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

LEAGUE OF WOMEN VOTERS,	**:**	
PLAINTIFFS,	**:**	
VS.	**:**	**CASE NO. 3:05-CV-7309**
J. KENNETH BLACKWELL,	**:**	**JUDGE CARR**
DEFENDANTS.	**:**	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MOTION TO DISMISS *INSTANTER* AND MOTION TO STAY DISCOVERY

I. Introduction

In a reply that misconstrues the legal concepts of Sovereign Immunity, mootness, standing, and standards for a motion to dismiss, the Plaintiffs have, nonetheless, shown why this Court should immediately stop discovery and why this Court should ultimately find that the Plaintiffs' claims are barred. The Plaintiffs' prayer for relief, regardless of what they attempted to convey, is couched in terms of the November 2005 election. That election has passed. Since the Plaintiffs claims are moot and the Defendants are entitled to Sovereign Immunity, this Court should halt all discovery in this case and, after properly reviewing both the motion and supplemental motion, dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

II. Law And Argument

A. A Court Must Review The Text Of The Complaint, Not The Subjective Intent Of Counsel, When Ruling Upon A Motion To Dismiss.

In this Circuit, when subject matter jurisdiction is challenged in Rule 12(b)(1) motion to dismiss, "the plaintiff has the burden of providing jurisdiction in order to survive the motion." *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc) *citing Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986). Thus, despite the platitudes Plaintiffs state in their memorandum contra, it is they who must prove that this Court has jurisdiction over their claim.

Furthermore, it is irrelevant what the Plaintiffs' counsel intended with their prayer for relief. They may have intended to request relief in 2006, but the terms of their complaint are now moot. Thus, when this Court examines the allegations in the complaint, as it must, it becomes clear that the Plaintiffs are unable to prove that this Court has any jurisdiction whatsoever over their claims. *See, e.g., Jones v. City of Lakeland*, 173 F.3d 410, 413 (6th Cir. 1993).

Finally, this Court should reject the Plaintiffs' blatant attempt to have it both ways. After arguing that the Plaintiffs really did not mean what they pled in their prayer for relief, they then state that "Plaintiffs are prepared to serve an amended pleading." (Memo Contra at 5). However, the date to amend the complaint has passed. In addition, the Sixth Circuit has determined that it is inappropriate for a plaintiff to oppose a motion to dismiss and at the same time ask the Court for permission to amend if their pleading is, in fact, deficient. *See, e.g., Begala v. PNC Bank, Ohio*, 214 F.3d 776, 786 (6th Cir. 2000) (stating that plaintiffs cannot expect "an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies."). Thus, the Plaintiffs' arguments must either

prevail or this case must be dismissed on the basis of their complaint, not on the basis of some hoped for future amendment.

B. This Court Is Without Subject Matter Jurisdiction To Hear Any Of The Plaintiffs' Complaints And, As A Result, The Defendants Are Entitled To Having This Case Dismissed.

1. The Plaintiffs Have Failed To Understand That Mootness, By Its Very Nature, Is Something That May Present Itself At Some Point After An Initial Motion To Dismiss Is Filed.

The Plaintiffs have spent a considerable amount of time in their memorandum contra arguing that the Defendants did not raise mootness during the case management conference in August, but instead, waited until November. This allegation, of course, is just as correct as it is meaningless.

Mootness, just like standing and ripeness, raises a most basic question about a federal court's jurisdiction that *cannot be waived* and goes to the very heart of the "case" or "controversy" requirement of Article III. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Furthermore, "the mootness inquiry must be made *at every stage of a case*; thus, if a case becomes moot during an appeal, the judgment below must be vacated and the case remanded with instructions to dismiss." *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (emphasis added).

Prior to the November 8, 2005 Statewide general election, the Defendants simply could not have raised a mootness argument. In addition, Issues 2-5 were not approved for placement on the Ohio Statewide ballot until September 6, 2005, more than one week after the status conference that the Plaintiffs quote. Thus, the opportunity to raise a mootness argument did not occur until November 9, 2005. On November 10, the Defendants informed the Plaintiffs that they were canceling all discovery in this case and, despite the fact that Friday November 11 was

a State and federal Holiday, the Defendants still filed a supplemental motion to dismiss on Monday November 14. The Defendants have been very prompt in raising this defense once the defense presented itself.

2. This Case Has Become Moot Because Of The November 2005 General Election.

The gravamen of the Plaintiffs' complaint is that Ohio's election system is unconstitutional. Yet, there is a simple question that they have failed to ever answer. Are they claiming that an Ohio law violates the Due Process Clause or the Equal Protection Clause? Is there a Directive that the Secretary of State issued in 2004 that infringes upon their constitutional rights? The answers to both of these questions are an unabashed no. Rather, instead of simply alleging R.C. § 35xx.xx violates the constitution, the Plaintiffs claimed that because each of them had a specific problem when they attempted to vote in 2004, that is proof of an unconstitutional voting system. It is because the Plaintiffs make such a claim that their claims have, in fact, become moot.

The Plaintiffs had an opportunity to vote in the 2005 election. Yet, there are simply no allegations in this complaint that any of the Plaintiffs had any problems when they voted. In fact, there are no allegations in the complaint whatsoever that the Plaintiffs themselves voted. Rather, Sadie Rubin has testified that she had not voted in the 2005 primary election and did not know whether she would vote in the 2005 general election. (Rubin Depo. At 21-22).[1] Furthermore, she had no basis to believe that when Knox County increased its supply of voting machines for the 2006 election by 43% that such an increase will be insufficient to handle the

[1] The mootness and Eleventh Amendment immunity arguments are brought specifically under Fed. R. Civ. P. 12(b)(1). The Sixth Circuit has recognized that a defendant can attach information outside of the complaint itself and that the presence of such material does not convert the 12(b)(1) motion to a motion for summary judgment. *Ernst v. Rising*, 427 F.3d 351, ___, 2005 US App LEXIS 23123 at * 58-59 (6th Cir. 2005) (en banc).

influx of voters from out of State college students who attend Kenyon College and decide to register to vote in Ohio. (Rubin Depo. At 50-51).

Mildred Casas presents an even clearer case of mootness. Since the 2004 election she has moved but she has failed to update her voter registration with the Franklin County Board of Elections. (Casas Depo. At 11, 17). As a result, she is not currently a legally registered elector entitled to vote in the precinct in which she had an alleged problem in 2004. R.C. § 3503.01. Furthermore, she did not plan on voting in 2005 and does not have any facts to suggest that when she presents herself to vote in 2006 there will be any issue. (Casas Deposition at 62). Thus, Casas' claim, by her own admission, is moot.

Likewise, Deborah Cooley's claim is equally moot. Her complaint is that she was told that she needed to reverse her Bush-Cheney 2004 t-shirt when she voted in November 2004. She has not alleged and simply cannot allege that in future elections she will wear a t-shirt of another candidate for office and that a county polling official will ask her to cover the candidate logo. (Cooley Depo. At 50-51).

Finally, Charlene Dyson's claim was moot before the end of the 2004 election. Her complaint was that when she appeared at her polling place in November 2004, her sister informed her that somebody had claimed she would not be allowed to do curbside voting. However, well before the polls closed on November 2, 2004, Dyson was informed that if she returned to her polling location, the election officials would bring a ballot out to her.[2] (Dyson Depo. At 25-26). Furthermore, Dyson has admitted that she had never had a problem voting in any election from 1977-2003. (Dyson Depo. At 28-34). Thus, she has not and cannot claim that this situation will present itself again in the future.

[2] Dyson is in a wheelchair due to arthritis. Since the November 2004 election, the school where Dyson votes has added a wheelchair ramp, thereby completely eliminating the need for Dyson to engage in curbside voting.

The mootness argument is the same for the other plaintiffs as well. There has been an intervening election. Since they are attacking the best efforts of thousands of elections officials instead of the statutes or directives of the State of Ohio and they have failed to allege that they were impacted again in 2005, their claims are moot and should be dismissed.[3]

3. The Defendants Have A Right To Articulate Additional Arguments Concerning The Standing Of The Organizational Plaintiffs.

In a rather unusual argument, the Plaintiffs have claimed that the Defendants should be precluded from advancing any additional arguments concerning their standing. This argument shows that the Plaintiffs have a fundamental misunderstanding about the jurisdiction of federal courts.

As mentioned above, standing is a basic Article III requirement that simply cannot be waived by a party. *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 531 (6th Cir. 2002). Furthermore, a lack of standing may be raised at any point in litigation. *Id.*; *see also* Fed. R. Civ. P. 12(h)(3). Thus, the Plaintiffs argument that the standing of the organizational plaintiffs cannot be raised now is simply incorrect.

Furthermore, in their substantive response to this argument, the Plaintiffs have clearly misconstrued the requirements of standing. Organizations may have standing in order to raise the harm that their members have suffered. However, the situation present in *Sandusky County Democratic Party*, 387 F.3d 565 (6th Cir. 2004) is simply not present in this case. In *Sandusky County*, the allegation was that a Directive of the Ohio Secretary of State requiring any

[3] In their memorandum contra, the Plaintiffs make some passing references to newspaper articles about allegations of problems that some may have experienced in 2005. Outside of the obvious fact that such statements are hearsay, they are utterly irrelevant to this case. First, this is a motion to dismiss and none of those allegations have been included in the Plaintiffs' complaint. Second, this case has not been filed as a class action. The people referred to in the newspapers are not proper plaintiffs in this case and the plaintiffs cannot use anything that happened to them in order to advance their own claims.

provisional ballots to be cast in the proper precinct directly challenged the constitutionality of that Directive and did not require the participation of any member of the Plaintiffs' organization.

The Supreme Court has recognized that organizations do not have standing to litigate harm of their members if the individual participation of "each injury party (is) indispensable to the proper resolution of the cause…." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The Plaintiffs have not maintained that the Sixth Circuit's decision about organizational standing overruled the Supreme Court's decision in *Warth.* The Plaintiffs have not maintained that the *Warth* decision is no longer good law. Thus, the Plaintiffs are simply incorrect in their legal statement concerning organizational standing.

In this case, the participation of individual members of the organizational plaintiffs is paramount. The organizational Plaintiffs, much like the individual Plaintiffs, are simply alleging that problems occurred in Ohio in 2004. However, in order to examine these allegations, we will need to examine the situation of the individual members of the organization since there is not a simple claim that a statute or directive, but rather every miniscule decision made by every single county election official, was unconstitutional.

C. The Defendants Are Entitled To Eleventh Amendment Immunity In This Case.

As demonstrated above, all of the Plaintiffs claims are moot. They have not alleged an ongoing constitutional violation on behalf of either Secretary of State Blackwell or Governor Taft. Rather, they have alleged that individualized decisions of local elections officials violated the constitutional rights of the various Plaintiffs. Because the Plaintiffs' claims are mooted by the passage of time and their failure to allege any unconstitutional action by either of the Defendants in the 2005 election, they are not seeking prospective injunctive relief.

Furthermore, the specific relief that the Plaintiffs seek concerned the next Statewide election.[4] Therefore, by the terms of the relief itself, the Plaintiffs are seeking retroactive relief that is simply impossible to grant.

Finally, the Plaintiffs have failed to understand a major component of Eleventh Amendment immunity in attempting to cast aspersions upon the manner in which the Defendants raised their immunity. In a concurring opinion in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 395 (1998), Justice Kennedy wrote that the Supreme Court "could eliminate the unfairness by modifying our Eleventh Amendment jurisprudence to make it more consistent with our practice regarding personal jurisdiction. Under a rule inferring waiver from the failure to raise the objection at the outset of the proceedings, States would be prevented from gaining an unfair advantage."

The Supreme Court adopted this reasoning in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002). The Court noted that a State will have waived its Eleventh Amendment immunity if it takes action during litigation that can be construed as a waiver. The Sixth Circuit has, therefore, recognized that if a State sued in federal court, fails to raise an Eleventh Amendment defense at the outset, and engages in discovery, the State will have waived its immunity. *Ku v. Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003). In order to make it abundantly clear to the Plaintiffs, this Court, and any reviewing Court that the State of Ohio has not engaged in any behavior that could constitute a waiver of Sovereign Immunity, the State immediately raised the issue and also immediately ceased engaging in any discovery as soon as that immunity emerged.

[4] Although the Plaintiffs' lawyers may be somewhat unfamiliar with O.R.C. Chapter 35 since they are from New York City, San Francisco, and Washington, D.C., they should still be charged with the duty to understand Ohio's elections laws and to plead their complaint in compliance with those laws.

D. The Defendants Are Entitled To A Complete Stay Of Discovery While This Court Evaluates Their Eleventh Amendment Immunity Defense.

As argued in the supplemental motion to dismiss, Sovereign Immunity, like qualified and absolute immunity, is immunity from suit. That would include the burdens of litigation such as discovery. Therefore, the Defendants are entitled to a stay. Furthermore, if a stay is not granted, the Defendants are forced into the untenable position of potentially waiving their sovereign immunity by following the Court's order or having to take an interlocutory appeal of a discovery order so that no court can find that the Defendants waived their immunity.

III. Conclusion

For the foregoing reasons, this Court should immediately stay discovery and dismiss the Plaintiffs' claims because they are moot and the Defendants are entitled to Eleventh Amendment immunity.

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 18th day of November, 2005.

/s Richard N. Coglianese