IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO RIGHT TO LIFE SOCIETY, INC.,	:	Case No. 2:08-cv-492
	:	
Plaintiff,	:	Judge Smith
v.	:	
	:	Magistrate Judge King
OHIO ELECTIONS COMMISSION, et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' JURISDICTIONAL BRIEF

Pursuant to the Court's June 15, 2009 scheduling order (Doc. 54),[1] Defendants file this brief and respectfully ask the Court to dismiss this matter for lack of subject matter jurisdiction on the following grounds: (1) the Eleventh Amendment to the United States Constitution bars the Court from issuing declaratory or injunctive relief against a State when the relief operates only retrospectively, *Green v. Mansour*, 474 U.S. 64 (1982); *Ex Parte Young*, 209 U.S. 123 (1908); and (2) Plaintiff's claims for relief are moot because there is no longer any live dispute between the parties.

Respectfully submitted,

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[1] On January 20, 2010, the Court issued an order (Doc. 55) overruling Plaintiff's objections to the magistrate's discovery order (Doc. 49) and finding that the Defendants' requests for admissions were appropriate and relevant to whether the Court had subject matter jurisdiction. This brief therefore follows the Court's June 15, 2009 scheduling order (Doc. 54) that Defendants were to file their jurisdictional memorandum 45 days after resolution of Plaintiff's objections to discovery.

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DEFENDANTS' JURSIDICTIONAL BRIEF

I. INTRODUCTION

Plaintiff Ohio Right to Life ("ORTL") allegedly planned to run broadcast advertisements between June and December 2008 in support of legislation before the Ohio General Assembly banning human cloning. Before running the ads, however, ORTL filed this action in May 2008 out of a concern that its intended broadcasts would run afoul of Ohio's "electioneering communications" statutes, contained in R.C. 3517.01(B)(6) and R.C. 3517.1011. ORTL's suit seeks a declaration that these laws are unconstitutional on their face and as-applied, as well as a preliminary and permanent injunction barring the Secretary of State and the Ohio Elections Commission from applying those laws to the two proposed advertisements. However, all of ORTL's claims for relief should be dismissed for three reasons.

First, the Eleventh Amendment bars the Court from entering injunctive or declaratory relief concerning the past actions of state officials. On the face of ORTL's complaint, any injunctive or declaratory relief would necessarily pertain only to past events – specifically, the November 2008 election and Ohio Senate Bill 174, the anti-human cloning bill which expired when the 127th General Assembly adjourned *sine die*. With respect to ORTL's proposed ads, nothing in ORTL's complaint seeks prospective injunctive relief against future actions by the Defendants. Therefore, ORTL's claims are barred by the Eleventh Amendment.

Second, ORTL's claims are moot. With the passing of the 2008 election and the expiration of the anti-human cloning bill, it is impossible for the Court to issue any relief that would allow ORTL to broadcast the specific ads attached to its complaint. And as further explained below, this case also does not fall into the "capable of repetition yet evading review" mootness exception.

Finally, because the Eleventh Amendment and mootness dispose of ORTL's as-applied challenges, the Court should not decide ORTL's facial challenges. In the absence of a particular set of facts to which the challenged statutes apply, ORTL's dispute is no longer embedded in any actual controversy about its legal rights. What remains, rather, is a "dispute solely about the meaning of a law abstracted from any concrete actual or threatened harm." *Alvarez v. Smith*, 130 S. Ct. 576, 580-581 (2009). As such, ORTL's facial challenge, divorced from any particular set of facts, falls outside the scope of the Court's jurisdiction to hear "cases" and "controversies." *Alvarez*, *supra*; *Renne v. Geary*, 501 U.S. 312 (1991). In light of the U.S. Supreme Court's strong disapproval of facial challenges where, as here, a plaintiff asks the court to "speculate about hypothetical or imaginary cases," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), the Court should decline to rule on ORTL's remaining claims.

The Defendants therefore request that the Court dismiss on jurisdictional grounds all of ORTL's claims for declaratory and injunctive relief.

II. STATEMENT OF THE CASE AND FACTS

A. The underlying facts of ORTL's complaint

ORTL alleged that it wanted to broadcast ads from June 2008 through December 2008 relating to Ohio Senate Bill 174 – a bill before the 2007-2008 General Assembly that purported to prohibit the practice of "human cloning" (as defined by proposed R.C. 3701.94). See Compl. ¶ 8; Ohio Senate Bill 174 (2007) [attached as Ex. A]. The bill was introduced on May 22, 2007 and was referred to the Judiciary-Civil Justice Committee of the Ohio Senate on that same date for further consideration. *See* Ohio Senate Journal (May 22, 2007), at 385 [attached as Ex. B].

Attached to ORTL's complaint were draft scripts for the two ads that ORTL wanted to broadcast in support of the bill. *See* Compl, at Exs. A and B. Both ads list the names of nine state senators who then sat on the Judiciary-Civil Justice Committee: Senators David Goodman, Kurt Shuring, Steve Buehrer, Keith Faber, Bill Seitz, Steve Stivers, Eric Kearney, Teresa Fedor, and Lance Mason. *Id*. ORTL alleged that the ads would expressly mention one or more of those senators, including Senate President Bill Harris, and exhort the public to call them to urge further action on the bill. *Id*., ¶ 9. However, ORTL alleged that it did not broadcast these ads because some of these senators were "candidates" for office, as defined in R.C. 3501.01(H), and the naming of a "clearly identified candidate" is one of the triggers for regulation as an electioneering communication. *See* Compl., ¶¶ 10-11; *see also* R.C. 3517.1011(A)(7)(a) ("`electioneering communication' means any broadcast, cable, or satellite communication that refers to a clearly identified candidate" and is made during a certain period of time before an election.).

B. Summary of ORTL's legal claims

The gravamen of ORTL's complaint consists of as-applied and facial challenges to three different statutes regulating electioneering communications: (1) the definition of "electioneering communication" in R.C. 3517.1011, (2) various limitations on the broadcasting of electioneering communications within 30 days prior to an election, as set forth in R.C. 3517.06(B)(6) and R.C. 3517.1011(H), and (3) the disclosure requirements in R.C. 3517.1011(C) to (F). ORTL also alleges that federal law preempts these statutes. A description of each claim follows.

1) As-applied and facial challenge to the definition of "electioneering communication" in R.C. 3517.1011 (Count 5)

R.C. 3517.1011 defines an "electioneering communication" as (a) any broadcast, cable, or satellite communication, (b) that refers to a clearly identified candidate, and (c) is made starting from the time the identified candidate actually becomes a candidate through the thirtieth day preceding the primary election and between the date of the primary through the thirtieth day prior to the general election at which the candidate will be elected to that office. R.C. 3517.1011(A)(7)(a). ORTL challenges two aspects of the definition as being overbroad because it regulates issue advocacy: the use of a candidate name as triggering regulation as an electioneering communication, and the period of time prior to an election during which an advertisement would be regulated as an electioneering communication. Compl., ¶ 47; *id*., ¶¶ 24-25 [Doc. 1]. Accordingly, ORTL asks the Court to invalidate the statute on its face (Prayer for Relief, ¶ 3), or to adopt a narrowing construction that, among other things, "limits the applicability of the statute to no more than 60 days prior to the election" and "limits the applicability of the statute to 'electioneering ads' that are the functional equivalent of express advocacy, insofar as they can be susceptible of no reasonable interpretation other than appeal to vote for or against a specific candidate." *Id*., ¶ 4(ii) and (iii).

2) As-applied and facial challenges to limitations on expenditures and broadcasting of electioneering communications 30 days prior to an election (Counts 3 and 4)

The second group of statutes challenged by ORTL places certain restrictions on the broadcasting of electioneering communications thirty days prior to an election, generally referred to by ORTL as the "blackout provision." The first of those statutes is R.C. 3517.1011(H), which prohibits the broadcasting of an electioneering communication that is funded by contributions from a corporation or labor organization during the thirty days preceding a general or primary

election. *See* R.C. 3517.1011(H) ("No person shall make, during the thirty days preceding a primary election or during the thirty days preceding a general election, any broadcast, cable, or satellite communication that refers to a clearly identified candidate using any contributions received from a corporation or labor organization.").

The second statute in this group is R.C. 3517.06(B)(6). ORTL does not challenge the first part of the statute, which defines an "expenditure" for general campaign finance purposes as "the disbursement or use of a contribution for the purpose of influencing the results of an election." Rather, ORTL focuses on the latter part of the statute, which reads as follows:

> During the thirty days preceding a primary or general election, any disbursement to pay the direct costs of producing or airing a broadcast, cable, or satellite communication that refers to a clearly identified candidate shall be considered to be made for the purpose of influencing the results of that election and shall be reported as an expenditure or as an independent expenditure under section 3517.10 or 3517.105 of the Revised Code**,** as applicable, except that the information required to be reported regarding contributors for those expenditures or independent expenditures shall be the same as the information required to be reported under divisions (D)(1) and (2) of section 3517.1011 of the Revised Code**.**

R.C. 3517.01(B)(6).

ORTL alleges that the "expenditure" definition and the reporting requirements in R.C. 3517.01(B)(6) "hamper[] [ORTL's] ability to raise money for the proposed ad during the time period ending 30 days prior to the general election." Compl., ¶ 10. ORTL also asserts that these statutes "prevent[] an independent corporation from broadcasting any independent core political speech that simply mentions the name of a candidate during the 30 day period prior to an Ohio election." *Id.*, ¶ 41. ORTL thus asks the Court to invalidate R.C. 3517.06(B)(6) on its face (Prayer for Relief, ¶ 1), or to adopt a narrowing construction "that forbids its enforcement against any core political speech that is neither express advocacy, nor can only be construed as the functional equivalent of express advocacy." *Id.*, ¶ 2.

3) As-applied and facial challenge to disclosure requirements in R.C. 3517.1011(C) to (F) (Count 5)

ORTL challenges various provisions that require the filing of disclosure statements with respect to electioneering communications. One such provision requires that any person who makes a disbursement in excess of $10,000 during any calendar year for the costs of producing and airing an electioneering communication must file a disclosure statement containing certain information, including: the full name and address of the person making the disbursement; the principal place of business of the person making the disbursement, if not an individual; the amount of each disbursement of more than one dollar during the period covered by the statement; and the identity of the person to whom the disbursement was made. R.C. 3517.1011(D)(1)(a)-(c). The statute also requires additional disclosures for each contributor who contributed an aggregate amount of $200 or more. See R.C. 3517.1011(D)(1)(e).

ORTL alleges that these disclosure requirements constitute a prior restraint and violate ORTL's First Amendment right to freedom of speech and association. Compl., ¶¶ 48, 49. Accordingly, ORTL asks the Court to invalidate the requirements or to adopt a limiting construction "that limits the onerous regulatory burden of disclosure of contributions and expenditures to a reasonable level." Prayer for Relief, ¶ 4(iv).

4) Federal preemption claim (Count 6)

Finally, ORTL alleges that R.C. 3517.01(B)(6) and R.C. 3517.1011 are preempted by Section 203 of the Federal Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 4416(b)(2). Compl., ¶ 51. At the time it filed the Complaint, ORTL believed that Senators Stivers and Schuring would be candidates for the U.S. House of Representatives in the 2008 election. *Id.*, ¶ 11. ORTL therefore requested that these provisions of Ohio law be ruled inapplicable to these candidates. *Id.*, ¶ 51.

C. The Court's September 5, 2008 preliminary injunction order

The Court issued an Opinion and Order on September 5, 2008 in which it rejected the merits of nearly all of ORTL's claims. *See* Op. and Order, pp. 14-15 [Doc. 40]. The Court upheld the constitutionality of the disclosure provisions both facially and as applied. *Id*. at 15. With respect to the blackout provisions, the Court found that the challenged statutes were facially constitutional (*id*. at 11-14), but not as applied to ORTL's two proposed ads. *Id*. at 14-15. As noted by the Court, the Defendants conceded that the U.S. Supreme Court's ruling in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2659 (2007) ("*WRTL*") precluded the enforcement of R.C. 3517.1011(H) and R.C. 3517.01(B)(6) with regard to Plaintiff's proposed ads. *Id.* The Court's order thus stated that ORTL "may. . . run the two ads attached to its Complaint during the thirty-day period preceding the November 4, 2008 general election, and Defendants are enjoined from enforcing Ohio's blackout provision with regard to the two proposed ads." [*Id*., p. 24].

That Order, by its own terms, dissolved on November 4, 2008 at the close of the 30-day period. There is currently no injunction in place affecting future actions by the Defendants with respect to ORTL's proposed ads.

D. Summary of events since the November 2008 election

Several events have taken place since the filing of ORTL's complaint. First, the 2008 election has come and gone. Despite the fact that the Court's preliminary injunction allowed ORTL to run its ads during the thirty-day period preceding the November 4, 2008 general election, see Op. and Order (Sept. 5, 2008), p. 24 [Doc. 40], ORTL did not broadcast any of its proposed ads during the 2008 election cycle. See Defendants' Request for Admissions Nos. 1-8

(Jan. 14, 2009) [attached as Ex. C].[2] As a result, ORTL was never subject to either the blackout provisions or disclosure requirements in R.C. 3517.1011 related to the broadcasting of or disbursements for electioneering communications. ORTL has not amended its complaint to allege an intention to run similar ads in future election cycles, and the Court's deadline of December 15, 2008 to amend the pleadings has come and gone. *See* Order [Doc. 45].

Second, with the passing of the 2008 election, the senators named in ORTL's ad are no longer "candidates" for that election, as defined in R.C. 3501.01(H). In fact, the term limits of four of those senators – Senators Goodman, Schuring, Fedor, and Harris – expire in 2010 and they are ineligible to run for another term in the Senate. See http://www.ohiosenate.gov/directory.html.

Third, Ohio Senate 174, the proposed legislation banning human cloning and the subject of ORTL's intended broadcasts, expired with the adjournment of the 127th General Assembly. The bill reached no further than the Senate committee by the time the General Assembly adjourned at the end of 2008. There is no legislation on human cloning currently pending before the 128th General Assembly. See Defendants' Request for Admissions No. 10 (Jan. 14, 2009) [attached as Ex. C].

III. LAW AND ARGUMENT

A. ORTL's claims are barred by the Eleventh Amendment.

Under the Eleventh Amendment to the United States Constitution, federal courts lack jurisdiction to hear suits against a State unless the State unequivocally consents to suit or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate

[2] On January 20, 2010, the Court overruled Plaintiff's objections to the magistrate's discovery order (Doc. 49). See Doc. 55. Plaintiff's failure to admit or deny the Defendants' requests for admissions within 30 days of that order constitutes an admission thereof. See Fed. Rule Civ. P. 36(a)(3).

state immunity. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). The Defendants in this matter are all official state actors: Jennifer Brunner, in her official capacity as Ohio Secretary of State; the Ohio Elections Commission, an arm of the state pursuant to R.C. 3517.152; and five members of the OEC sued in their official capacities only (Martin O. Parks, Williams L. Ogg, Charles E. Calvert, John R. Mroczkowski, and Harvey H. Shapiro). A suit against a state actor in her official capacity is simply another way of pleading a claim against the state of Ohio. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). As in any suit against a State, the Court must assess its jurisdiction in light of the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

The U.S. Supreme Court has recognized one pertinent exception to this jurisdictional bar: a suit challenging the constitutionality of a state official's action in enforcing state law is not considered to be against the State, and therefore Eleventh Amendment immunity does not apply. *Ex Parte Young*, 209 U.S. 123 (1908).[3] The *Young* doctrine rests on a paradox: the state official's unconstitutional conduct qualifies as state action under the Fourteenth Amendment but not as state action under the Eleventh Amendment. *Florida Dept. of State v. Treasure Salvors, Inc*., 458 U.S. 670, 685 (1982) (Stevens, J. plurality opinion). The *Young* fiction allows federal courts to grant **prospective** injunctive relief to prevent a continuing violation of federal law by state officials. *Ex Parte Young*, 209 U.S. at 155-156, 159. However, as explained below, the *Young* exception does not allow the Court to exercise jurisdiction over ORTL's claims.

[3] Without question, the Ohio Elections Commission should be dismissed as a defendant. The *Young* exception applies only to suits against state **officials**, and "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 (1993); *Cory v. White*, 457 U.S. 85, 90-91 (1982).

In numerous subsequent cases, the Supreme Court has emphasized the limited scope of *Young*, namely that it only applies to prospective injunctive relief. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Quern v. Jordan*, 440 U.S. 332 (1979). Retrospective injunctive relief is barred by the Eleventh Amendment. *Green v. Mansour*, 474 U.S. 64, 68-69 (1985) rehearing denied, 474 U.S. 1111 (1986); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1066 (6th Cir. 1984). Likewise, a declaratory judgment against state officers declaring that they violated federal law in the past "would constitute retrospective relief and is therefore barred by the Eleventh Amendment." *Green*, 474 U.S. at 71-74; *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The case in which the U.S. Supreme Court most fully spelled out its Eleventh Amendment jurisprudence had its origins in the Sixth Circuit, in a case filed against the Michigan Director of Social Services. *Banas v. Dempsey*, 742 F. 2d 277 (6th Cir. 1984). The lawsuit challenged Michigan's Poor Law, which required state officials to include income from stepparents when calculating eligibility for AFDC benefits, as contrary to both federal law and the Fourteenth Amendment. The District Court granted a preliminary injunction on May 28, 1981.

Thereafter, Congress amended the Social Security Act to provide that income from stepparents living in the same household should be counted. In response, the parties agreed to amend the preliminary injunction to reflect that it would only remain in effect until October 1, 1981, the effective date of the statute. After October 1, the district court granted the defendant's motion to dismiss on two independent grounds: mootness and Eleventh Amendment immunity.

On a consolidated appeal, the Sixth Circuit Court of Appeals addressed both arguments. *Banas*, 742 F.2d 277. First, the appellate court ruled that the complaints should not have been

dismissed on the grounds of mootness: even though the change in federal law resolved the legal dispute going forward, some plaintiffs may have had claims for lost benefits pre-dating the change in the law, and those claims would not be moot. *Id*. at 283.

The Court then turned to the question of Eleventh Amendment immunity. After an extensive review of post-*Young* jurisprudence, the Sixth Circuit concluded that the *Young* exception only permits a district court to issue additional orders if they are ancillary to the prospective injunction, in other words, if the orders compel actions that are "a necessary consequence of *compliance in the future* with a substantive federal-question determination. *Id*. at 285 (quoting *Miliken v. Bradley*, 433 U.S. 267, 289 (1977) (emphasis in original)).[4] The Sixth Circuit expressly rejected the argument that the district court could issue declaratory judgment as ancillary relief to the injunction already in place, because that injunction, by its own terms, had expired and was no longer in force and effect.

> The *Banas* injunction was expressly modified so that it would have no prospective effect after the change in law became effective on October 1, 1981. After that date, there was no conduct in violation of federal law to be enjoined, and thus the injunctive relief * * * had been eliminated. Any declaratory judgment in these cases would concern only the past conduct of the state official, a finding, in retrospect, that certain activities of the state official had previously violated plaintiffs'' rights under federal law. In our view, such a declaration would not be prospective in nature, and therefore an order based solely on a declaration regarding the *past* conduct of the state official would not be an order falling within the 'prospective-compliance' exception necessary to bring it on the *Ex parte Young* side of the Eleventh Amendment.

Id. at 288 (emphasis in original) (internal quotations and citations omitted).

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[4] The ancillary-effect exception is "a narrow one." *Ernst v. Rising*, 427 F.3d 351, 368 (6th Cir. 2005), *cert denied*, 2006 U.S. LEXIS 2274 (Mar. 20, 2006) (quoting *Kelley v. Metro. County Bd. of Educ*., 836 F.2d 986, 992 (6th Cir. 1987)). Examples of this "prospective–compliance exception" include (1) sending notice to class members that they may have a right to institute administrative proceedings against the state to recover unpaid past benefits, *Quern v. Jordan*, 440 U.S. 332, 349 (1979); and (2) necessary costs incurred to implement the terms of a court's order. *Thomson v. Harmony*, 65 F.3d 1314, 1321 (6th Cir. 1995); *Doe v. Wigginton*, 21 F.3d 733, 737 (6th Cir. 1994).

The U.S. Supreme Court affirmed, holding that the Eleventh Amendment bars a federal court from ordering relief in a suit against the state, unless it is ancillary to a judgment awarding prospective injunctive relief. *Green*, 474 U.S. at 71-72 (affirming *Banas*, 742 F.2d 277 (6th Cir. 1984)). As a result of the change in the law, there was no allegation of a continuing violation of federal law, and hence no basis for issuing prospective injunctive relief. *Green*, 474 U.S. at 71-72. Thus, a request for declaratory judgment could not be "ancillary" to anything, but would be purely retrospective relief. *Id*.

The same reasoning applies in this case to bar ORTL's claims. The only relief requested by ORTL as applied to its ads is limited to the time period before the 2008 election and is necessarily retrospective. With each claim, ORTL asks the Court to declare that its ads do not run afoul of the electioneering statutes and to enjoin enforcement of those statutes so that it can broadcast the ads during the 2008 election cycle. The Court's September 5, 2008 Order permitted ORTL to run its two proposed advertisements without state interference "during the thirty-day period preceding the November 4, 2008 general election." *See* Doc. 40. The injunction dissolved at the end of that period, and ORTL ultimately elected not to run either of the ads. Now that the 2008 election has passed, there is no prospective injunctive relief that the Court can issue with respect to those specific ads. And because there is no possible underlying injunctive relief, the Court cannot attach any "ancillary" declaratory relief.

The Eleventh Amendment also bars ORTL's facial challenges and its request for permanent injunction. ORTL may contend that jurisdiction exists to afford further relief because the challenged provisions remain in the Ohio Revised Code, and constitutes an "ongoing constitutional violation." This argument misconstrues the *Young* exception to Eleventh Amendment immunity. "*Young* abrogates a state official's Eleventh Amendment immunity

when a suit challenges the constitutionality of a state official's **action**." *Children's Healthcare Is A Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996) (citations omitted) (emphasis in original). Courts have repeatedly declined to apply the *Young* exception when the defendant state officials are not enforcing or threatening to enforce the allegedly unconstitutional statute. *Id*., citing *Long v. van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) and *Kelley v. Metropolitan County Bd. of Ed.*, 836 F.2d 986, 990-991 (6th Cir. 1987). These cases make clear that the existence of a statute, standing alone, does not qualify as an "on-going constitutional violation." And in this case, not only are the Defendants not currently seeking or threatening to enforce the blackout provision, they have conceded throughout this case that they would not do so.

The absence of on-going enforcement dovetails with another obstacle to keeping this case alive. ORTL has not amended its complaint to allege an intention to run similar ads in future election cycles, and the Court's deadline of December 15, 2008 to amend the pleadings has come and gone. *See* Doc. 45. Indeed, any allegations concerning the content of future advertisements would be pure speculation on ORTL's part, and since this case involves an as applied challenge to the statute, hypotheticals will not suffice. To put the mater in legal terms, any prospective challenge to the black-out provision as applied suffers from a ripeness problem. *Community Mental Health Services of Belmont v. Mental Health and Recovery Board Serving Belmont, Harrison & Monroe Counties*, 150 Fed. Appx. 389, 397-98 (6th Cir. 2005) ("Without knowledge of what [form future enforcement] will be, this court does not have the concrete context necessary for judicial review").

Defendants anticipate that ORTL will likely cite *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 127 S. Ct. 2652 (2007) ("*WRTL*") as contrary authority. In that case, WRTL wanted to run advertisements during the 2004 election and challenged the constitutionality of the blackout

provision in federal law. The *WRTL* decision provides no guidance because the critical difference between our case and *WRTL* is the identity of the defendant: WRTL sued the *Federal* Elections Commission.[5] As there was no State defendant, the case did not raise Eleventh Amendment issues.[6]

Under the Eleventh Amendment, this Court has no subject matter jurisdiction to afford ORTL any relief. Therefore, the Court should dismiss this case in its entirety.

B. ORTL's claims should be dismissed as moot.

ORTL's claims should also be dismissed because intervening events since the filing of ORTL's Complaint have mooted its claims. Article III, § 2 of the U.S. Constitution allows federal courts to decide legal questions only in the context of actual "cases" or "controversies." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006) (citations omitted). In order to survive a mootness challenge, an "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Alvarez, supra* (citations omitted). In other words, there must be a live dispute throughout the course of proceedings, and not just at the outset of an action.

There is no longer a live controversy here: intervening events have mooted all of ORTL's claims. In fact, the issuance of ORTL's requested relief is impossible because none of the provisions challenged by ORTL can be applied or enforced with respect to ORTL's ads.

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[5] As further explained below, *WRTL*'s holding on mootness is also distinguishable from the present case. See pages 17-18, *infra*.

[6] To the extent that federal sovereign immunity would normally apply, 28 U.S.C. § 2284 provides a right of action to sue the Federal Elections Commission. *See WRTL*, 127 S.Ct. at 2661 (citing 28 U.S.C. § 2284).

ORTL's challenges three aspects of the electioneering communication statutory scheme: (1) the definition of "electioneering communication" in R.C. 3517.1011, (2) the limitations on the broadcasting of electioneering communications within 30 days prior to an election, as set forth in R.C. 3517.06(B)(6) and R.C. 3517.1011(H), and (3) the disclosure requirements in R.C. 3517.1011(C) to (F). ORTL asks the Court to enjoin the enforcement and application of these provisions to its ads. *See* Prayer for Relief, ¶ 4. In order to do so, the Court must fashion some narrowing construction that limits the applicability of these provisions to express advocacy. *Id*. However, the issuance of this relief would be a hypothetical exercise because the 2008 election has passed. The senators named in ORTL's ad are no longer "candidates" for the 2008 election. Ohio Senate Bill 174, the anti-human cloning bill that was the subject of ORTL's intended ads, went no further than the Senate committee when the General Assembly adjourned for that session. Therefore, the bill expired at the end of 2008.[7] Finally, because ORTL never broadcasted its ads during the 2008 election cycle, the challenged disclosure requirements do not apply and cannot be enforced with respect to those particular ads. There is no longer a justiciable controversy with respect to ORTL's as-applied challenge.

ORTL furthermore cannot meet its burden of showing this matter falls under the "capable of repetition yet evading review" exception to mootness. *See Deja Va of Nashville v. Metro Govern. of Nashville and Davidson Cty*., 274 F.3d 377, 390-91 (6th Cir. 2001) (party asserting exception to mootness bears burden of establishing both prongs). A court may exercise

[7] *See* Ohio Senate Rule 88 (Feb. 20, 2007) ("[i]f a Senate bill or resolution is defeated or indefinitely postponed in the Senate it shall not be reintroduced during either annual session of the same General Assembly.") [attached as Ex. D]; *see also State ex rel. Gilmore v. Brown,* 6 Ohio St. 3d 39, 40-41 (1983) (a bill vetoed by the Governor cannot be returned to the General Assembly if it has adjourned *sine die*, as opposed to a temporary adjournment, because that General Assembly can no longer vote to reconsider the bill,); 1985 Ohio Op. Atty. Gen. No. 91 ("matters" from the first regular session of a General Assembly may carry over to the second regular session but terminate at the end of that second regular session).

jurisdiction only in the "exceptional situation" *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), where two requirements are met: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Libertarian Party of Ohio*, 462 F.3d at 584; *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Courts have recognized that the first prong of the mootness exception is often satisfied in elections cases because such challenges are unlikely to be completed before the occurrence of the relevant election. *See Libertarian Party of Ohio*, 462 F.3d at 584. However, ORTL cannot meet the second prong of this exception: that there is a reasonable expectation that it would be subjected to the same action again.

The case of *Renne v. Geary*, 501 U.S. 312 (1991) demonstrates that even in the context of a First Amendment elections law challenge, a case can become moot where a plaintiff has not shown a reasonable expectation that it will suffer the same injury in the future from the same defendants. In *Renne*, plaintiffs (which included several members of county central committees of a political party) challenged the constitutionality of a provision of the California Constitution that prohibits a political party or party central committee from endorsing, supporting, or opposing a candidate for nonpartisan office. The Court found that plaintiffs' general assertions that they have been harmed by past enforcement of this provision and will continue to suffer irreparable injury to their First Amendment rights did not demonstrate a live dispute. *Id.* at 321. While acknowledging the "capable of repetition yet evading review" exception, the Court found that there was "no ripe controversy in the allegations that [plaintiffs] desire to endorse candidates in future elections." *Id*. The Court pointed to the lack of specificity in these allegations—i.e., that plaintiffs failed to allege an intention to endorse any particular candidate, or that a candidate

wanted to include a party's endorsement in a candidate statement. *Id*. Without more, the Court had no way of knowing the nature of the endorsement, how it would be publicized, or the precise language that might be used or deleted. *Id.* at 322. The Court concluded that there was no factual record of an "actual or imminent application of [the provision] sufficient to present the constitutional issues in clean-cut and concrete form." *Id*. (citations omitted). To meet the capable of repetition exception, courts thus require more than an allegation of possible enforcement of a statute in the future: "for the purposes of assessing the likelihood that state authorities will reinflict a given injury, we have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig v. Doe*, 484 U.S. 305, 320 (1988).

ORTL has generally alleged in its Complaint that "ORTL desires, and intends to continue its advocacy of pro-life issues, during 2008 and into the future, throughout the State of Ohio." Compl., ¶ 7. However, as demonstrated by *Renne*, this vague allegation fails to show with any specificity that there is a reasonable expectation that ORTL would be subject to future enforcement of the electioneering communication statutes. With the expiration of the human cloning bill at the end of 2008, ORTL has made no showing of its intent to support or oppose a specific pro-life legislative issue in the future, what form that advocacy would take (broadcast or print), or what language might be used. In order for the statute to apply, a number of factors have to converge. The ad would have to (1) address a specific pro-life legislative issue, (2) name a specific candidate, and (3) be broadcast on TV, radio or satellite media (4) during an election year. The mere allegation that ORTL intends to engage in future pro-life advocacy does not establish a "case" or "controversy" for the Court to adjudicate.

The absence of any specific showing by ORTL that an alleged injury is likely to recur in the future distinguishes ORTL's case from *Davis v. FEC*, 128 S. Ct. 2759 (2008) and *FEC v. WRTL*, 127 S. Ct. 2652 (2007) – two cases which ORTL is likely to invoke to argue that its claims are not moot. In those cases, each plaintiff made a specific showing that he/it would be adversely affected by the challenged law in an upcoming election. In *Davis*, the plaintiff – a candidate challenging the asymmetrical contribution limits in Section 319(a) of the Bipartisan Campaign Reform Act on self-financing candidates who spend more than $350,000 of their personal funds – made a public statement expressing his intent to run in the next election as a self-financing candidate. *Davis*, 128 S. Ct. at 2770. Therefore, the Court held that Davis' claim was capable of repetition and was not moot. *Id*. In *WRTL*, the Court found that WRTL had "credibly claimed that it planned on running materially similar future targeted broadcast ads" that would be subject to the same statutory prohibition. *WRTL*, 127 S. Ct. at 2663. To back up that claim, WRTL sought a second preliminary injunction (in addition to the injunction sought before the 2004 election) that would permit the broadcast of such an ad during the 2006 election cycle. *WRTL*, 127 S. Ct. at 2663. In both of these cases, the plaintiffs had more than ORTL's bare-bones allegation in a complaint that it intended to engage in future conduct that might implicate a challenged statute. Here, even with the passing of the 2008 election, ORTL has neither amended its complaint, nor sought any relief that would allow it to broadcast a specific ad in the 2010 election, nor made any other credible showing that the challenged electioneering communication statutes would be applied to ORTL.

These cases make it clear that ORTL's vague assertion is insufficient to meet the capable of repetition yet evading review exception to mootness.

C. ORTL's facial challenges should be dismissed in the absence of a live controversy or actual dispute.

As set forth above, the Eleventh Amendment bars all of ORTL's claims. Furthermore, ORTL's as-applied challenge is moot because there is no longer a live dispute with respect to its proposed ads. To the extent that the Court determines that ORTL's facial challenges survive Eleventh Amendment immunity and mootness, the Court should still dismiss those claims. Without a live, factual dispute applying to ORTL, the Court would be proceeding on ORTL's facial challenges in a vacuum – something that the U.S. Supreme Court has expressly discouraged.

In the absence of an actual controversy or concrete set of facts to which the challenged statutes can be applied, the Court should refrain from ruling on all of ORTL's facial challenges to the statutes regulating electioneering communications. Where, as here, a plaintiff's challenge to the application of law is moot and no longer embedded in any actual controversy, the U.S. Supreme Court has declined to hear an ongoing, abstract dispute about the validity of a law. Justice Scalia wrote for a unanimous Court that even where a complaint sought a declaration that a statute was unconstitutional and an injunction against future enforcement, along with specific as-applied relief, the plaintiff "must establish that it has a 'specific live grievance' against the application of the statutes . . . and not just an 'abstract disagreement over the constitutionality of such application." *Lewis v. Continental Bank Corp.* 494 U.S. 472, 479 (1990) (Scalia, J.) Likewise, in *Alvarez v. Smith*, 130 S. Ct. 576 (2009), the Court dismissed plaintiff's facial challenge after determining that plaintiff's as-applied challenge was moot. While there was a continuing dispute about the lawfulness of the state's challenged procedures, the Court declined to go any further because "that dispute is no longer embedded in any actual controversy about the plaintiff's particular legal rights. Rather, it is an abstract dispute about the law, unlikely to

affect these plaintiffs any more than it affects other . . . citizens. And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.* at 580-81.

Even in a First Amendment context, the Court has warned against the impropriety of resolving the facial constitutionality of a provision "without first addressing its application to a particular set of facts. After having dismissed plaintiff's claim as moot, the Court stated that in one elections law challenge that it "cannot decide the case based on "amorphous and ill-defined factual record." *Renne v. Geary*, 501 U.S. at 324. Rather, the "better course" would be "to address in the first instances the constitutionality of [the challenged law] as applied" to a specific factual context. *Id*. at 324.

Finally, the U.S. Supreme Court has expressed strong disapproval of facial challenges where a plaintiff asks the court to "speculate about hypothetical or imaginary cases." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008); *see also Fieger v. Mich. Supreme Court*, 553 F.3d 955, 960 (6th Cir. 2009). Because facial challenges "often rest on speculation," courts have a duty to exercise judicial restraint in order to avoid the "premature interpretation of statutes." *Wash. State Grange*, 128 S.Ct. at 1191 (internal citations omitted); *Fieger*, 553 F.3d at 960. In light of this judicial disfavor of facial challenges, ORTL can only succeed by "establish[ing] that no set of circumstances exists under which the [statute] would be valid, i.e. that the law is unconstitutional in all of its applications." *Wash. State Grange*, 128 S.Ct. at 1190 (internal citations omitted). Throughout the course of these proceedings, ORTL has never been able to meet this burden. Because this Court need not decide "a question of constitutional law in advance of the necessity of deciding it," *id.* at 1191, the Court should decline from entertaining ORTL's facial challenge here.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully ask the Court to dismiss this case for lack of subject matter jurisdiction.

Respectfully submitted,

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CERIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Jurisdictional Brief was filed electronically on March 8, 2010. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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