

**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 Memo Contra Motion To Alter Or Amend

In their motion to alter or amend, the Plaintiffs have raised a frivolous argument in order to claim that their claims are no longer moot. They have relied upon recount schedules for a State election in 2005 and tried to selectively quote provisions from H.B. 3, which will become effective on May 2, 2006. However, neither of these arguments shows that this case is moot. Thus, this Court should deny the Plaintiffs' motion.

The plaintiffs' arguments concerning Directive 2005-32 is misplaced. Surely, the Plaintiffs are not contending that Ohio conducted an election for Presidential electors in 2005. Most certainly, the Plaintiffs are not contending that in a Statewide general election, a recount for a school board must be completed by the safe harbor date in 3 U.S.C. § 5. The State is

completely free to determine the timing of recounts for State office and this Court would have no jurisdiction to hear any challenge to that. Thus, the Plaintiffs cannot use Directive 2005-32 in this case.

Likewise, the Plaintiffs cannot use H.B. 3 to show that this case is not moot. Although the Plaintiffs are correct that H.B. 3 specifies that “[t]he Ohio legislature intended that Ohio’s Presidential electors participate fully in the federal electoral process in accordance with 3 U.S.C. § 1 *et seq.*” However, under the terms of H.B. 3, “any recount of votes conducted under this chapter shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors.” R.C. § 3515.041.¹ Thus, any Presidential recount in Ohio will be completed, as a matter of State law, no later than six days before the meeting of electors. The Plaintiffs, therefore, cannot rely on H.B. 3 to claim this case is not moot.

Finally, the Plaintiffs have failed to make any arguments whatsoever that would show this Court has jurisdiction to hear this case. As the Defendants have demonstrated, a recount is a matter of State law. Under the Eleventh Amendment, this Court is without jurisdiction to hear this case regardless of whether it is moot.

For the foregoing reasons, this Court should deny the Plaintiffs’ motion to vacate its prior decision.

Respectfully submitted,

Jim Petro
Attorney General

/s Richard N. Coglianes
Richard N. Coglianes (0066830)
Deputy Attorney General

¹ This new provision of the Revised Code becomes effective with most of the rest of H.B. 3 on May 2, 2006.

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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. Coglianes
Richard N. Coglianes