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

LEAGUE OF WOMEN VOTERS, *et al.*,	:	**CASE NO. 3:05-CV-7309**
	:	
Plaintiffs,	:	**JUDGE JAMES G. CARR**
	:	
vs.	:	
	:	
J. KENNETH BLACKWELL, *et al.*,	:	
	:	
Defendants.	:	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

I. Introduction

The Second Circuit said it best in *Gold v. Feinberg*, a case decided in 1996 regarding allegations such as delays in the arrival of voting machines, miscounting of votes, and the presence of ineligible candidates on the ballots. Soundly rejecting due process and equal protection claims, the court stated:

> [H]uman error in the conduct of elections does not rise to the level of a Fourteenth Amendment constitutional violation actionable under § 1983 in the absence of willful action by state officials intended to deprive individuals of their constitutional right to vote. Short of that, human error is something we all have to live with.

Gold v. Feinberg, 101 F.3d 796, 802 (2nd Cir. 1996). In filing this case, the Plaintiffs have set about attempting to conflate a laundry list of incidental occurrences of human error with some sort of systematic conspiracy by the Governor and Secretary of State of Ohio to deprive Ohioans of their constitutional right to vote.

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On its face, the Plaintiffs' Complaint should not survive the Motion to Dismiss filed by the Defendants. The Plaintiffs had failed to plead factual allegations against either the Secretary of State or the Governor which shows that Ohio law is unconstitutional. Rather, these Plaintiffs merely conclude that because a small number of county employees may have made mistakes, the State of Ohio has a systemically unconstitutional election system. Those are not allegations of fact, but rather unsupported legal conclusions that should be ignored by this Court.

Likewise, the Plaintiffs have failed to properly plead a claim against the Governor or Secretary of State. Instead of alleging that specific statutes, directives, or advisories violate the federal constitution, the Plaintiffs have simply claimed that because certain people may have had trouble standing in line in 2004, the Secretary of State and the Governor are liable to them. Such a claim simply ignores who is responsible for actions of the employees of the local boards of elections.

In addition, the institutional plaintiffs have been unable to allege sufficient facts that show they have standing to bring this claim. They have failed to allege that they have members in the counties where they allege problems with the 2004 election occurred. Since the plaintiffs have failed to articulate their standing, they cannot advance their claims. Most importantly, since the League of Women Voters had a prior opportunity to litigate their claims, they cannot take a second bite at the apple by raising claims that could have and should have been brought in its prior litigation. Finally, since the main institutional plaintiff as well as the defendants are residents of the Southern District of Ohio, this case should be transferred.

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II. Law and Argument

A. Plaintiffs Have Not Properly Pled Their Complaint

The Defendants do not challenge Plaintiffs' assertion that they need to merely plead allegations sufficient to sustain a complaint in order to survive a motion to dismiss. However, it is well-settled law that courts need not accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Despite the length of their complaint, Plaintiffs have failed in a basic respect to sufficiently allege that by law, the State of Ohio maintains an unconstitutional, non-uniform voting system.

For instance, Plaintiffs maintain that some individuals requested absentee ballots prior to the election, but did not receive them. See, i.e., Complaint at ¶ 16. Even if we accept this fact as true, it does not follow as a necessary consequence that it must be because the State of Ohio maintains a non-uniform, unconstitutional elections system. Maybe the request was never received by the county board of elections, or maybe the United States Postal Service lost the ballot during delivery. The point is, the Plaintiffs failed to specifically allege that any state statute or directive, or any particular action taken by the Secretary of State or the Governor, deprived the individual in question of an absentee ballot. In order to have a properly pled complaint, the Plaintiffs must link the resulting lack of a ballot to some unconstitutional cause. If the Plaintiffs had alleged that a directive issued by the Secretary of State mandated that requests for absentee ballots must be postmarked at least 12 months prior to the election, the Plaintiffs might be able to challenge that directive as unconstitutional.

Merely pleading in a conclusory way that some individuals requested absentee ballots and did not receive them does not constitute a properly pled complaint, without direct or indirect allegations of causation regarding the named Defendants. Taken in a light most favorable to

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Plaintiffs, at best the various isolated voting problems complained of are non-uniform application and implementation of uniform laws and directives, some of which is bound to occur when 88 separate units in good faith attempt to follow a set of state statutes and directives. The Plaintiffs have pointed to no law, directive, or action by a state official as the direct cause of voting problems, but merely complain of generic "systemic" causation – a classic legal conclusion couched as a factual allegation.

B. The Governor Is Not a Proper Party to This Action, and the Secretary of State Is Not Liable for the Failures of County Elections Officials

To begin, neither the Ohio Secretary of State nor the Governor are empowered to oversee the minutiae of the day to day operations of county officials and their employees at the various 88 Boards of Elections throughout the State, and as such, cannot be sued for actions taken by them. In contrast, the Secretary of State has distinct duties as Ohio's chief elections officer outlined in the Ohio Revised Code. See Motion to Dismiss at 2-3. However, in the Complaint, Plaintiffs once again fail to specify any particular law the Secretary of State violated, or any particular directive the Secretary issued, that inhibited any individual's constitutional right to vote. Likewise, each county Board of Elections has separate and distinct responsibilities. See Motion to Dismiss at 3-4. The specific scenarios detailed in the Complaint, such as a county's failure to properly purge a voter registration list, incorrectly allocation voting machines, or fail to accurately determine which precinct a person should vote in are not the result of the failure of the Secretary of State to carry out his duties under the law. Even if the Plaintiffs could prove that a particular local elections official unconstitutionally prevented an individual from receiving a properly requested absentee ballot, they would also have to allege that the Secretary of State "at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." See *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). The

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Secretary of State certainly has duties with regard to statewide elections – however, the Plaintiffs failed to make any specific allegations of wrongdoing against the Secretary of State sufficient to sustain a Complaint.

The Plaintiffs repeatedly claim that the Defendants, and not county Boards of Elections, have the responsibility of ensuring "uniformity of rules and processes among the counties." See Opposition to Motion to Dismiss at pg. 7. However, the Plaintiffs point to not one single instance where the Defendants set differing rules for differing counties, or had knowledge of and subsequently tolerated differing applications among county boards of undeniably uniform statutes and directives. In order to sustain a suit against the state officials, the Plaintiffs must have alleged something of this sort in the Complaint, which they failed to do. What specific action(s) taken or not taken by the Secretary of State caused the problems outlined by Plaintiffs in the Complaint? No specific allegations were made because the Plaintiffs must agree that the statutory and legal framework for elections in the State of Ohio is constitutional.

The Plaintiffs correctly note that the Secretary of State has the duty to "prescribe" the form of voter registration cards. See Ohio Rev. Code § 3501.05 (F). The Secretary has properly prescribed uniform legal standards. He has issued Directives concerning the use of provisional ballots. He has issued Directives concerning the conduct of the election. The Plaintiffs, however, appear to confuse prescribe with control. The Secretary of State has the legal authority to prescribe standards by means of Directives. However, these directives are transmitted to eighty-eight different county boards that then must implement them. The boards, not the Secretary, are responsible for the actual implementation of the Directives. It is the Secretary of State's responsibility to promulgate rules, to guide the individual county boards of elections, and to assure general compliance with them – not be the guarantor of a "perfect" election. See

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Powell v. Power, 436 F.2d 84 (2nd Cir. 1970). To hold otherwise would be the equivalent of allowing individuals to sue the State Fire Marshall every time the local volunteer fire department does not arrive in time to save a burning structure.

Likewise, The Governor's role is particularly attenuated to justify keeping him as a party to this Complaint. It is true that the Governor is Ohio's "principal executive officer." See Complaint at ¶ 37. However, the Governor has absolutely no direct role in state-wide elections, by either law or practice. The Plaintiffs point to no statute enforced by the Governor, nor to any particular action taken or not taken by the Governor, depriving any individual of his or her right to vote. Under Plaintiffs' generic theory of liability, the Governor would be a proper party in every action against any state official in any context, as Ohio's "principle executive officer." As this generic liability theory is nonsensical, Governor Taft should be dismissed as a Defendant from this suit.

Most importantly, the Plaintiffs have failed to articulate any specific law of the State of Ohio they believe is unconstitutional. They have not asked this Court to issue a declaration, for example, that a specific section of the Ohio elections code violates the Fourteenth Amendment. Similarly, the Plaintiffs have equally failed to allege that any specific Directive or Advisory issued by the Secretary of State violate the United States Constitution. If those were the allegations in this lawsuit, then the Secretary of State would be the proper defendant.

Instead, the Plaintiffs have merely alleged that they do not like the way Ohio conducts its elections and because they believe isolated errors may have occurred, they think there is a systemic failure. In order to challenge those errors, they need to sue the governmental bodies responsible for those errors – the local boards of elections.

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C. The Institutional Plaintiffs Lack Standing, And Have Failed to Name Necessary Parties

As stated in the Motion to Dismiss, one of the requirements for proper standing is that the alleged injury is traceable to the actions of the named Defendants, a point to which Plaintiffs fail to respond. As the Supreme Court has stated, "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). In this instance, if there are in fact any injuries, they can be traced to county boards of elections and/or local elections officials, i.e. third parties not before this Court. There must "be a causal connection between the injury and the conduct complained of" in order to survive a challenge to standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The fatal flaw in Plaintiffs' suit is that they have failed to specifically identify what conduct by state officials is the cause of the alleged injuries.

Furthermore, by failing to join the county boards of elections, the Plaintiffs have failed to include necessary and proper defendants in the suit. Under Federal Rule of Civil Procedure 19, parties must be joined if the parties' absence will cause a failure of complete relief. As has been stated numerous times, assuming Plaintiffs have been harmed, it is by the actions of local elections officials, not the state defendants. Any relief granted by this Court against the state defendants will be insufficient. As the Sixth Circuit has stated:

> Although the legal position of the present defendant and its theoretical ability to comply with an order are relevant, they may be outweighed by a finding that absent parties may as a practical matter prevent the full realization of the intended relief. The Court must guard against the formulation of "paper" decrees which neither adjudicate nor, in the end, protect rights.

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NLRB v. Doug Neal Management Co., 620 F.2d 1133, 1140 (6th Cir. 1980), quoting *Eldredge v. Carpenters 46 Northern California*, 440 F. Supp. 506, 519 (N.D. Cal. 1977). In this instance, any potential relief attempted by this Court against the state defendants will be merely "paper" relief if the county boards of elections are not joined.

D. Plaintiffs' Claims are Barred by the Doctrine of *Res Judicata*

As stated in the Motion to Dismiss, Plaintiffs' suit should be dismissed on the basis of the doctrine of *res judicata*, or claims preclusion. The Plaintiffs herein admittedly previously sued the Secretary of State in this very Court in Case No. 3:04-CV-7582. While that case concerns more narrowly defined and specific elections issues as opposed to Plaintiffs' current generic "systemic failure" Complaint, the doctrine applies just the same. In the current Complaint, Plaintiffs cite examples of Ohio's alleged systemic voting failures going as far back as the 1970s. Therefore, Plaintiffs certainly were aware of and had the opportunity to raise the general "systemic failure" claim at the same time and in conjunction with their previous action filed in the fall of last year. In their earlier litigation, the Plaintiffs complained about the manner in which the Secretary of State directed the county boards of elections to issue and count provisional ballots. Those same and similar complaints have arisen in this litigation. Furthermore, since the Plaintiffs were focusing on the alleged unconstitutional direction that ballots had to be cast in the proper precinct in order to be counted, the Plaintiffs could have further alleged their claims that there has been historical problems in the allocation of precincts, the identification of precincts, and the staffing of precincts.

The basic premise of the doctrine of *res judicata* prohibits parties from filing new complaints raising claims that were previously available to the party, whether or not they were asserted in the previous proceeding. See *E.E.O.C. v. Franks Nurery & Crafts, Inc.*, 177 F.3d

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448, 462-63 (6th Cir. 1999). Plaintiffs readily admit that cases are precluded as the "same cause of action" when they arise from the same nucleus of operative facts. See Opposition to Motion to Dismiss at 30. Yet Plaintiffs claim in this suit that the relevant operative facts are that Ohio's election system is fundamentally flawed, clearly the same alleged "operative facts" giving rise to the allegations in their previous complaint. Essentially, Plaintiffs' previous suit was based on more narrowly drawn and specific complaints, contrasted by their current complaint, which is more broadly based and generic – though nonetheless the same.

The fact remains, however, that both of Plaintiffs' suits arise out of the same alleged nucleus of operative facts, and therefore should be precluded. The public policy arguments that serve as the underpinnings of the doctrine are wholly applicable here – if given the opportunity by this Court, the Plaintiffs will sue the Ohio Secretary of State repeatedly, regardless of the merits. Plaintiffs could have raised their "systemic failure" of the election system in their previous elections suit, and they should not be afforded another bite at the proverbial apple.

E. This Court Should Transfer Venue to the Southern District

Plaintiffs attempt to minimize the effect of the inconvenience of venue imposed upon Defendants if this suit is tried in the Northern District of Ohio. However, Plaintiffs never consider the relevant test. According to the Sixth Circuit, when a claim can be considered to have arisen in more than one district, venue is to be selected "in terms of the availability of the witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff)." *Northern Kentucky Welfare Rights Ass'n v. Wilkinson*, 1991 U.S. App. LEXIS 11472 (6th Cir. unreported). In this instance, all of the Defendants, as well as some of the Plaintiffs, including the institutional plaintiff, are located in the Southern District. The alleged "systemic failure" of the Ohio elections system complained of by Plaintiffs necessarily

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originates from the Southern District, as Plaintiffs have chosen to sue only the Governor and Secretary of State, both residing in the Southern District. Witnesses and evidence to be used by the Defendant as well as the Plaintiff are located in the Southern District. Finally, all else being equal, case law dictates that courts should err on the side of convenience for the Defendants, which in this instance is the Southern District. *Wilksinson*, 1991 U.S. App. LEXIS 11472. Therefore, this Court should immediately transfer venue to the Southern District of Ohio.

III. Conclusion

For the foregoing reasons, the Court should issue an order dismissing this case, and/or transferring it to the Southern District of Ohio.

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 September, 2005.

/s Richard N. Coglianese
Richard N. Coglianese
Deputy Attorney General