



Plaintiffs rely in seeking prospective injunctive relief to prevent such delay in the future, and (2) Defendant Blackwell's adoption of the recount procedures of Directive No. 2004-58 (December 7, 2004) for the 2005 election in Ohio. *See* Directive No. 2005-32 (November 17, 2005), with the *Outline of Recount Procedures*, attached hereto as Plaintiffs' Exhibit A ("The requirements set forth in the 2005 *Outline of Recount Procedures* are based on the *Outline of Recount Procedures* that was sent with Directive 2004-58 on December 7, 2004 . . . ."). Plaintiffs ask the Court to deny Defendant's Motion to Dismiss and reinstate their Complaint because Plaintiffs meet all of the *Ex Parte Young* requirements to prosecute this case for prospective injunctive relief against ongoing violations of federal law by Secretary Blackwell.<sup>1</sup>

### **Background**

Presidential candidates David Cobb and Michael Badnarik properly applied for and filed suit to obtain a timely, fair and otherwise meaningful recount of the votes cast in Ohio in the 2004 Presidential election. The rather complicated procedural history of this litigation is set forth in Plaintiffs' Opposition to Defendant's Motion to Dismiss Their First Consolidated Amended Complaint, Docket No. 75, and will not be repeated here.

In their First Consolidated Amended Complaint, Plaintiffs seek prospective injunctive relief remedying procedural defects of constitutional magnitude in the Defendant's conduct of recounts of votes cast in Ohio for President of the United States. First Consolidated Amended Complaint of Plaintiffs in Case No. 3:04CV7724 and of Counter-Plaintiffs in Case No.

3:05CV7286 (September 19, 2005) (the "Complaint") ¶¶ 1-3; 54-68 and Prayer for Relief. The

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<sup>1</sup> 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 First Consolidated Amended Complaint. Likewise, Secretary Blackwell is referred to herein as the Defendant in *Rios* and *Delaware County*.

Complaint alleges that these fundamental defects are capable of repetition in future Presidential elections yet would evade appropriate review absent this suit, and seeks a declaration that they are unlawful. *Id.*

a. Recount Timing Procedures Plaintiffs' Complaint alleges that Defendant Blackwell builds-in a "delay in the certification of the initial vote count that denies sufficient time for the recount of the Presidential election vote to be completed and the results of the recounted vote to determine the election in Ohio for President of the United States." Complaint ¶ 3. Plaintiffs allege that, despite the intention of the Ohio legislature that any recount conducted in accordance with Ohio law would be completed in time for the state's Presidential electors to participate fully in the federal electoral process by complying with the federal safe harbor statute, 3 U.S.C. § 5, Blackwell directed that the Ohio county board of elections need not provide him with their certified abstracts before December 1, 2004, 29 days after the election. *See* Complaint ¶¶ 12-21 and Directive 2004-43 (October 25, 2004) at 3 ("Each board's official canvass must be completed no later than December 1."), which is attached hereto as Plaintiffs' Exhibit B. Plaintiffs also allege that Secretary Blackwell intended to wait and did wait until December 6, 2004, only one-day before the expiration of the federal safe harbor provision, to certify the statewide results of the 2004 Presidential election in Ohio based on the initial count of the vote. Complaint ¶¶ 19-20. Plaintiffs further allege that "[i]t continues to be the policy of Secretary Blackwell that the recount of a Presidential election in Ohio need not be completed until after the federal safe-harbor date and after Ohio presidential electors have been appointed, met and cast their votes." Complaint ¶ 27.

b. Recount Conduct Procedures On December 7, 2004, Secretary Blackwell issued Directive 2004-58, which one-page directive summarized rules for the start of the Presidential

recount and to which the Secretary attached his pre-existing *Outline of Recount Procedures*. Complaint ¶ 28. See Directive 2004-58 (December 7, 2004), with the *Outline of Recount Procedures*, attached hereto as Plaintiffs' Exhibit C. Plaintiffs' Complaint sets forth a variety of fundamental defects in Secretary Blackwell's recount procedures, as demonstrated in the 2004 election, including:

- Inadequate procedures to preserve and secure ballots, voting machines and other voting materials;
- Inadequate standards for the random selection of the initial 3% of the statewide votes to be hand counted in the recount;
- The absence of procedures to conduct a recount of votes cast on electronic voting machines; and
- Inadequate procedures to ensure uniform and proper treatment throughout the state of access by recount observers to provisional, absentee, and spoiled ballots, to poll books, to voting machines and to other materials.

Complaint at ¶ 3; see also ¶¶ 28-53.

The Complaint further alleges that the timing and manner defects in the recount of votes cast in Ohio in the 2004 Presidential election are likely to occur again under Secretary Blackwell or his successors, who are likely to use the 2004 Presidential recount practices or ones essentially the same, absent judicial intervention and resolution of the issues raised in this action.

Complaint ¶ 4.

On October 4, 2005, Defendant moved to dismiss the Complaint on the basis of sovereign immunity or ripeness. Docket No. 71<sup>2</sup> Plaintiffs opposed on October 24, 2005, Docket No. 75, and Defendant replied on November 3, 2005, Docket No. 76.

After completion of the briefing on Defendant's motion and unbeknownst to Plaintiffs, on November 17, 2005, Defendant Blackwell issued Directive 2005-32, in which he used the

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<sup>2</sup> Defendant had previously moved to dismiss complaints in *Rios* and *Delaware County*, without raising sovereign immunity. See Motions to Dismiss, *Rios* Docket No. 12 and *Delaware County*, Docket No. 42.

recount procedures from the 2004 Presidential election recount for the 2005 general election. *See* Plaintiffs' Exhibit A. Directive 2005-32 expressly provides that "[t]he requirements set forth in the 2005 *Outline of Recount Procedures* are based on the *Outline of Recount Procedures* that was sent with Directive 2004-58 on December 7, 2004." *Id.* at page 1.

In addition, on January 31, 2006, Governor Taft of Ohio signed into law H.B. 3, which, among other things, amends the Ohio Revised Code to add Section 3515.041. Section 3515.041 provides that "[a]s required by 3 U.S.C. [§] 5 any recount of votes conducted under this chapter for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors." *See* Amended Substitute House Bill No. 3 page 198, a copy of which is attached as Plaintiffs' Exhibit D.<sup>3</sup> Section 3515.041 is consistent with, and may be read to codify into state law, Plaintiffs allegation in their Complaint 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.*" Complaint ¶ 18.

Yet, Defendant Blackwell did not bring to the Court's attention either this new law or his continued reliance upon the recount procedures used by him in the 2004 Presidential election.

On February 7, 2006, the Court entered a 3-page order dismissing Plaintiffs' Complaint on sovereign immunity grounds. February 7, 2006 Order, Docket No. 78. The Court correctly concluded that "plaintiffs seek prospective injunctive relief and Secretary Blackwell's actions arguably conflict with federal law," February 7, 2006 Order at 3. The Court further concluded Secretary Blackwell's alleged violations of federal law are not continuing, however, because Blackwell "limited the effect of Directive 2004-58 to the 2004 election." *Id.* The Court focused exclusively on Plaintiffs' complaint about the delayed timing of the recount, omitting any

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<sup>3</sup> Section 3515.041 does not go into effect until June 1, 2006. *See* Plaintiffs' Exhibit D (also attaching Governor Taft's Press Release regarding his execution of H.B. 3).

consideration of Plaintiffs multiple complaints about the manner in which Defendant Blackwell administers recounts. *See* Complaint ¶¶ 1-4 and 28-53. Finding no allegations of ongoing misconduct, the Court held that Plaintiffs had not satisfied the *Ex Parte Young*, 209 U.S. 123, 155, 159 (1908), exception to Eleventh Amendment sovereign immunity. This motion to reconsider followed.

### Argument

Pursuant to Federal Rule of Civil Procedure 59(e), a Court should alter or amend a judgment if one or more of the following circumstances exists: 1) if there is a clear error of law; 2) if there is newly discovered evidence; 3) if there is an intervening change in controlling law; and 4) to prevent manifest injustice. *See, e.g., Gencorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). As explained herein, Plaintiffs seek alteration of the Court's February 7, 2006 Order and Judgment to account for judicially noticeable new evidence not previously available, to correct a clear error of law, and to prevent a manifest injustice.<sup>4</sup>

As explained by this Court in its February 10, 2006 Order in *League of Women Voters v. Blackwell*, C.A. No. 3:05CV7309, State sovereign immunity "does not [] extend to claims brought against state officials in their official capacity alleging an ongoing failure to comply with federal law and seeking only prospective relief. *Verizon v. Public Serv. Commn*, 535 U.S. 635, 645 (2002); *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6<sup>th</sup> Cir. 2002)." *Id.* at 5. The Court further explained that "[t]o determine whether sovereign immunity applies, a court conducts only a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly

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<sup>4</sup> *See, e.g., Val Decker Packing Co. v. Corn Products Sales Co.*, 411 F.2d 850, 850, 852 (6th Cir. 1969) (courts "may take judicial notice of the state statutes"), *citing Lamar v. Micou*, 114 U.S. 218 (1885); *International Bhd. of Teamsters etc. v. Zantop Air Transp. Corp.*, 394 F.2d 36, 38-40 (6th Cir. 1968) (courts "may take judicial notice of the rules, regulations and orders of administrative agencies issued pursuant to their delegated authority).

characterized as prospective.” February 10, 2006 Order at 5, *quoting Verizon*, 535 U.S. at 645 (internal quotations omitted), *League of Women Voters v. Blackwell*, Docket No. 237.

In the *League of Women Voters* case, the Court found that the League of Women Voters plaintiffs allege in their complaint that “Ohio administers an election system that unconstitutionally burdens voters’ access to the ballot box based solely on where they live. In addition, LWV alleges that Ohio’s election officials have failed and continue to fail to train poll workers adequately and that such failure amounts to willful indifference to Ohioans’ voting rights . . . . Plaintiffs allege that system remains in place and, therefore, any alleged violations are ongoing.” February 10, 2006 Order at 6. Accordingly, the Court denied Defendant Blackwell and Taft’s motion to dismiss and, separately, found their sovereign immunity argument to be frivolous. *Id.*

Similar to the plaintiffs in the *League of Women Voters* case, who challenge Secretary Blackwell’s election day procedures, Plaintiffs here allege that the fundamental defects in Secretary Blackwell’s recount procedures remain in place and that violations of federal law arising from them are ongoing. Complaint ¶¶ 2-4 and 54-68. Plaintiffs allege ongoing violations both with respect to Defendant Blackwell’s timing of recounts, Complaint ¶¶ 1-4 and 12-27, and with the manner in which he conducts recounts. *Id.* ¶¶ 1-4 and 28-53. A self-serving statement by Defendant Blackwell that the recount procedures used in 2004 are limited to 2004 is without moment. This is because on a motion to dismiss, the allegations in the Complaint, including those alleging Blackwell’s continuing use of essentially the same recount procedures, must be taken as true. *Ricco v. Potter*, 377 F.3d 599, 602 (6<sup>th</sup> Cir. 2004) (the complaint must be construed in “the light most favorable to the plaintiff [and] all factual allegations [are accepted] as true.”) (internal quotations omitted).

Moreover, the Court's February 7, 2006 Order and Judgment turn on the treatment of Secretary Blackwell's Directive 2004-58 as the vehicle by which Blackwell delayed any recount until after the federally mandated safe harbor. But Directive 2004-58 was not issued until December 7, 2004, the day that the federal safe harbor expired and after the delay set by Blackwell had already occurred, making impossible a recount that could affect the Presidential election. Instead Blackwell created the structural delay about which Plaintiffs complain through Directive 2004-43 (October 25, 2004). Plaintiffs' Exhibit B. Plaintiffs allege that Directive 2004-43 is inconsistent with the legislative intent of Ohio to avail the state of the federal safe harbor statute, Complaint ¶¶ 18-19 (which intent is now codified in Section 3515.041 of the Revised Code, *see supra* page 7), and that Blackwell continues to adhere to his policy of delaying recounts until they cannot affect the outcome of a Presidential election. Complaint ¶ 27. On this basis alone, the Court should reconsider its Order and Judgment of February 7, 2006 and find that conduct giving rise to violations by Secretary Blackwell of federal law are ongoing and reinstate Plaintiffs' Complaint.

In addition, the Court should consider Plaintiffs' allegations regarding the fundamental defects in the procedures used by Secretary Blackwell during recounts of votes cast in elections in Ohio, including the lack of adequate and uniform procedures, and enforcement thereof, for ballot security, hand-counts, recounts on voting machines, and treatment of provisional ballots, absentee ballots, witnesses and other things. Complaint ¶¶ 1-4 and 28-53. Plaintiffs allege that these fundamentally defective recount procedures will be used by Secretary Blackwell in future Presidential elections. Complaint ¶ 4. Plaintiffs allegations in this respect are further born out by Secretary Blackwell's subsequent use of these same procedures almost verbatim in Ohio in the 2005 elections. *See* Plaintiffs' Exhibit A and *compare with* Plaintiffs' Exhibit B. That is, we

now know for a fact that Secretary Blackwell's Directive 2004-58 and the recount procedures incorporated therein are not limited by their terms to the 2004 election but instead continue to be applied by Secretary Blackwell to elections in Ohio.

Accordingly, both as to the timing of the recount, which the Court addressed in its February 7, 2006 Order, and as to the procedures used and enforcement measures taken (or not) in the conduct of recounts, which was not addressed in that order, Plaintiffs allege ongoing failures by Defendant Blackwell in complying with federal law. Under the test set forth by the United States Supreme Court in *Verizon*, Plaintiffs meet all of the requirements of the exception to sovereign immunity. Accordingly, Defendant's Motion to Dismiss should be denied.

### **Conclusion**

For the foregoing reasons, the Court should grant Plaintiffs' Motion to Alter and Amend the February 7, 2006 Order, deny Defendants' Motion to Dismiss, and resume proceedings on Plaintiffs' First Consolidated Amended Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 17th day of February, 2006. 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