In The United States District Court
For The Southern District Of Ohio
Eastern Division

State ex rel. Yost, *et al.*,

Plaintiffs,

vs. **Case No. 2:04-cv-1139**

National Voting Rights Institute, *et al.*, **Judge Sargus**

Defendants-Counter Plaintiffs,

vs.

Secretary of State Blackwell,

Counter-Defendant.

Defendant's Supplemental Motion To Dismiss

Secretary of State J. Kenneth Blackwell, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), asks this Court to issue an order dismissing this case. A memorandum in support is attached.

Respectfully submitted,

Jim Petro

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Memorandum In Support

I. Introduction

The two candidate plaintiffs in this lawsuit between them received 0.25% of the vote for President. Yet, despite the fact that one of the candidates received all of 24 votes in the 2004 Presidential campaign, they, along with an organization and several individual voters, asked this Court to order the State of Ohio to begin a recount of the Presidential vote before those votes were certified. This Court originally denied their request. Instead of appealing that decision, however, the Plainitffs refiled these identical claims in the United States District Court for the Southern District of Ohio.

Despite the blatant forum shopping in which the Plaintiffs have engaged, the fact that the Southern District is completely without jurisdiction to hear their case, and the first-filed rule demands this Court hear the matters concerning the start of the recount, the Plaintiffs have decided to apparently abandon their claim before this Court and attempt to litigate all recount issues in the Southern District. Since this case is moot and the Plaintiffs have apparently abandoned it, this Court should immediately dismiss it.

II. Law and Argument

A. The Individual And Organizational Plaintiffs In This Case Lack Standing To Bring A Claim.

Standing is to be assessed under the facts existing when a complaint is filed. *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001). In order for a party to have standing, the plaintiff must show: (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. *Id.* at 523-24 *quoting Friends of the Earth, Inc. v. Laidlaw*

Envtl. Servs., 528 U.S. 167, 180-81 (2000). Furthermore, for an organization to have standing to sue on behalf of its members, an organization must be able to show that its members "would otherwise have standing to sue in their own right, the interests are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 524.

In this case, neither the organizational plaintiff nor the individual plaintiffs have standing to bring any litigation concerning the start date of Ohio's recount. Ohio's recount statute is clear that in the case of a race involving candidates, as opposed to issues, only candidates who were not certified as the winner of the election can ask for a recount. R.C. § 3515.01. Because none of the individual voters, or the members of the organizational plaintiff, have a legal right in Ohio to request a recount, they lack standing to bring any claim concerning the date upon which the recount could start.

B. The Claim Concerning The Date The Recount Started Is Moot.

David Cobb, who received 186 votes, and Michael Badnarik, who received 14,695 votes, out of the 5,625,631 official votes cast for President, asked this Court to issue an order requiring a statewide recount before the official vote was certified. However, under Ohio law, a candidate must be certified as the winner of an election before any losing candidate can file a request for a recount. R.C. § 3515.01. The Presidential vote was certified by the Secretary of State on December 6, 2004.

Pursuant to Ohio law, the recount began, after the requisite notice, and has been completed. Not surprisingly, neither Cobb nor Badnarik were determined to have won Ohio's Presidential vote. Instead, the recount determined for the third time that George Bush and Dick

Cheney received Ohio's electoral votes. In conformity with State and federal law, Ohio's Presidential Electors met at the State Capital on December 13, 2004 and cast their votes.

The relief sought by the Plaintiffs in this case is an injunction requiring that the statewide recount begin before a winner in the Ohio Presidential Election was certified. As the election has already been certified, the recount has been completed, and the Electors have already cast their votes, the injunctive relief sought by the Plaintiffs is moot.

"Mootness addresses whether that plaintiff continues to have an interest in the outcome of litigation." *City of Parma*, 263 F.3d at 525. "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormick*, 395 U.S. 486, 496 (1969). Thus, "if events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001).

This case, as it relates to the losing Presidential candidates, is moot. The recount is completed and Ohio's Electors cast their votes as scheduled on December 13. Thus, the Court cannot grant either of the Presidential candidates any relief whatsoever.

Likewise, the candidates' claim for declaratory judgment is moot. The Sixth Circuit has recognized that district courts have discretion under the Declaratory Judgment Act as to "whether and when to entertain an action…even when the suit otherwise satisfies subject matter jurisdiction prerequisites." *Amsouth Bank v. Dale*, 386 F.3d 763, 784 (6th Cir. 2004) *quoting Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). The Court of Appeals has, therefore, laid out a five-part test to help determine whether a district court should exercise jurisdiction over a declaratory judgment:

- Whether the judgment would settle the controversy;

- Whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;
- Whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*";
- Whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and
- Whether there is an alternative remedy that is better or more effective.

Id. at 785.

No useful purpose whatsoever could possibly be served by this Court entertaining the candidates' request for declaratory relief. Under Ohio law, the local boards of elections have an obligation to begin the official canvass of votes not earlier than 11 days nor later than 15 days after a general election. R.C. § 3505.32(A). The boards of elections must complete the canvass by the date set by the Secretary of State. *Id.*, R.C. § 3501.05(U). The Secretary must declare the date for the completion of the official canvass no later than 35 days before the election takes place. R.C. § 3501.05(U). Thus, no specific date for the completion of the official canvass is set in stone.

In this particular case, the candidates' complaint revolves completely around the specific dates of the 2004 election. Based upon that, a decision by this Court would not clarify any legal relationship between the losing candidates and the Secretary of State. Furthermore, it would not settle any controversy. They have asked this Court for an order and an injunction requiring a Statewide recount to begin before Ohio law allows such a recount to begin. The recount has begun and has been completed. The recount has demonstrated once again that the voters of the

State of Ohio can have faith in their elections system. Thus, there is no reason for this Court to entertain any question concerning the timing of the beginning of the Statewide recount.

Furthermore, this is purely a question of Ohio law, regardless of the manner in which the Plaintiffs wish to address it. It is indisputable that there is no constitutional right to a recount in a Presidential race. Instead, the laws as passed by the Ohio General Assembly, prior to the Presidential Election, govern the conduct of the election and any "right" to recount. The General Assembly has determined that under certain very specific circumstances, it would allow a recount of a race. Thus, the candidates are forced to accept the timeframe put forth by the General Assembly and the Secretary of State. It is clear, therefore, that a declaratory judgment in this particular case does nothing to answer any long term questions concerning Ohio's recount statutes.

III. Conclusion

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

Respectfully submitted,

Jim Petro

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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 this Court's electronic filing system.

/s Richard N. Coglianese
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Assistant Attorney General