In The United States District Court
For The Northern District Of Ohio
Western Division

League of Women Voters of Ohio*, et al.*,

Plaintiffs,

vs. **Case No. 3:05-CV-7309**

J. Kenneth Blackwell*, et al.*, **Judge Carr**

Defendants.

Motion To Dismiss Or, In The Alternative, Motion To Transfer Venue
By Defendants J. Kenneth Blackwell and Bob Taft

Defendants J. Kenneth Blackwell and Bob Taft, pursuant to Fed. R. Civ. P. 12(b)(1), (6), and (7) ask this Court to issue an order dismissing the Plaintiffs' Complaint. In the alternative, the Defendants, pursuant to Fed. R. Civ. P. 12(b)(3) asks this Court to transfer this case to the United States District Court for the Southern District of Ohio since venue is not proper in this judicial district. A memorandum in support is attached.

Respectfully submitted,

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Memorandum In Support

I. Introduction

Despite the fact that the 2004 election is long over, the Plaintiffs have once again filed a lawsuit with the express purpose of asking this Court to assume the role of controlling Ohio's elections system. Ohio's election system was at the heart of a close nationwide election. When it became clear that Ohio was the State that would determine the Presidential election, lawsuits were filed all over the State of Ohio both before and after the election. However, the Ohio election system once again proved itself to be fair and efficient. Regardless of the strain of new voters and a historically unprecedented level of litigation, Ohio's elections system and election officials demonstrated that we have a fair system which is available for all Ohioans.

This Court should reject the Plaintiffs' request to become the overseer of Ohio's election system. It should dismiss this case and allow Ohio's elections professionals the ability to continue to run a fair and efficient system.

II. Law And Argument

A. The Plaintiffs Fail To Comprehend The Proper Roles For The Governor, The Secretary Of State, And County Boards Of Elections In Ohio's Elections System.

The Plaintiffs, by filing suit against Governor Taft and Secretary of State Blackwell, but failing to sue the local county boards of elections, have shown they do not comprehend how elections in the State of Ohio actually operate. The Plaintiffs have sued the Governor and Secretary of State over several issues over which they have no control. Thus, before either the Governor or Secretary address the specific issues of this claim, it is necessary for this Court to understand the various roles the Governor, Secretary of State, and local county Boards of Elections play in Ohio's election system.

The supreme executive power of the State of Ohio rests with the Governor. Ohio Const. Art. III § 5. The Secretary of State is the State's chief election officer. R.C. § 3501.04. He has, among his duties, the power to:

- Appoint all members of county boards of elections;
- Advise members of the boards as to the proper method for conducting elections;
- Prepare rules and instructions for conducting elections;
- Prescribe the form of registration cards, blanks, and records;
- Determine and prescribe the forms of ballots and forms of all blanks, cards of instruction, pollbooks, tally sheets, certificates of election, and all forms and blanks required by law for use by candidates, committees, and boards;
- Compel the observance by election officers in the several counties of the requirements of the election laws;
- Make an annual report to the Governor containing the results of elections, the cost of elections in the various counties, a tabulation of the votes in the several political subdivisions, and other information and recommendations relative to elections the Secretary of State considers desirable; and

- Prescribe a general program to remove ineligible voters from official registration lists by reason of a change of residence, which shall be uniform, nondiscriminatory, and in compliance with federal law.

R.C. § 3501.05.

Each Board of Elections has among its responsibilities, the following:

- Establish, define, provide, rearrange, and combine election precincts;
- Fix and provide the places for registration and for holding primaries and elections;
- Provide for the purchase, preservation, and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms, papers, and equipment used in registration, nominations, and elections;
- Appoint and remove its director, deputy director, and employees and all registrars, judges, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve;
- Advertise and contract for the printing of all ballots and other supplies used in registrations and elections;
- Provide for the delivery of ballots, pollbooks, and other required papers and material to the polling places;
- Cause the polling places to be suitably provided with stalls and other requires supplies;
- Receive the returns of elections, canvass the returns, make abstracts of them, and transmit those abstracts to the proper authorities;
- Make an annual report to the Secretary of State, on the form prescribed by the Secretary of State, containing a statement of the number of voters registered, elections held, votes cast, appropriations received, expenditures made, and other data required by the Secretary of State;
- Prepare and submit to the proper appropriating officer a budget estimating the cost of elections for the ensuing fiscal year;
- Investigate and determine the residence qualifications of electors;
- Establish and maintain a voter registration of all qualified electors in the county who offer to register;

- Maintain voter registration records, make reports concerning voter registration as required by the Secretary of State, and remove ineligible electors from voter registration lists in accordance with law and directives of the Secretary of State;

- At least annually, on a schedule and in a format prescribed by the Secretary of State, submit to the Secretary of State an accurate and current list of all registered voters in the county for the purpose of assisting the Secretary of State to maintain a master list of registered voters pursuant to Ohio law.

O.R.C. § 3501.11.

An even cursory review of Ohio law, therefore, shows that the Plaintiffs completely fail to comprehend the respective roles of the Governor, Secretary of State, and county Boards of Elections. A proper understanding of those roles, however, leads to the inescapable conclusion that the Plaintiffs' claims must be dismissed.

B. The Plaintiffs Have Failed To Allege Any Federal Statutory Or Constitutional Violation And As A Result, Their Claims Must Be Dismissed.

Although the Plaintiffs allege at various points in their complaint that the State of Ohio maintains a non-uniform elections system, they have failed to plead any facts whatsoever under which they can prevail on those claims. As a result, the Plaintiffs have failed to allege any violations of the Fourteenth Amendment or the Help America Vote Act by the Governor, the Secretary of State, or any other state or county official.

The Plaintiffs' complaints in this litigation revolve around the simple fact that they do not like precinct based voting and that some local county boards of elections officials may have made some errors in the manner in which they conducted the 2004 election. However, this does not rise to the level of either a statutory or constitutional violation.

As the Second Circuit recognized long ago, the Constitution contains no guarantee that an election be free from error. *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970). After rejecting the concept of perfect elections, the *Powell* court noted that "[w]ere we to embrace plaintiffs' theory,

this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Id.* at 86. This is the exact lawsuit the Plaintiffs have brought and the exact relief that they seek. Just as the Second Circuit has rejected this notion, so too should this Court.

The Plaintiffs have attempted to dress-up their claims by maintaining that the State of Ohio maintains a non-uniform elections system. However, the Plaintiffs fail to allege any facts in support of that contention. Instead, they allege what may, at best, amount to errors committed by local, not State, elections officials. These allegations, however, do not amount to a determination that Ohio maintains a non-uniform elections system in violation of either HAVA or the Fourteenth Amendment. Instead, they simply amount to allegations that some local officials may have made some mistakes during the 2004 election.

A court must accept as true all well-pled allegations in a complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). In this particular complaint, the Plaintiffs allege that they had very specific problems when they went to cast ballots in November 2004. They then attempt to turn those specific factual allegations into a general allegation that the State of Ohio has historically maintained a non-uniform election system. They have not, however, plead any specific facts that show a non-uniform application of Ohio law. Instead, they merely allege that because individuals had problems at specific polling places, that somehow proves Ohio maintains a non-uniform elections system in violation of the United States Constitution. These allegations are not

sufficient to allow a court to accept as true the statement that Ohio has maintained a non-uniform voting system.

The Plaintiffs have failed to come forward with any facts that would support the notion that the State maintains a non-uniform voting system. They do not allege, nor could they, that the State of Ohio has laws, administrative rules, or Directives from the Secretary of State that require different locations to follow different rules. Instead, the Plaintiffs merely alleged that because one individual had a problem when he or she attempted to cast a ballot, that must mean that Ohio maintains a non-uniform elections system in violation of the law. However, that is not a well-plead fact. Instead it is an unwarranted conclusion that does not allow the Court to find a cause of action against the Secretary of State, the Governor, or even local elections officials.

In addition, the Plaintiffs fail to recognize exactly what would constitute a violation of the Fourteenth Amendment or HAVA. Once a State allows its citizens to cast ballots for President, the State must accord equal weight and dignity to each voter. *Bush v. Gore*, 531 U.S. 98, 105 (2000). In *Bush*, the United States Supreme Court was faced with a situation where the Florida Supreme Court adopted recount procedure that was constantly changing what constituted a legal vote. The Court determined that whenever "a court orders a *statewide* remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* at 109 (emphasis added). "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." *Id.*

In his dissent, Justice Souter eloquently recognized that different counties may use different voting machines even if those machines have different levels of effectiveness. "It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction…." *Id.* at 531 (Souter, J., *dissenting*). Thus, both the majority and minority in *Bush* recognized that some differences may exist between counties in an election. What cannot differ, however, is the legal definition of a vote over time.

In this particular case, the Plaintiffs have simply complained that various errors may have prevented them from voting. However, since there is no constitutional right to error-free elections and since the Plaintiffs have not specifically pointed to any Ohio laws or rules that were not uniformly applied by the Secretary of State, they have not stated a legal basis for relief. Thus, the Court should dismiss the Plaintiffs' complaint against all defendants on this basis alone.

C. The Plaintiffs Have Failed To State Any Cause Of Action Against Governor Bob Taft.

The Plaintiffs repeat a simple claim against Governor Bob Taft. He is the State's "principal executive officer." (Complaint at ¶ 36). He, as Governor, has not provided "adequate, equitable funding and resources to the county boards of elections to ensure that the boards timely and responsibly carry out their duties…." (Complaint at ¶ 45). At other points of the Complaint, the Plaintiffs also simply allege that Governor Taft, as one of the "Defendants" was responsible for oversight and funding Ohio's elections system, that he failed to provide adequate oversight and funding for voter registration, that he failed to provide adequate resources to local elections officials, that he maintains an unequal voting system that lacks uniform standards, that he deprived the Plaintiffs of their right to vote, that he maintains a system that denies or severely burdens the right to vote, and that he has implemented a computerized voting

registration list in violation of the Help America Vote Act. (Complaint at ¶¶ 169, 172, 179, 203, 205, 208, 210, and 212).

Although the Plaintiffs may have put together an interesting litany and tale of woe, they have not stated a cognizable claim against Governor Taft. As noted above, he is merely the supreme executive power of the State of Ohio. He does not fund election systems. He does not provide workers, train workers, maintain voter registrations, process ballots, or any of the myriad of baseless allegations spouted by the Plaintiffs. As a matter of law, therefore, he cannot be liable under a § 1983 theory.

By now, it should be undisputed that § 1983 liability cannot be imposed under a theory of *respondeat superior*. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.) *cert. denied* 469 U.S. 845 (1984). Instead, "a § 1983 plaintiff must show that a supervisory official at least implicity authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Id.*

In this case, the Plaintiffs have completely failed to allege that Governor Taft personally denied them their constitutional rights or that he implicitly authorized, approved, or knowingly acquiesced to such a denial. Based upon the Governor's responsibilities under Ohio law, such a claim would be impossible.

As demonstrated above, the Governor has no direct role in Ohio's elections. Instead, the Secretary of State is the Chief Elections Officer while the county Boards of Elections have specific responsibilities as determined in their statutes. Since the Governor is not given any direct responsibility for Ohio's elections system under the law, he should be dismissed for failure to state a claim upon which relief can be granted.

D. The Plaintiffs Have Failed To State Any Cognizable Claim Against Secretary Of State Blackwell Because He Cannot, As A Matter Of Law, Be Held Liable For Any Alleged Failings Of The County Boards Of Elections.

As noted above, § 1983 cannot be used to impose liability under a theory of *respondeat superior*. *Bellamy*, 729 F.2d 421. Rather, a person can only be liable under §1983 for their own willful violations of the constitutional rights of others under color of State law. Plaintiffs have merely alleged that the County Boards of Elections did not hire enough poll workers, did not have enough voting machines, and did not properly inform people of their new precincts. Since the Ohio law vests the responsibility for these functions in the County Boards of Elections, not the Secretary of State, he cannot be liable even if the Plaintiffs can actually prove their allegations.[1]

1. Darla Stenson has failed to allege any cause of action against Secretary of State Blackwell.

Darla Stenson alleges that she was told by a pollworker that she was not on the registered voter list when she arrived at the polling place. She further alleges that her provisional ballot was not counted because it was cast in the wrong precinct. (Complaint at ¶ 12). The legal power to "establish, define, provide, rearrange, and combine election precincts" falls within the authority of the local board of elections. R.C. § 3501.11(A). The pollworker that told her she was not on the voter registration roll is an employee of her local board of elections. R.C. § 3501.11(D). The maintenance of the voter registration roll is a function of her local board of elections. R.C. § 3501.11(T). Further, the counting of ballots, including provisional ballots, is a function of her local board of elections. R.C. § 3501.11 (L).

[1] Although, as noted above, there is no constitutional right to a perfect elections system and the Plaintiffs have not alleged intentional deprivation of a federal right. Instead, they merely claim that errors in the conduct of the election were made. Thus, the Plaintiffs could not prove a constitutional violation against the local board of elections either. This portion of the memorandum merely addresses the issue that to the extent the Plaintiffs would be able to make out a constitutional or statutory violation, such a claim would have to be brought, if at all, against the local boards of elections.

Most importantly, the Sixth Circuit has correctly recognized that under Ohio law, "a voter is eligible to vote in the particular polling place only if he or she resides in the precinct in which that polling place is located." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004) *citing* O.R.C. § 3503.01. Thus, "[o]ne simply cannot be a 'qualified elector' entitled to vote unless one resides in the precinct where he or she seeks to cast [a] ballot." *In re Protest Filed with Franklin County Bd. Of Elections*, 49 Ohio St. 3d 102 (1990).

The Help America Vote Act, 42 U.S.C. § 15301 *et seq.*, "does not require that any particular ballot, whether provisional or 'regular', must be counted as valid. States remain free, of course, to count such votes as valid, but remain equally free to mandate, as Ohio does, that only ballots cast in the correct precinct will be counted." *Sandusky County Democratic Party*, 387 F.3d at 578. By Stenson's own admission, she cast her provisional ballot in the wrong precinct. Therefore, under Ohio law and accepted by the Sixth Circuit, that ballot can be rejected. Thus, Stenson has failed to allege any cause of action against Secretary of State Blackwell.

2. Dorothy Stewart has failed to allege any cause of action against Secretary of State Blackwell.

The gravaman of Dorothy Stewart's complaint is simple. She is disabled and there were lines to vote in her precinct. Since she could not physically stand in a long line, she left without voting. Stewart finally complains that she was offered no accommodation and had to leave without voting. (Complaint at ¶ 13). Stewart has failed to state any claim against Secretary of State Blackwell.

First, as a matter of law, Stewart's claim of not being offered any accommodation besides standing in line to vote is false. Disabled voters, however, are allowed to cast absentee ballots. R.C. § 3509.02(A)(8). The same is true for an registered Ohio voter who is age sixty-two or

older. R.C. § 3509.02(A)(1). Stewart apparently failed to request an absentee ballot from the Franklin County Board of Elections.

Furthermore, it is the responsibility of the local board of elections, not the Secretary of State to provide "for the delivery of ballots" and to "cause the polling places to be suitably provided with stalls and other requires supplies." R.C. § 3501.11(H) and (G). Finally, it is the responsibility of the local board of elections, not the Secretary of State, to "provide for the purchase, preservation, and maintenance of … equipment used in registration, nominations, and elections." R.C. § 3501.11 (C).

To the extent that Stewart is complaining about equipment, including the adequacy of voting machines in the 2004 election, her complaint and her lawsuit, should be with the Franklin County Board of Elections, not with the Secretary of State.[2]

3. Charlene Dyson has failed to state any cause of action against Secretary of State Blackwell and her claim should be dismissed.

Just like Dorothy Stewart, Charlene Dyson's claim revolves around her allegation that she is disabled and the local pollworkers did not allow her to cast her vote at the curbside despite her allegation that the Franklin County Board of Elections told her she could do so. (Complaint at ¶ 14). As explained with Stewart, Dyson had the right to cast an absentee ballot and any complaint she has about the inaccessibility of voting machines or pollworkers is the legal responsibility of the Franklin County Board of Elections, not the Secretary of State.

4. Anthony White has failed to state any cause of action against Secretary of State Blackwell and his claim should be dismissed.

Anthony White's complaint is also straight-forward. He alleges that the Cuyahoga County Board of Elections sent him a postcard telling him he was registered to vote and

[2] In addition, this claim is duplicative of litigation has already been dismissed in the United States District Court for the Southern District of Ohio. *See Ohio Democratic Party v. Blackwell*, Case No. 2:04-cv-1055.

informed him of the appropriate precinct in which he was to vote. He alleged that when he reached the registration table, they informed him he was not registered in any precinct. He finally complains that the Cuyahoga County Board of Elections has no record of White's effort to vote in the 2004 election. (Complaint at ¶ 15).

As with the other Plaintiffs, White has failed to state a cognizable claim against Secretary of State Blackwell. It is the legal responsibility of the local boards of elections to maintain voter registration records. R.C. § 3501.11(U). If the Cuyahoga County Board of Elections did not do that properly, Blackwell cannot be held liable.

5. Justine Watanabe has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Justine Watanabe's claim is simple also. She alleges that she requested an absentee ballot from the Cuyahoga County Board of Elections and even though the Board of Elections told her numerous times it was mailed, she never received it. (Complaint at ¶ 16). This claim, like every other one, cannot properly be brought against the Secretary of State. The Director of the local board of elections has the duty of providing absentee ballots to persons who are qualified to vote in such a manner. R.C. § 3509.04. As a result, this Plaintiff cannot maintain a cause of action against Secretary of State Blackwell. In addition, the Plaintiff has not alleged any intentional deprivation of a federal constitutional or statutory right under color of State law. Watanabe simply alleges that the Cuyahoga County Board of Elections told her that they mailed her absentee ballot and she never received it. She does not allege that the Board of Elections, in fact, refused to mail her ballot. Taking her allegations as true, she cannot show anybody intentionally violated her constitutional rights. Instead, she alleges that the Board of Elections mailed her ballot and she did not receive it. The Board of Elections, and the Secretary of State,

cannot be held liable for a § 1983 violation if the United States Postal Service did not properly process an absentee ballot. As a result, Watanabe has failed to state a claim.

6. Deborah Thomas has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Deborah Thomas' complaint is identical to the other plaintiffs, and, as a result, she has failed to state a cause of action against the Secretary of State. She alleges that she has voted at the same location for twenty years and when she showed up at the place she usually voted at her name was not on the voter registration role according to the pollworker. She also alleges that the Cuyahoga County Board of Elections did not count her provisional ballot and has no record of her attempting to vote. As argued above, the maintenance of voter registrations and the counting of provisional ballots are within the purview of the local board of elections. As a result, the Secretary of State cannot be liable for these alleged incidents and her claim against him must be dismissed.

7. Leonard R. Jackson has failed to state a cause of action against Secretary of State Blackwell and his claim should be dismissed.

Jackson's claim is similar to the other claims and should be dismissed for the same reasons. Jackson alleges that he had been a registered voter in Cuyahoga County and when he went to his usual polling location, he was advised by a pollworker that his name was not on the voter registration log. He further claims that his provisional ballot was not counted and the Cuyahoga County Board of Elections has no record of him attempting to vote. (Complaint at ¶ 18). Since the maintenance of voter registration roles and the counting of provisional ballots are matters vested with the local boards of elections, the Secretary of State as a matter of law cannot be responsible for any alleged failure. Therefore, Jackson's claim must be dismissed.

8. Deborah Barberio has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Much like the other Plaintiffs, Barberio has failed to state a claim for which the Secretary of State could be liable. Barberio complains that her name appeared on the Cuyahoga County Board of Elections voter rolls in August of 2004 but when she went to vote on election day, the pollworkers claimed that she was not a registered voter so her provisional ballot was not counted. (Complaint at ¶ 19). For the same reasons noted above, the Secretary of State cannot be liable for any alleged violation since it is the responsibility of the local board of elections to maintain voter registration rolls and count provisional ballots.

9. Mildred Casas has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Just like the other Plaintiffs, Casas claims that employees of the Franklin County Board of Elections improperly told her to vote at the wrong precinct when she arrived to vote at the correct precinct. She further claims that she cast a provisional ballot in the wrong precinct. (Complaint at ¶ 20). Since the determination of precincts, the hiring of pollworkers, and the counting of ballots is a function that is the province of the local board of elections, this is a claim that must be made against the Franklin County Board of Elections, not the Secretary of State.

10. Sadie Rubin has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Sadie Rubin's complaint is similar to the other Plaintiffs. She alleges that she had to wait in line in Knox County for nine hours. (Complaint at ¶ 21). As previously demonstrated, the placement and supply of voting machines is something that falls within the legal duty of the board of elections, therefore, Rubin's complaint must be against the Knox County Board of Elections, not the Secretary of State. Furthermore, the State of Ohio has filed a counterclaim in the case of *Ohio Democratic Party v. Blackwell*, Case No. 1:04-cv-1055, in which it has asked a

judge in the Southern District to declare that the voting machine ratios used in the 2004 election by Knox and Franklin County are constitutional.

11. Lena Boswell has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Lena Boswell, who had been a registered voter of Cuyahoga County since prior to the 1996 elections. She claims that the Cuyahoga County Board of Elections informed her that she was either purged from the voter rolls in 2000 or that she was dropped by the Cuyahoga County Board of Elections when they instituted a computerized voter registration roll. She also claimed that even though the Cuyahoga County Board of Elections told her that her provisional ballot would be counted, it was not. (Complaint at ¶ 22). As argued above, all of these activities fall within the purview of the board of elections. Her allegations are against employees of the Cuyahoga County Board of Elections. Therefore, she has failed to state a claim against the Ohio Secretary of State and this complaint must be dismissed.

12. Chardell Russell has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Russell alleges that when she went to vote in Lucas County, she was given a paper ballot because the machines allegedly were not working (but she does not allege that it was a provisional ballot) and the screens on the table she voted at were not high enough that people walking by would be blocked from seeing her ballot. Finally, she complains that she was not given any instruction to find out if her ballot had been counted. (Complaint at ¶ 23). As noted numerous times, the purchase of machines and other voting supplies is the legal responsibility of the local board of elections. In addition, it is the responsibility of the local board of elections to

count her vote. In the highly unlikely event that Russell has actually stated any cognizable cause of action at all,[3] the proper defendant is the Lucas County Board of Elections.

13. Dorothy Cooley has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Cooley's claim is every bit as defective as the other plaintiffs in this case. She simply alleges that she and her son went to vote wearing t-shirts that contained the names of political candidates. When she was asked by a Medina County Board of Elections employee to either remove or cover her t-shirt, she asked what legal authority prohibited her from wearing the shirt into a polling place. After she was told she could check with a police officer, she took off her t-shirt. (Complaint at 24).

Ohio law clearly prohibits any election activity within 100 feet of a polling place. R.C. §§ 3501.30, 3501.35. The Sixth Circuit has upheld the constitutionality of Ohio's statute prohibiting electioneering within 100 feet of a polling place. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004). In that case, the Court noted that the Supreme Court has affirmed the right of States to establish "campaign-free zones" in order to protect voters from confusion and undue influence. *Id. citing Burson v. Freeman*, 504 U.S. 191, 199). Since the State of Ohio can and does prohibit any election activity within 100 feet of a polling place, the Medina County Board of Elections employee properly informed Cooley that she was in violation of State law and needed to stop campaigning inside a polling place. As a result, Cooley has failed to state any cause of action against the Secretary of State or, for that matter, any local Board of Elections official.

[3] The Secretary of State is unaware of any caselaw that holds that a voter has a constitutional right to call a board of elections after the election in order to receive "proof" that voter's ballot was counted. If such precedent exists, the Secretary of State will await eagerly to see it in the Plaintiffs' memorandum contra.

14. Lula Johnson-Ham has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Just like the other Plaintiffs, Johnson-Ham has failed to plead a constitution violation against the Secretary of State. Her complaint is that the voting machine she used in the 2004 election was not properly functioning when she voted so she was instructed to leave her ballot in a slot on the side of the machine and it would be processed once the machine was working again. She further alleges that she does not know if her vote was processed and was not given information on how to find out. (Complaint at ¶ 25).

As demonstrated above, this complaint is something that is within the province of the local board of elections, not the Secretary of State. Thus, on the small chance that a machine breaking down and a ballot being processed after the voter leaves the polling place is an intentional violation of some constitutional provision, such violation would be the responsibility of the local board of elections, not the Secretary of State.[4]

15. Jimmie Booker has failed to state a cause of action against Secretary of State Blackwell and her claim should be dismissed.

Jimmie Booker, like every other Plaintiff, has failed to state a cognizable constitutional claim against Secretary of State Blackwell. Booker alleges that she was undergoing chemotherapy during the 2004 election. When she arrived at her polling place, a person supposedly wearing a board of elections badge told her that there were different lines for Republicans and Democrats. When she asked for curbside assistance from this man, he never came back. (Complaint at ¶ 26).

Naturally, under Ohio law, there are not separate lines for Democrats and Republicans in order to vote in general elections. There is no allegation in Booker's complaint that the man who

[4] Furthermore, since there is no constitutional right to a perfect, error-free election, the Plaintiffs could not prevail in any claim against the local board of elections.

wore the alleged election badge was an actual employee of the Franklin County Board of Elections. If Booker was unable to vote in person because of her chemotherapy, she had the right to cast an absentee ballot. Finally, as noted above, these issues are the responsibility of the Franklin County Board of Elections, not the Secretary of State. Thus, although it is highly doubtful that Booker stated a claim, any claim would be properly brought against the Franklin County Board of Elections, not the Secretary of State.

16. The League Of Women Voters-Ohio and The League Of Women Voters Toledo-Lucas County Have Likewise Failed To State A Cause Of Action.

Just like the individual Plaintiffs, these alleged institutional plaintiffs have failed to state a cause of action against the Secretary of State. Paragraph after paragraph of the complaint detail functions of the local boards of elections, not activities of the Secretary of State.

Some of the remaining paragraphs of the complaint concern things like county voter registration rolls that were not properly maintained, (Complaint at ¶ 51), former felons who were barred from voting,[5] (Complaint at ¶ 56), estimations that county boards of elections may not have timely processed new voter registrations (Complaint at ¶ 67), allegations that local election officials did not properly process absentee ballots and alleged refusal to provide provisional ballots on election day (Complaint at ¶ 75),[6] local county board of elections employees giving voters incorrect precinct information (Complaint at ¶ 82).

Other complaints include other unsupported allegations and rumors that precincts were not opened at the proper time (Complaint at ¶ 84) and an unidentified witness in Franklin County allegedly testifying at an unidentified event that the allegedly untimely opening of a polling place

[5] Under Ohio law, a felon's voter registration is automatically rescinded upon conviction of a felony. The felon would need to re-register to be eligible to vote. R.C. § 3503.21.

[6] Several of the Plaintiffs lawyers have brought this identical claim in this very Court the case of *White v. Blackwell*, Case No. 3:04-cv-7689. A trial on the merits was held on May 12, 2005.

disenfranchised hundred of voters (Complaint at ¶ 88), or that polling places lacked adequate judges, materials, or supplies. (Complaint at ¶ 89). As pointed out with the other allegations in this Complaint, the legal responsibility to open polling places, provide judges, materials, and supplies rests with the local board of elections, not with the Secretary of State. O.R.C. § 3501.11(B), (C), (D), (E), (F). If these allegations do actually state a constitutional violation, the proper defendants would be the offending county boards of elections, not the Secretary of State.

In order to further their incorrect understanding of either Ohio's elections system or what actually happened in this state in 2004, the Plaintiffs allege that counties did not deploy sufficient voting machines. These plaintiffs then follow up with various allegations concerning the placement of voting machines specifically in Knox and Franklin Counties.[7] (Complaint at ¶¶ 91-119). The plaintiffs then finish this litany with allegations their allegations that some precincts improperly closed early.[8] (Complaint at ¶¶ 120-21). The plaintiffs have once again failed to state any claim against Secretary of State Blackwell. As demonstrated before, the county boards of elections are the legal entities responsible for procurement and placement of voting machines, the hiring of poll workers, and finally, for opening and closing precincts. O.R.C. § 3501.11. Therefore, the Plaintiffs' claim, if there is one, is against the local boards of elections, not the Secretary of State.

The Plaintiffs' next litany of complaints revolves around alleged "technical problems with voting." In this group, the Plaintiffs complain that certain voting machines may have gone

[7] Most importantly concerning the Plaintiffs' allegations against the Knox and Franklin Boards of Elections is that those claims appear to be barred. The US Distirct Court in Columbus dismissed these claims in the case of *Ohio Democratic Party v. Blackwell*, Case No. 2:04-cv-1055. In that case, the State of Ohio had attempted to bring a counterclaim arguing that the ratio of voting machines in both Knox and Franklin Counties were constitutional.

[8] The Plaintiffs' allegation that there is no uniform standard concerning poll closing is utterly inexcplicable in light of O.R.C. § 3501.32(A) which dictates that all polling places in the State of Ohio shall be open from 6:30 a.m until 7:30 p.m. and further requires that any voter standing in line at 7:30 p.m. shall be allowed to cast a ballot.

blank,[9] and some precincts did not have adequate supplies. (Complaint at ¶ 122). Since the procurement and supply of machines and other equipment necessary for conducting an election is the legal responsibility of the local board of elections, the Plaintiffs as a matter of law cannot prevail against the Secretary of State. Thus, this claim must be dismissed.

Likewise, in yet another litany of perceived wrongs, the Plaintiffs allege that various employees of the local boards of elections were not properly trained. (Complaint at ¶¶ 123-127). Since these polls workers are employees of the local boards of elections, as a matter of law, the Secretary of State cannot be legally liable for their activities under 42 U.S.C. § 1983. Thus, the Court must dismiss these allegations.

The next litany concerned provisional balloting. (Complaint at ¶¶ 128-143). The Plaintiffs have the same problem with these allegations that they have run into with every other complaint they have tried to bring to this court. Since the counting of ballots, including provisional ballots, is a function of the local board of elections, the local boards of elections, not the Secretary of State, would be responsible for any alleged constitutional violations, if the Plaintiffs were ever able to articulate one.

In the next panoply of allegations, the Plaintiffs complain that Ohio's polling places were not accessible to the disabled as required *under Ohio law*. (Complaint at ¶¶ 144-146). There are several reasons why this claim must be dismissed. First, this Court is completely, patently, and unambiguously without jurisdiction to hear any claim that an Ohio official did not comply with State law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). The Eleventh Amendment would prohibit the Court from hearing this claim as a matter of law. In addition, the

[9] Much like problems attributing a constitutional violation to the Ohio Secretary of State when the United States Post Office fails to properly deliver an absentee ballot, it is equally impossible to fault the Secretary, or a local board of elections if a voting machine happens to break down. That would be as silly as claiming a constitutional violation against a local police department if a cruiser happened to break down when a police officer was en route to a robbery in progress.

placement of precincts and polling places is something that is the responsibility of the local board of elections, not the Secretary of State. R.C. § 3501.11.

Not content with merely trying to bring claims of alleged wrongdoing by employees of the local boards of elections, the Plaintiffs next have attempted to sue the Secretary of State for alleged activities that occurred in anywhere from 1971-2000. (Complaint at ¶¶ 147-166). In addition to the ever persistent problem that the Secretary of State, as a matter of law, is not liable for the activities of local employees of the Boards of Elections, the statute of limitations has expired on these claims. In Ohio, the statute of limitations on any alleged violation of 42 U.S.C. § 1983 is two years. *See, e.g.*, *Browning v. Pendelton*, 869 F.2d 989, 992 (6th Cir. 1989). Since this case was filed in July 28, 2005, none of these claims is within the two year statute of limitations and they all must be dismissed.

In the next litany against the State of Ohio, the Plaintiffs complain that Ohio's voting system is not adequately funded. (Complaint at ¶¶ 169-185). Again, however, the responsibility to hire and fund the local board of elections falls on the local governmental unit, not the Secretary of State. *See*, O.R.C. §§ 3501.05, 3501.11. Therefore, any allegation that there is a constitutionally required level of funding for a voting system must be brought against the local boards of elections, not the Secretary of State.

In a most bizarre litany, the Plaintiffs admit that the State of Ohio does not have to be compliant with the voter registration system of the Help America Vote Act until 2006, and then sue the Secretary of State for failing to comply with the voter registration system of the Help America Vote Act in 2005. (Complaint at ¶¶ 192-197). Since the deadline for compliance has not yet arrived, the Plaintiffs cannot state any cause of action under this theory.

E. The Institutional Plaintiffs Lack Standing To Bring Any Claims Against Either Governor Taft Or Secretary Of State Blackwell.

In their complaint, the organizational Plaintiffs allege institutional standing to bring their claims against the Secretary of State and the Governor. However, they lack such standing.

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, the organizational Plaintiffs lack standing. First, as pointed out time and time again, their claims cannot be fairly traceable to any action of Governor Taft or Secretary of State Blackwell. The Plaintiffs are complaining about decisions made by local boards of elections or their employees. Since any injury any of the members of these organizations had would have been caused by local boards of elections, not the Secretary of State, they lack standing.

Furthermore, the League of Women Voters of Ohio alleges that it has members in 28 counties. However, it fails to identify which counties those are. Thus, based upon the terms of the Complaint itself and the lack of League of Women Voters of Ohio to specify it has members

in any of the affected counties, the League lacks standing on the face of its complaint to bring a claim as a result of anything that has happened in this case. Likewise, the League of Women Voters of Toledo-Lucas County would apparently only have standing as it relates to harms its members in that one particular county suffered. Thus, this case should be dismissed due to the lack of standing by the Plaintiffs.

F. This Case Should Be Dismissed Because The Plaintiffs Have Failed To Include All Necessary Defendants.

The Plaintiffs have sued Governor Taft and Secretary of State Blackwell but have failed to include all necessary and proper defendants. Under Fed. R. Civ. P. 19(A), a person shall be joined as a party if that joinder will not deprive the Court of jurisdiction and if in that person's absence complete relief cannot be granted. Since, as demonstrated above, the activities over which the Plaintiffs have filed this lawsuit are within the legal control and the legal duty of the local county boards of elections, those boards must be joined. If the Plaintiffs refuse to join the eighty-eight local boards of elections, this Court should dismiss this claim.

G. The Plaintiffs Claims Are Barred By The Doctrine Of Claims Preclusion.

Throughout the month of October, numerous interest groups, including some of the Plaintiffs, filed lawsuits against the Secretary of State. Since claims concerning absentee ballots,[10] provisional ballot directives,[11] election day challengers,[12] pre-election challengers,[13] and voting machine placement[14] have already, or are in the process of being litigated, this Court should dismiss these claims.

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[10] *White v. Blackwell*, Case No. 3:04-cv-7689, N.D. Ohio.
[11] *League of Women Voters v. Blackwell*, Case No. 3:04-cv-7622, N.D. Ohio; *Sandusky County Dem. Party v. Blackwell*, Case No. 3:04-cv-7582, N.D. Ohio
[12] *Summit County Democratic Party v. Blackwell*, Case No. 5:04-cv-2165, N.D. Ohio; *Spencer v. Blackwell*, Case No. 1:04-cv-738.
[13] *Miller v. Blackwell*, Case No. 1:04-cv-735.
[14] *Ohio Democratic Party v. Blackwell*, Case No. 2:04-cv-1055.

The Sixth Circuit recognizes that the doctrine of "claims preclusion" prevents "litigation of claims that 'were previously available to the parties, regardless of whether they were asserted or determined in the first proceeding.'" *E.E.O.C. v. Franks Nursery & Crafts, Inc.*, 177 F.3d 448, 462-63 (6th Cir. 1999) *quoting Brown v. Felsen*, 442 U.S. 127, 131 (1979). Claims preclusion applies when the following elements are present: (1) a final decision on the merits; (2) subsequent action between the same parties, (3) the assertion of a new claim which should have been litigated in the prior action; and (4) identity of the causes of action. *Wilkins v. Jakeway*, 183 F.3d 528, 531 (6th Cir. 1999). All of these elements are present. On October 5, 2004, the Plaintiff League of Women Voters sued Secretary of State Blackwell in this very court concerning his directives dealing with provisional ballots. Case No. 3:04-cv-7622. The major portion of that case was dismissed under Fed. R. Civ. P. 12(b)(6). A 12(b)(6) dismissal is a dismissal on the merits. *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 917 (6th Cir. 1986). The alleged "historical problems" of Ohio's election system should have been litigated in that proceeding. Furthermore, the post election problems also should have been litigated in that proceeding since the case itself wasn't completely dismissed until January 12, 2005. Finally, the theory under the older League of Women Voters case was a § 1983 claim concerning Ohio's election. Thus, there is no reason to give the Plaintiffs a second bite at the apple. Therefore, this case should be dismissed on the doctrine of claims preclusion.

H. This Case Should Be Transferred To The United States District Court For The Southern District Of Ohio.

Venue in this Court is improper and this case should be transferred to the United States District Court for the Southern District of Ohio in Columbus. Both Defendants Taft and Blackwell, as well as the main Plaintiff League of Women Voters of Ohio have their main offices located in Columbus. Under 28 U.S.C. § 1404(a), a court should transfer venue for the

convenience of parties and witnesses. The Sixth Circuit has recognized that when determining whether to transfer venue, Courts should examine "the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.'" *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991) *quoting Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988). Since the defendants and the organizational plaintiff have their places of business in Columbus and the relevant witnesses to the Secretary of State's activities in the 2004 election reside in Columbus, this case should be transferred.

III. Conclusion

For the foregoing reasons, the Court should issue an order dismissing 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 29th day of August 2005.

/s Richard N. Coglianese
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