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.

Defendants' Supplemental Motion To Dismiss

Defendants J. Kenneth Blackwell and Bob Taft ask this Court to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1) and (6). A memorandum in support is attached.

Respectfully submitted,

Jim Petro
Attorney General

<u>/s Richard N. Coglianese</u>
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Memorandum In Support

On July 28, 2005, the Plaintiffs filed this lawsuit claiming that the manner in which Ohio conducts statewide elections violates the Fourteenth Amendment to the United States Constitution. Despite the fact that all of the problems claimed by the Plaintiffs revolve around decisions made by each local board of elections, the Plaintiffs refused to include those entities in this litigation. Instead, they sued two parties, Governor Taft and Secretary of State Blackwell, who as a matter of law, have no daily control over the various decisions the Plaintiffs claimed were unconstitutional.

The Plaintiffs' prayer for relief asks this Court to "preliminarily and permanently enjoin Defendants *prior to the next Statewide general election*…." (Complaint at Prayer ¶ 5) (emphasis added). On November 8, 2005, the State of Ohio held a Statewide general election in which the electors voted on five separate constitutional amendments. Thus, the Plaintiffs' claims for relief are now moot. Since the Plaintiffs are no longer asking for prospective injunctive relief, their claims are barred by the Eleventh Amendment. As a result, this Court no longer has jurisdiction over the Plaintiffs' claims and it should dismiss this case.[1]

[1] By means of a separate filing, the Defendants are also asking this Court to immediately stay all discovery.

I. Law And Argument

A. The Plaintiffs' Claims And Their Request For Relief Are Moot Since The State Has Held A Statewide Election And These Particular Plaintiffs Have Failed To Allege Any Problems Whatsoever With Regard To That Election.

It is axiomatic that federal courts are courts of limited jurisdiction. The Constitution restricts this Court to the adjudication of "cases" or "controversies." U.S. Const. Art. III § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). The mootness doctrine, which is a subset of the Article III "justiciability" requirement, demands that a case present a live case or controversy at *all times* during the pendency of the case. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). If, for example, a case presented a live case or controversy during the trial phase, but something happened during an appeal that mooted the case, the appellate court is bound to simply remand the case to the trial court with instructions to dismiss the case. *Id.* at 365.

The Sixth Circuit has recognized that "the test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc). Mootness, therefore, turns on whether a court can award any effective relief for an allegation of a deprivation. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992).

In this case, it is clear that this Court cannot award any relief for the allegations concerning the Plaintiffs claims. The Plaintiffs' prayer for relief is contingent upon the relief itself occurring *prior* to the November 8, 2005 election. That election has already occurred. Furthermore, the Plaintiffs have failed to specify any facts which would show any routine problems from that election, much less any allegations that the election was conducted in an unconstitutional manner.

This concern is more than simply niceties concerning the allegations in the complaint. The basis of the Plaintiffs' original complaint involved poll books, machine placements, and instructions that county elections officials gave the Plaintiffs concerning voting in proper precincts. However, as a matter of state law, the poll book is newly compiled each election. R.C. § 3503.23. Thus, if the Plaintiffs have failed to allege that there were any problems whatsoever with the voter registration rolls concerning the November 2005 Statewide election, this claim has been mooted. The same is true concerning any of the other allegations of harm to these particular Plaintiffs.

The Supreme Court has noted that an "equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged against – a 'likelihood of substantial and immediate irreparable injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 *quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). Since there has been an intervening Statewide election and the Plaintiffs have not alleged they are victims of any unconstitutional behavior, there is simply no harm under which the Plaintiffs can continue to allege an injury. Thus, the Plaintiffs' claims in this case, as well as the Plaintiffs' request for relief, have become moot.

B. The Plaintiffs' Claims Are Barred By The Eleventh Amendment To The United States Constitution.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has long recognized that this Amendment bars the federal courts from hearing suits against a State by residents of that State. *Hans v. Louisiana*, 134 U.S. 1 (1890).

In its most recent announcement on Eleventh Amendment immunity, the Sixth Circuit recognized the well-known exceptions to Eleventh Amendment immunity including lawsuits filed against state officials "for purely injunctive relief enjoining the official from violating federal law." *Ernst v. Rising*, 2005 U.S. App. LEXIS 23123 at * 14 (6th Cir., Oct. 26, 2005) (en banc).

The Sixth Circuit recognized that a federal court's jurisdiction is limited only to prospective injunctive relief and cannot include any retroactive awards. *Id.* at * 43 *citing Edelman v Jordan*, 415 U.S. 651, 677 (1974). Eleventh Amendment defenses, as well as any exception to the defense, must be considered on a case-by-case basis. *Id.* at *44 *citing Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 337 (6th Cir. 1990).

In this case, it is clear that the Plaintiffs, by the very terms of their complaint, are not seeking prospective injunctive relief. Rather, their prayer for relief, filed in July of 2005, is couched in terms of the "next Statewide general election." The Ohio Revised Code defines "General election" as "the election held the first Tuesday after the first Monday in each November." R.C. § 3501.01(A). Since this Court cannot issue any type of injunctive relief that will apply to an election that has already passed, the Plaintiffs cannot maintain that they are seeking prospective injunctive relief. Rather, they are seeking retroactive relief in violation of the Eleventh Amendment. Thus, this Court is without jurisdiction to hear any claim or to award any relief.

C. The Organizational Plaintiffs Lack Any Standing To Pursue Any Claim.

The League of Women Voters and the League of Women Voters of Toledo Lucas County lack standing to bring this claim. The United States Supreme Court has recognized that an organization has standing to bring litigation on behalf of its members if the members "or any one

of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The exception to this, however, is "[s]o long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction."

In this particular case, each and every member of the Plaintiffs' organization is essential to the proper resolution of this case. The Plaintiffs are not alleging that a particular statute or directive is unconstitutional. Rather, the Plaintiffs have alleged that there were numerous problems with prior elections in the State of Ohio. They further allege that individual decisions made by thousands of county employees resulted in the intentional deprivation of constitutional rights. Thus, in order to appropriately litigate those claims, each and every member of both the League of Women Voters and the Toledo League may have to be deposed to determine exactly what problem they had and whether that was the result of an error or of intentional conduct resulting in the deprivation of constitutional rights. Thus, the individual participation of each and every member of the organization is essential to this case. That makes the organizations an improper party to raise any claim.

Conclusion

For the foregoing reasons, the Defendants ask this Court to dismiss this case.

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 14th day of November, 2005.

/s Richard N. Coglianese