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

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

DEFENDANTS' MOTION TO DISMISS
THE PLAINTIFFS' AMENDED COMPLAINT

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

Respectfully submitted,

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Memorandum In Support

I. Introduction

After more than a year, various parties are still attempting to cast doubt on the 2004 election process—a process that every reviewing court has concluded to have been conducted in a fair, honest and efficient manner. *See e.g. Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004); *Stewart v. Blackwell*, 356 F. Supp. 2d 791 (D. Ohio 2004); *Moss v. Bush*, 105 Ohio St.3d 458, 2005-Ohio-2419. In this particular challenge to the 2004 election process, the Plaintiffs have argued that the State of Ohio, Governor Bob Taft and Secretary of State Ken Blackwell ("Defendants") have engaged in a pattern of activity designed to deprive Ohio citizens of their right to vote. Laying aside the fact that Plaintiffs have not, and, indeed, cannot, offer a single shred of evidence to suggest that Defendants have masterminded a decades-long constitutional conspiracy, Plaintiffs' complaint must be dismissed due to a more fundamental flaw: the Eleventh Amendment prohibits them from asserting such claims.

The Eleventh Amendment bars plaintiffs from suing the State unless such suits limit the relief sought to enjoining "state officials from the future enforcement of state legislation that violates federal law." *See, e.g., Ernst v. Rising*, 427 F.3d 351, 367 (6th Cir. 2005) (en banc) *citing Alden v. Maine*, 527 U.S. 706, 713 (1999); *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). As a result, for Plaintiffs to defeat a motion to dismiss on Eleventh Amendment immunity grounds, they must sufficiently prove that they have placed Defendants on notice of a

continuing constitutional or federal statutory violation and request the court to order the offending officials from engaging in such violations in the future.

Plaintiffs' complaint fails here because they have failed to place Defendants on notice of a continuing constitutional violation. Instead, Plaintiffs attempt to cobble together a continuing constitutional violation by manufacturing a list of alleged election law violations, such as insufficient number of voting machines, long lines and poll worker miscommunications, each of which occurred at specific polling locations. *See* Amended Complaint, ¶¶ 14, 18-19. These types of violations, regardless of whether they actually happened, would not even fall under the Defendants' jurisdiction. Rather, county boards of elections police the polls and are responsible for the polls. *See e.g.* R.C. 3501.11; R.C. 3501.29. And even if the Defendants were somehow responsible for the elections' conduct, a laundry list of perceived slights does not rise to the level of a continuing constitutional violation. *See, e.g., Gamza v. Aguirre,* 619 F.2d 449 (5th Cir. 1980); *Hennings v. Grafton,* 523 F.2d 861 (7th Cir. 1975). Indeed, the complaint's weakness is evident from the conspicuous absence of any alleged violations from the three elections held in 2005. That weakness, and the simple failure to allege sufficient facts showing an ongoing constitutional violation by the State of Ohio, make the Plaintiffs' amended complaint facially invalid and deprive this Court of jurisdiction under the Eleventh Amendment.

II. PROCEDURAL HISTORY

On July 28, 2005, the Plaintiffs filed their original complaint in this litigation. That complaint included several individual voters who alleged garden variety election problems when they attempted to vote in the 2004 general election. It also included a laundry list of unattributed allegations from unknown voters who apparently believe they had problems when they tried to vote in 2004. The original complaint demanded relief before the next Statewide general election.

On August 29, the Defendants filed a motion to dismiss the complaint. Because the next Statewide general election was not yet upon us, the Defendants did not raise an Eleventh Amendment defense. The Statewide general election occurred on November 8, 2005. On November 14, 2005, the Defendants immediately filed a supplemental motion to dismiss arguing that the Eleventh Amendment prohibited the Court from exercising jurisdiction over the Plaintiffs' claims and a motion to stay discovery. The Plaintiffs opposed this filing and the Defendants filed a reply brief.

On November 21, this Court denied the Defendants' supplemental motions without prejudice and ordered the Plaintiffs to file an amended complaint no later than November 30. They did so. The Plaintiffs, however, simply changed their prayer for relief. They simply changed their prayer from the next Statewide general election to the 2006 Statewide general election. They did not include any allegations that any alleged constitutional violations were ongoing. After seeing the amended complaint, the Defendants again filed a motion to stay discovery.

On December 2, 2005, this Court issued an opinion denying, in part, the Defendants' motion to dismiss the original complaint. Since an amended complaint had been filed, the original complaint had become moot. *Klyce v. Ramirez*, 852 F.2d 568 (6th Cir. 1988). The Defendants were ordered to file a motion to dismiss by noon on December 7.

III. LAW AND ARGUMENT

A. This Court Is Without Jurisdiction To Hear The Plaintiffs' Complaint Because The Defendants Are Entitled To Sovereign Immunity.

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 federal courts from hearing suits against a State by residents of that State. *Hans v. Louisiana*, 134 U.S. 1 (1890).

1. The Plaintiffs Have Failed To Plead Proper Facts That Show The Defendants Have Engaged In An Ongoing Violation Of Federal Law Or The Constitution.

From the time of the organization of this Country, States have enjoined immunity from suit in federal court. *See, e.g., Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (en banc) *citing Alden v. Maine*, 527 U.S. 706, 713 (1999); *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). The nature of a State's immunity "flows from the nature of the sovereignty itself as well as the Tenth and Eleventh Amendments to the United States Constitution." *Id. citing Alden*, 527 U.S. at 713.

"In *Ex parte Young*, 209 U.S. 123, 159-60 (1908), the Supreme Court carved out an exception to the States' constitutional immunity from suit, one that permits federal courts to enjoin state officials from the future enforcement of state legislation that violates federal law." *Id.* at 367. Thus, in order to qualify for an exception to the constitutional doctrine that a State cannot be sued by a private individual in federal court, the Plaintiff must allege that application of State law has violated the federal constitution in the past and will continue that violation into the future. Thus, a federal court can grant "relief that serves directly to bring an end to a present violation of federal law." *Papasan v. Allain*, 478 U.S. 265, 278 (1986).

In their amended complaint, the Plaintiffs have completely failed to plead any facts that would show the State of Ohio, Governor Bob Taft, Secretary of State Ken Blackwell, or any other State (or even municipal) official is currently engaged in a continuing violation of federal statutory or constitutional law. Rather, in the Plaintiffs' original Complaint, they simply asked that this Court issue an injunction concerning a sporadic list of actions taken by local officials

during the 2004 election in time for the "next Statewide general election." The Defendants, immediately upon being able to raise this issue with the passing of the "next Statewide general election," filed a supplemental motion to dismiss based upon its Eleventh Amendment immunity.

The Plaintiffs' Complaint fails to meet the requirements of *Ex parte Young* because the Plaintiffs have failed to allege any facts regarding how the State of Ohio is continuing to violate their constitutional rights. Rather, the Plaintiffs have simply said that they believe that some bad things happened in the past. Most importantly, however, the Plaintiffs have failed to allege that any unconstitutional activities took place during the November 2005 general election. Thus, the Plaintiffs have failed, in a most elementary manner, to plead a claim that meets the *Ex parte Young* standard. Because of that failing, this amended Complaint must be dismissed.

2. The Plaintiffs have failed to plead any constitutional violations by either Governor Taft or Secretary of State Blackwell.

It is undisputed that the Federal Constitution protects the right of all qualified citizens to vote in state and federal elections. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Furthermore, those qualified citizens who do vote have a constitutional right to have their votes counted without debasement or dilution. *Hadley v. Junior College Dist. Of Metropolitan Kansas City*, 397 U.S. 50, 52 (1970).

However, this does not mean that any simple election irregularity rises to the level of a constitutional violation. *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975). For example, the "[m]ere violation of a state statute by an election official … will not [rise to the level of a constitutional violation]." *Id. citing Snowden v. Hughes*, 321 U.S. 1, 11 (1944). As *Hennings* recognized, the only time that infringements have been found to rise to the level of a constitutional violation have been "malapportioned voting districts or weighted voting systems, purposeful or systematic discrimination against voters of a certain class, geographic area, or

political affiliation; election frauds; and other willful conduct which undermines the organic processes by which candidates are election." *Id.* (internal citations omitted).

On the other hand, election irregularities "caused by mechanical or human error and lacking in invidious or fraudulent intent … does not show conduct which is discriminatory by reason of its effect or inherent nature," and by definition cannot be a constitutional violation. *Id.* Thus, when voting machines malfunction and election officials fail to take the legally proscribed steps to remedy that situation, it is not a constitutional violation. *Id.* Likewise, allowing some voters to vote a second time without establishing a procedure to insure that the first vote cast by that voter was not counted is certainly a failure of that official to properly discharge his responsibilities; however, it does not rise to the level of a constitutional violation. *Id.*

Other courts have adopted the constitutional standard as set forth in *Hennings*. "The Constitution is not an election fraud statute." *Bodine v. Elkhart County Election Board*, 788 F.2d 1270, 1271 (7th Cir. 1986). After restating the *Hennings* standard, the *Bodine* Court went on to discuss the allegations that were before it:

> The difficulty here is that appellants confuse fraud with what is at most willful neglect. Appellants' argument is that defendants' undermined the election process by fraudulently and willfully refusing to test the system, count the votes, and certify the results. Significantly missing from the argument is any allegation that the computer control cards were somehow manipulated by the defendants to undermine the election.

Id. at 1272. The Court went on to find that the Plaintiffs failed to state a claim because the complaint failed to include an allegation of fraud on behalf of the government officials. *Id.* at 1273.

In another opinion, the Seventh Circuit, in another opinion, recognized that almost all election law is State law. "The district court has no supervisory powers and no authority to

instruct the Board how to follow state law. A violation of state law does not state a claim under § 1983; we have rejected such contentions repeatedly…. That this case involves elections does not matter. *Snowden v. Hughes*, 321 U.S. 1, 11 (1944) holds that a deliberate violation of state election laws by state election officials does not transgress the Constitution." *Kasper v. Board of Election Commissioners of the City of Chicago*, 814 F.2d 332, 342 (7th Cir. 1987). The *Kasper* Court went on to state that:

> The complaint does not allege, and the proposed decree does not admit, that the Board desires the dilution of honest votes and is trying to ensure an adequate supply of ghost voters. The natural reading of the documents is that the Board has done a slapdash job of administering the law, and that private parties ("dishonest precinct captains") have taken advantage of its laxity. The failure of the police and other agents of the government to stop private offenders is not itself a violation of the constitution. So, if as in *Jackson v. City of Joliet*, police direct traffic around a burning car without trying to save its occupants, their inaction does not violate constitutional rights of the occupants, although it may violate state law. The remedies for ineffectual public officials are political rather than constitutional.

Id. at 344.

The Fifth Circuit has adopted this reasoning as well. In *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980), the Court recognized that there is a distinction between "state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote." The *Gamza* Court noted that "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause. The unlawful administration by state officers of a non-discriminatory state law, 'resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an

element of intentional or purposeful discrimination.'" *Id. quoting Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

Elections, including the election for a State's Presidential electors, is a matter entrusted by the United States Constitution to the States themselves. U.S. Const. Art. I, § 4; U.S. Const. Art. II , § 1; *see also Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986). "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss. Section 1983 did not create a delictual action for the torts of state officials and it did not authorize federal courts to be state election monitors." *Id.* at 453-54.

In an election case brought under § 1983 that actually sought monetary damages, the Fourth Circuit observed that "In presenting their case plaintiffs would essentially ask a jury to review the outcome of an election…. The task is reserved for states and legislatures, and though the jury's review would not directly impair their primary responsibility to adjudge elections, its re-examination of election results would be inconsistent with proper respect for the role of others whose job it is to canvass the returns and declare a prevailing party. This intrusion, moreover, would not be limited to that of a jury, for the judiciary itself would doubtless be asked to review the jury's judgment of the election in post-trial motions. Principles of separation of powers and federalism, therefore, dictate that both jury and court avoid this inquiry." *Hutchinson*, 797 F.2d at 1285-86. After recognizing the very real problem of juries and judges allowing partisanship to enter into any legal review, the court recognized that "[e]lections are, regrettably, not always free from error. Voting machines malfunction, registrars fail to follow instructions, absentee ballots

are improperly administered, poll workers become overzealous, and defeated candidates are, perhaps understandably, inclined to view these multifarious opportunities for human error in a less than charitable light." *Id.* at 1286-87. Even with such inherent problems, the Fourth Circuit still declined to involve itself with duties properly reserved to the States.

The State, as noted above, has a Sovereign Immunity defense to the Plaintiffs' claims because the Plaintiffs have failed to include allegations in their Amended Complaint that the State is currently engaging in any type of an ongoing constitutional violation. All of the allegations in the Plaintiffs' Amended Complaint end with the 2004 statewide general election. On November 8, 2005, the State of Ohio held a Statewide general election. Most noticeably absent, however, from the Plaintiffs' Amended Compliant is any allegation whatsoever that any problems, including even the most basic garden variety election problems, occurred. The Plaintiffs' Amended Complaint also failed to include any factual allegations of any willful and malicious denial of constitutional rights. This Court should not engage in conjecture to infer that the Plaintiffs had any problems whatsoever during the November 2005 general election, as the Amended Complaint must stand on its own. Rather, the lack of allegations concerning problems in the November 2005 general election show that the Plaintiffs have failed to allege any ongoing constitutional violation.

Just as important, numerous Ohio laws are in the process of changing as a result of the Help America Vote Act. For example, by the first federal election of 2006, every single county in the State of Ohio will have new voting equipment. H.B. 262 (attached). Thus, it is impossible to predict how these changes will affect any alleged problem concerning voting lines. In addition, the State of Ohio has just passed a new law that will go into effect for the 2006 elections that will allow for no-fault mail balloting. Thus, for example, it is completely

impossible to predict today whether there will be any lines on election day 2006 since under Ohio's new law, anybody can simply request a mail-ballot. This is a major change from the prior law under which there were very few reasons a voter was able to obtain an absentee ballot. R.C. § 3509.02.

In addition, the Plaintiffs in the present case have failed to allege any willful discrimination by either the Governor or the Secretary of State concerning the past, present, or future administration of Ohio's election system. Rather, they have alleged the garden variety polling place problems that affect every single election that has ever been held in any State in this County. Such activities, as courts have recognized, simply are not a violation of either the Due Process or Equal Protection Clauses. Rather, they are examples of regrettable human errors by local poll workers that simply occur during the election process.

Most importantly, however, by recognizing that the Plaintiffs have failed to allege an ongoing constitutional violation by the State of Ohio, the Plaintiffs will not force this Court to commit itself to the problems that the *Hutchinson* case recognized by examining what are essentially political questions. "To ask a jury to undertake such tasks, moreover, is to risk the intrusion of political partisanship into the courtroom, where it has no place. From the exercise of jury strikes to the final rendering of verdict, the spectre of partisanship would intrude and color court proceedings. Such disputes belong, and have been placed, in the political arena, and we cannot accept the substitution of the civil jury for the larger, more diverse, and more representative political electorate that goes to the polls on the day of the election." *Hutchinson*, 797 F.2d at 1287. Although the State recognizes that the *Hutchinson* case involved a demand for monetary damages under § 1983 and a jury trial, if this Court were to find it had jurisdiction over the Plaintiffs' claims, it would soon have to face the very real possibility of lawsuits that actually

asked for monetary damages and contained jury demands as well for past and future elections. Since the Plaintiffs have failed to allege that the Defendants have engaged in an intentional and ongoing deprivation of their federal constitutional rights, the Plaintiffs have failed to plead a complaint that defeats the State's sovereign immunity and this Court must dismiss this case.

B. The Plaintiffs Have Failed To Plead Any Cognizable Cause Of Action Under The Fourteenth Amendment.

As noted above, federal courts are without jurisdiction to hear garden variety election claims because the United States Constitution gives large discretion to the States themselves in the conduct of elections. The Plaintiffs have not plead any facts that would allow this Court to conclude that the Defendants are intentionally violating either the Due Process Clause or the Equal Protection Clause, or that those violations are ongoing.

The most basic element of a § 1983 claim is that it must involve intentional behavior. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Since the allegations in the Amended Complaint lack any facts that show intentional, willful, or malicious actions by the Secretary of State or the Governor, these claims do not meet the most basic requirement for a claim under § 1983.

Furthermore, as it relates to any due process claim that the Plaintiffs have attempted to present to this Court, the simple fact is that an adequate state remedy exists, thereby depriving them of the ability to bring a claim under 42 U.S.C. § 1983. One of the most fundamental requirements of a due process claim under 42 U.S.C. § 1983 is to assess whether an adequate state remedy exists to redress any alleged deprivation. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978).

In *Griffin*, the court found a constitutional violation because Rhode Island law did not address whether absentee ballots were authorized for primary elections. The Rhode Island Secretary of State initially ordered absentee ballots to be issued for a primary election. Those

ballots were issued and returned by voters. After the election, the Rhode Island Supreme Court ordered that the absentee ballots not be counted. *McCormick v. State Board of Elections, R.I.*, 119 R.I. 384, 378 A.2d 1061 (1977). Litigation in federal court proceeded, and the First Circuit found that this behavior was sufficient to state a claim under § 1983 because the entire electoral process was flawed. *Griffin*, 570 F.2d at 1078. The court found that "due process is implicated where the entire election process – *including as part thereof the state's administrative and judicial corrective process* – fails on its face to afford fundamental fairness." *Id*. (emphasis added).

The Plaintiffs have failed to allege that Ohio's electoral process, including the administrative process or the State's judicial process, fails to afford them due process. For example, some of the Plaintiffs in this case allege that their names did not appear on the poll roster in the 2004 general election. Ohio election law, however, allows any voter whose name should have been on a registration roll, but was not there, to file an appeal with the appropriate county board of elections. R.C. § 3503.24. Furthermore, the various county boards of elections are empowered to investigate the accuracy of the voter registration roll on its own. R.C. § 3503.25. Finally, boards of elections have a clear legal duty to compile an accurate and correct list of voters registered to vote for that election. R.C. § 3503.23. Thus, if the board of elections failed to properly comply, filing a mandamus action in the State court system is another adequate state remedy that will defeat any due process claim brought under 42 U.S.C. § 1983. *See, e.g.*, *Collyer v. Darling*, 98 F.3d 211, 227 (6th Cir. 1996). Furthermore, the State of Ohio has adopted a complete administrative complaint process for any voter who believes his rights under the Help America Vote Act have been violated. 42 U.S.C. § 15512.

Since the Plaintiffs' Amended Complaint fails to allege that either Ohio's administrative or judicial review processes are inadequate, they have failed to state a claim under the due process clause. Thus, the Court should dismiss this allegation.

C. This Court Must Dismiss The Plaintiffs' Claims Under HAVA Because The Plaintiffs Have Failed To Allege That The State Of Ohio Is Not Complying With The Help America Vote Act.

The Plaintiffs have failed to state any claim under HAVA for the failure to maintain a proper voter registration roll. As an initial matter, this list is not required under HAVA until January 1, 2006. 42 U.S.C. § 15483(d)(1)(B). Therefore, this claim is simply not ripe. Furthermore, the statute leaves the choice of the manner of compliance with this provision and every other provision in Title III of HAVA upon the State. 42 U.S.C. § 15485.

Furthermore, the Secretary of State expects that Ohio will be HAVA compliant by the deadline – January 1, 2006. The Secretary's Office has worked hard in conjunction with various local county boards of elections in areas such as training of poll workers, updating voter registration rolls, and every other provision of HAVA to insure that Ohio's elections system continues to be one of the best run in the country.

D. This Court Should Dismiss The Claims Filed By Plaintiffs Dyson, Rubin, Casas, And Cooley.

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 vote curbside. 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.[1] (Dyson Depo. At 25-26).[2]

[1] 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.

Furthermore, Dyson 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.

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). Moreover, Cooley has failed to make any allegations that there was any discriminatory intent whatsoever by the local county government official who told her to reverse her t-shirt. Thus, she has failed, as a matter of law, to properly plead a § 1983 claim.

Sadie Rubin 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). Furthermore, she had no basis to believe that when Knox County increased its supply of voting machines for the 2006 election by 43 per cent that such an increase would be insufficient to handle the 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 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

[2] Since the Defendants are alleging that the complaints specifically of these four plaintiffs are moot under Fed. R. Civ. P. 12(b)(1), the Defendants have a right to attach information outside of the complaint. Such material does not convert this motion into a motion for summary judgment. *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc).

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.

E. Ohio Officials Cannot Be Liable For The Actions Of County Employees.

Federal district courts in Ohio have properly recognized that "Title 35 of the Ohio Revised Code is entitled 'Elections' and contains 15 separate chapters. The Ohio system for elections delineates the Secretary of State as the chief elections officer (§ 3501.04). However, *the conduct of elections is controlled primarily by the Board of Elections in each of the 88 counties*. The duties of the Board of Elections are set forth in § 3501.11." *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 804 n. 20 (N.D. Ohio 2004) (emphasis added). Among those duties are the requirements that each local board of elections:

- 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.

Furthermore, the obligation to pay the expenses of the board of elections falls squarely upon the "county treasury." R.C. § 3501.17. Each county has a legal obligation to properly fund the board of elections and if it does not do so, each local board may "apply to the court of common pleas within the county, which shall fix the amount necessary to be appropriated and the amount of money shall be appropriated." R.C. § 3501.17(A). Thus, the employees of each board of elections are county officials and county employees. R.C. §§ 109.36, 309.09.

The local boards of elections have an obligation to divide the county into precincts and to "provide for the convenience of the voters and the proper conduct of elections." R.C. § 3501.18. When the local boards of elections change the location of a precinct, it has the legal obligation to mail notice to the affected voters. R.C. § 3501.21. The local boards of elections, by majority vote, are required to appoint four judges in each precinct. R.C. § 3501.22. The boards of elections must provide "adequate facilities at each polling place for conducting the election."

R.C. § 3501.29(A). Thus, it falls squarely upon the local boards of elections to "provide a sufficient number of screened or curtained voting compartments to which electors may retire and conveniently mark their ballot…." *Id.*

In addition to these duties, under State law, the local boards of elections have the affirmative obligation to "assure that polling places are free of barriers that would impede ingress and egress of handicapped persons, that the entrances of polling places are level or are provided with a nonskid ramp of not over eight per cent gradient, and that the doors are a minimum of thirty-two inches wide." R.C. § 3501.29(B). The local board of elections has the affirmative obligation under Ohio law to "provide for each polling place the necessary ballot boxes, official ballots, cards of instruction, registration forms, pollbooks or poll lists, tally sheets, forms on which to make summary statements, writing implements, paper, and all other supplies necessary for casting and counting the ballots and recording the results of the voting at the polling place." R.C. § 3501.30(A). In order to aid voters in determining which precinct is the proper precinct in which for them to cast a ballot, state law places the affirmative obligation upon each local board of elections to prominently display a large map of each appropriate precinct. R.C. § 3501.30(A)(1). Thus, *Stewart* properly determined that the conduct of elections is placed upon counties, not the Secretary of State. *Stewart v. Blackwell*, 356 F. Supp. At 804 n. 20.

The complaints of the Plaintiffs in this case are simply complaints that certain local officials may not have properly performed their duties. To find either the Governor or Secretary of State responsible for the behavior of these local government officials would be similar to holding the Commander of the Ohio State Highway Patrol liable for an illegal vehicle search conducted by a local police officer from Columbus. It would also be the same as finding legal liability against the State Fire Marshall if a volunteer firefighter in Concord Township committed

a constitutional violation. Thus, the State and its officials should not be held liable for the actions of these local officials.

F. The Statute of Limitations Prevents Most Of The Plaintiffs 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). The vast majority of the allegations in the Plaintiffs' litany occurred outside of the of limitations period. Since this case was filed in July 28, 2005, none of the allegations that arose prior to July 28, 2003 can be litigated and must be dismissed.

G. The Organizational Plaintiffs Lack Standing To Bring Their Claims.

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' organizations 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. 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.

Finally, the Defendants restate and reincorporate by reference each and every other argument raised in their motion to dismiss and their supplemental motion to dismiss the Plaintiffs' original complaint.

IV. Conclusion

For the foregoing reasons, this Court should dismiss the Plaintiffs' amended complaint.

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 7th day of December, 2005.

/s Richard N. Coglianese
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Deputy Attorney General