federal and state law in the hopes of circumventing the Eleventh Amendment and granting this Court jurisdiction to hear claims that are simply not ripe. Furthermore, they simply ignore the fact that because they simply do not yet know whether they will ever again appear on an Ohio Presidential ballot¹ their claims are not yet ripe. Since the Plaintiffs and the Intervenors have not alleged any claim under federal law for prospective injunctive relief, this Court must dismiss their claims.

¹ Or run as a Write-In as David Cobb did in 2004.

II. Law And Argument

A. The Candidates Have Failed To Present Any Legitimate Reason Why This Case Is Ripe For Adjudication.

The simple truth about this case is the Plaintiffs have presented the Court with a hypothetical question about what a recount in 2008 might look like and have asked the Court to speculate about whether such a recount would violate the United States Constitution. First, we simply do not know who the Presidential candidates in 2008 will be. One thing is certain; David Cobb has already announced that he *will not be a candidate for President in 2008.*² Second, although the other candidates claim that they might run for President in 2008, such a statement is not sufficient to show that they will actually suffer harm due to a recount in 2008.

Furthermore, there is simply no reason to believe that a recount of the Presidential vote in Ohio will occur in 2008. Under Ohio law concerning a statewide election, a recount will automatically occur if the margin of victory is less than 0.25%. R.C. § 3515.011. A recount may also occur as it did in 2004 when a defeated candidate asks for a recount in a specific precinct within five days after the certification of the election and pays the statutorily mandated fee. R.C. §§ 3515.01, 3515.07. Finally, the Candidates, including Kerry/Edwards, have simply failed to introduce any factual basis for this Court to conclude that these hypothetical recounts that might take place in 2008 would mirror the 2004 recount.

As demonstrated in the Motion to Dismiss, the recount timeframe in Ohio in 2004 was driven by the certification date. There is simply no reason to believe that an election in 2008, 2012, 2016, or 2020 will follow the same deadlines that the 2004 election followed. The Candidates have failed to show otherwise.

² Although he speculates that he might be the Vice Presidential selection of an unknown and unnamed female Presidential candidate, it is pure speculation that he, in fact, will be.

Furthermore, the Candidates arguments concerning “harm” in the 2004 election do not allow this Court to find this case ripe. They simply allege that there were “examples” of problems with the 2004 recount. However, that simply does not show that a recount in 2008 is likely or that these particular Candidates will be the ones affected. Thus, they have simply failed to demonstrate that this case is ripe for adjudication.

Most importantly, perhaps, is that the Candidates simply do not contest the notion that this Court will be forced to give an advisory opinion on the meaning of 3 U.S.C. §§ 5 and 15. In order to reach any determination about recounts in Ohio, this Court would need to construe the exact meanings of 3 U.S.C. §§ 5 and 15. It may even need to declare that the challenge to Ohio’s Presidential electors violated that statutory provision and Congress cannot mount any challenge to any elector who was officially certified prior to the “safe harbor” date. On the other hand, if this Court determines this case is, in fact, ripe, it may need to determine that Congress’ actions in challenging Ohio’s Presidential electors were legitimate and that the apparent protections in federal law are non-existent. Either way, the necessity of making this determination should lead to excessive caution before determining this case is ripe for adjudication.

B. The Individuals Electors Who Are Part Of This Litigation Simply Have No Standing To Press Any Claim.

Instead of directly arguing that the individual electors have standing to bring this litigation, the Plaintiffs simply argue that because the failed Presidential candidates have standing, the Court need not address the issue of individual or organizational standing. The Plaintiffs further seem somewhat disingenuous in their footnote discussing this issue. If they are claiming that the 2004 recount violated their constitutional rights in the manner in which it was conducted, that simply is not a claim for prospective injunctive relief and is, therefore barred under the Eleventh Amendment. If, however, their claim is that David Cobb, who might

possibly run for Vice President in Ohio in 2008 if an unknown person asks him to be her running mate and they believe that they might be harmed in 2008 because of timing, they have no standing to raise that claim.

C. The Eleventh Amendment Prohibits This Court From Exercising Jurisdiction Over The Plaintiffs' Claims.

The Plaintiffs seem to mischaracterize the extent of their legal challenge and the type of relief they seek. First, the Plaintiffs, in their memorandum contra clearly attempt to cast this case as a violation of Ohio law. (Memo Contra at 8, 13). Although the Plaintiffs claim that Title 35 was passed pursuant to Art. II § 1 of the Constitution, that simply does not give this Court jurisdiction to hear any allegations of violations of those statutory provisions. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) makes it clear that a district court is patently without jurisdiction to hear any claim that a State official violated State law. Thus, this Court cannot hear the Plaintiffs claims in this case since they base those claims upon Title 35 of the Revised Code.

Likewise, the Plaintiffs' request for relief is merely a sham. They are simply asking, based upon a hypothetical case in which they want the Court to believe the State of Ohio will violate federal law in the future, to order the State's officials to comply with federal law for the 2008 election. Prudential mootness dictates against an injunction in that case. *See, e.g., Chang v. TVA*, 82 F.2d 817, 822 (E.D. Tenn. 1999). Furthermore, this request for future relief is a feeble attempt to give the appearance of a request for prospective injunctive relief. Therefore, this Court lacks jurisdiction to hear any of the Plaintiffs claims.

III. Conclusion

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

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 3rd day of November, 2005.

/s Richard N. Coglianese
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