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

SARAH WHITE,	:	
	:	
PLAINTIFF,	:	
	:	
VS.	:	**CASE NO. 3:04-CV-7689**
	:	
J. KENNETH BLACKWELL, *ET AL.*,	:	**JUDGE KATZ**
	:	
DEFENDANTS.	:	

DEFENDANT J. KENNETH BLACKWELL'S MOTION TO ALTER OR AMEND THIS COURT'S ORDER OF JANUARY 19, 2006 OR, IN THE ALTERNATIVE, FOR RELIEF FROM A JUDGMENT

Defendant J. Kenneth Blackwell, pursuant to Fed. R. Civ. P. 52, 59, and 60, asks this Court to issue an order a vacating its decision of January 19, 2006 and dismissing the Plaintiffs' claims. A memorandum in support is attached.

Respectfully submitted,

Jim Petro
Attorney General

/s Richard N. Coglianese
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Memorandum In Support

I. Introduction

On October 27, 2005, Governor Taft signed H.B. 234, which greatly altered the manner in which Ohioans can receive and cast absentee ballots. That statute became effective on January 27, 2006. Among the changes in this bill is newly enacted section R.C. 3509.09. According to that new statutory section, when a person requests an absentee ballot but does not return the ballot to the board of elections, he will be permitted to cast a provisional ballot. R.C. § 3509.09(B)(1). Furthermore, even if the voter returned an absentee ballot and he appears at his polling location on election day, he will still be permitted to cast a provisional ballot. R.C. § 3509.09(B)(2). Based upon this change in Ohio law, this Court should vacate its decision of January 19, 2006 and dismiss the Plaintiff's complaint as moot.

II. Law And Argument

A. The passage of H.B. 234 has rendered this case moot and, as a result, this Court should vacate its decision.

During the pendency of this case, the State of Ohio enacted H.B. 234 which greatly modified the manner in which registered voters would be allowed to vote by absentee ballot. (H.B. 234 is attached as Exh. 1). Prior to the passage of H.B. 234, Ohio allowed absentee voting in only very limited circumstances. However, as a result of H.B. 234, Ohio now allows anybody to cast an absentee ballot in any election. R.C. § 3509.02(A).

In order to obtain an absentee ballot, a registered Ohio elector simply has to "make a written application for those ballots to the director of elections of the county in which the elector's voting residence is location." R.C. §3509.03. This written application does not have to be on any particular form but does need to include the elector's name, signature, address, date of birth, a statement identifying the election for which the voter wants a ballot, a statement that the voter is a qualified elector, the address to which the ballot should be mailed, the elector's partisan affiliation if the ballot is for a primary election, and the elector's drivers license number, last four digits of the elector's social security number, or other included identification information. R.C. § 3509.03.

Furthermore, H.B. 234 statutorily addresses the central issue of this case – what happens when a person who requested an absentee ballot does not receive the ballot and appears at his precinct on election day in order to cast his vote. R.C. § 3509.09(A) requires that the poll book in each precinct identify each registered elector who has asked for an absentee ballot.

> If a registered elector appears to vote in that precinct and the elector has requested an absentee voter's ballot for that election but the director has not received a sealed identification envelope purporting to contain that elector's voted absent voter's ballots for that election, the elector *shall be permitted to cast a ballot*, generally in the manner prescribed in division (B) of section 3503.16 of the Revised Code, in that precinct on the day of that election.

R.C. 3509.09(B)(1) (emphasis added). This statutory provision was added as a result of H.B. 234. Thus, as a result of that statutory amendment, a voter who requests an absentee ballot but does not return it can simply go to his assigned polling location and cast a provisional ballot.

Similarly, even if the voter had requested and returned an absentee ballot, that voter is entitled to obtain and cast a provisional ballot if he appears at his precinct on election day. R.C. § 3509.09(B)(2). Thus, Ohio law now specifies that a person who applies for an absentee ballot

has a right to cast a provisional ballot regardless of whether that person actually returned a completed absentee ballot. This addition to Ohio statutory law moots the Plaintiff's claim.

It should be undisputed that this Court's jurisdiction "extends only to actual cases and controversies." *McPherson v. Mich. High Sch. Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc). Although it is true that generally, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), there are exceptions to this rule. A case becomes moot due to the cessation of a defendant's conduct "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 203. Finally, "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990).

The Plaintiffs in this particular case incorrectly claim that an email sent by an employee of the Secretary of State's office concerning absentee and provisional ballots is the position of the State of Ohio concerning the eligibility to receive a provisional ballot. R.C. § 3509.09 definitively states that any registered voter in Ohio who had asked for an absentee ballot will be given a provisional ballot if he appears at his polling place and requests one. Thus, this case has become moot as a result of H.B. 234.

A similar situation occurred in *Hooper v. Morkle*, 219 F.R.D. 120 (S.D. Ohio 2003). In *Hooper*, the State of Ohio issued an administrative rule that required persons purchasing five or more kegs of beer to sign an affidavit giving the Department of Liquor Control the authority to enter and inspect their private residences. *Id.* at 121. After Hooper filed a lawsuit claiming that the administrative rule violated his Fourth Amendment rights, the Ohio Liquor Control

Commission repealed and replaced that rule. The district court determined that Hooper's claim was moot.

Federal courts recognize that there is a distinction between cessation of activity by private individuals or by the government. *Id.* at 124. When state law changes at any point during the pendency of litigation, that cessation renders a case moot unless the State has expressed its intention to reenact the legislation once the lawsuit is dismissed. *Id.* at 124-25 *citing Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997); *Camfield v. Oklahoma City*, 248 F.3d 1214, 1223 (10th Cir. 2001). Therefore, the Plaintiff's claim is moot and this case must be dismissed.

B. This Court Must Vacate Its Award Of Attorneys Fees.

H.B. 234 was not passed as a result of this litigation. Rather, H.B. 234 was part of a massive election law reform passed by the General Assembly to address not only absentee voting but also allowing certain high school students who have not yet turned eighteen to serve as precinct officials. R.C. § 3501.22(C).

In order to be entitled to attorneys fees, the Plaintiff must be a prevailing party. In order to qualify as a prevailing party, the Plaintiff must receive a court ruling in her favor. *Hooper*, 219 F.R.D. at 125 *citing Buckhannon Board & Care Home, Inc. v West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). In this case, the Plaintiff cannot prevail upon any portion of her claim because the change in Ohio law has made the Plaintiff's claim moot. Thus, this Court should vacate its judgment and deny the Plaintiff's request for attorneys fees.

III. Conclusion

For the foregoing reasons, this Court should vacate its opinion of January 19, 2006 and dismiss this case as moot.

Respectfully submitted,

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Attorney General

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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 2nd day of February, 2006.

/s Richard N. Coglianese
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Deputy Attorney General