UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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League of Women Voters of Ohio, League of Women Voters of Toledo-Lucas County, Darla Stenson, Charlene Dyson, Anthony White, Deborah Thomas, Leonard Jackson, Deborah Barberio, Mildred Casas, Sadie Rubin, Lena Boswell, Chardell Russell, Dorothy Cooley, and Lula Johnson-Ham,

Plaintiffs,

v.

J. Kenneth Blackwell, Secretary of State of Ohio and Bob Taft, Governor of Ohio,

Defendants.

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Case No. 3:05-CV-7309

Chief Judge James G. Carr

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Jeanne White,

Intervenor -Plaintiff,

v.

J. Kenneth Blackwell, Secretary of State of Ohio and Bob Taft, Governor of Ohio,

Defendants.

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**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A STAY PENDING APPEAL ON SOVEREIGN IMMUNITY GROUNDS**

Plaintiffs respectfully submit this opposition to Defendants' motion to stay all proceedings in this action pending the outcome of Defendants' "sovereign immunity" appeal. This Court has denied Defendants' motion to dismiss on sovereign immunity grounds, and

specifically determined that any appeal from that decision would be frivolous. Defendants have nevertheless decided to appeal on that very basis. Defendants now move for a stay of all proceedings pending the outcome of that appeal, and attack the Court's determination of frivolousness as an improper "advisory opinion." Defendants' motion is essentially a rehash of prior arguments that have been repeatedly rejected by this Court, and those arguments should be rejected once again.

**Preliminary Statement**

As this Court has repeatedly recognized in this action, it is axiomatic that the immunity of States under the Eleventh Amendment does not apply to claims, such as those by Plaintiffs here, seeking only prospective relief against state officials in their official capacity premised on alleged failure to comply with federal law. Ex Parte Young, 209 U.S. 123, 159-60 (1908). It is equally clear that in determining whether Eleventh Amendment immunity is applicable, a court need only conduct a "straightforward inquiry" into whether a complaint satisfies the requirements of Ex Parte Young. See Verizon Maryland v. Public Service Commission of Maryland, 535 U.S. 635 (2002). There can be no doubt that, as this Court has held, the Amended Complaint satisfies all of these requirements. Yet again seeking to stay these proceedings, in their latest dilatory motion, the Defendants once again improperly attempt to conflate the immunity question with the wholly separate, analytically distinct issue of whether the Amended Complaint states a cause of action. As the Supreme Court made clear in Verizon Maryland, an inquiry into a claim of "sovereign immunity" does **not** include an analysis of the underlying merits of the federal claim. That sort of attack on the underlying merits of Plaintiffs' claims is, however, exactly what Defendants are urging as the grounds for a stay pending an appeal on "sovereign immunity" grounds. As the Court previously - and correctly - concluded, any such

appeal on that basis would be "frivolous." Therefore, this Court should adhere to its prior determination, and retain jurisdiction over this matter.

**Procedural History**

This is the latest of a series of motions Defendants have filed to prevent discovery on the merits from proceeding in this action, and to delay an adjudication of Plaintiffs' important constitutional claims. On December 2, 2005, this Court issued an order denying Defendants' motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), except with respect to a claim under the Help America Vote Act (the "December 2 Order").[1] Specifically, this Court held that Plaintiffs had stated claims for relief under the equal protection and due process clauses of the Constitution; the named Defendants were proper parties; the Plaintiffs had standing; and the Plaintiffs' claims were not barred by claim preclusion. Shortly before the Court issued the December 2 Order, the Plaintiffs filed an Amended Complaint pursuant to the Court's order of November 21, 2005, after Defendants had asserted that the completion of the November 2005 election in Ohio had somehow rendered the Plaintiffs' claims "moot." As Defendants have acknowledged, the only change in the amended pleading was to make clear that Plaintiffs were seeking prospective relief with respect to future statewide elections, including but not limited to, the November 2006 election, based on allegations of ongoing constitutional violations.

Despite the fact the Amended Complaint was essentially identical to the original Complaint that had been sustained by the Court, on December 7, 2005, the Defendants filed another motion to dismiss. In that motion, in addition to regurgitating the previously rejected arguments advanced in support of their prior motion to dismiss, the Defendants also raised, for the first time, a sovereign immunity defense. On February 10, 2006, this Court issued an order

[1] Defendants' initial motion to dismiss failed to assert any claim of immunity.

denying Defendants' motion to dismiss in its entirety (the "February 10 Order"). The Court held that, as a technical matter, with respect to matters previously raised, Defendants' second motion to dismiss was a motion for reconsideration, and the Defendants had failed to meet their burden on such a motion, and that the December 2 Order was binding as law of the case.

This Court then specifically addressed Defendants' sovereign immunity argument, and noted that under well-settled Supreme Court precedent, sovereign immunity "does not … extend to claims brought against state officials in their official capacity alleging an ongoing failure to comply with federal law and seeking only prospective relief." (February 10 Order at 5) The Court further observed that Plaintiffs had clearly alleged ongoing violations of federal law, including allegations that "Ohio administers an election system that unconstitutionally burdens voters' access to the ballot box based solely on where they live," and that Defendants' failure to train poll workers adequately "amounts to willful indifference to Ohioans' voting rights." (February 10 Order at 6) In addition, the Court found that Defendants' sovereign immunity arguments were nothing more than a restatement of their arguments that had been previously rejected in connection with the "initial motion to dismiss with respect to the nature of Plaintiffs' claims." (Id.) Thus, while Defendants contended (as they do once again do in their so-called "statement of facts" in support of their motion to stay, in direct contradiction of the Court's prior rulings) that the Plaintiffs have alleged only "garden variety" election problems and "isolated incidents,"[2] this Court dearly disagreed, and reiterated that the complaint indeed alleged systemic violations of constitutional significance.

[2] One incident the state mentions involves the complaints of Plaintiff Casas. In their latest brief, the State claims that "election observers" were the agents of one of Plaintiff's attorneys. This statement is an intentional and unacceptable misstatement of the record. Plaintiff Casas clearly stated at her deposition that she was unaware of any organizational affiliation of the election observer with whom she spoke. Casas Depo. (R. 190) at 76-78.

As Plaintiffs correctly anticipated in responding to Defendants' second motion to dismiss, it was likely that the Defendants would attempt to divest this Court of jurisdiction by filing an appeal on sovereign immunity grounds. For that very reason, Plaintiffs asked this Court to certify any such appeal to be frivolous, because it is well-recognized that when such a certification is made, the district court maintains jurisdiction pending appeal. The Court granted Plaintiffs' application, and in order to prevent Defendants' from asserting "frivolous sovereign immunity defenses as strategic maneuvers to delay litigation," the Court made the following statement:

> **Defendants' sovereign immunity claim here is without merit. Secretary Blackwell's and Governor Taft's argument rests entirely on a reading of LWV's claim which I specifically rejected in my December 2, 2005, Order. Nevertheless, defendants persisted with a sovereign immunity motion that, in light of my previous ruling, was obviously unfounded. Therefore, that motion shall be certified as frivolous and this court will retain jurisdiction during the pendency of any appeal of this order. (February 10 Order at 6)**

On February 10, 2006, this Court issued another order granting in part Defendants' motion for leave to seek an interlocutory appeal of the December 2 Order (the "February 10 §1292(b) Order"). The Court was "confident [that] its December 2 Order follows naturally from established precedent," and observed that "[i]f 'one man, one vote' is to have meaning, it must encompass … systematic, governmentally - endorsed or - maintained impediments to equal and unimpaired access to the ballot box." However, the Court found that the case involved "uncharted constitutional territory" and therefore § 1292(b) certification was allowed solely with respect to one issue of the five raised by Defendants, whether the pleading stated a claim. At the same time, while not making a definitive ruling, the Court suggested that given the nature of the significant constitutional rights at issue, discovery might proceed pending appeal. Thus, if the appeal pursuant to the February 10 §1292(b) Order is accepted by the Sixth Circuit, the appellate

review that Defendants seek with respect to the Plaintiffs' constitutional claims will occur in the correct context. Their frivolous sovereign immunity appeal is no valid basis for further delaying such ongoing discovery (or any other proceeding ) as the Court deems to be appropriate. Furthermore, additional unneeded delays in this matter can only result in a bevy of election-eve injunction motions that are harmful to the public interest and the efficient administration of justice. This is a scenario that both Plaintiffs and the Court have attempted to avoid.

## ARGUMENT

### I. DEFENDANTS' FRIVOLOUS "SOVEREIGN IMMUNITY" ARGUMENT DOES NOT JUSTIFY A STAY PENDING APPEAL

"Try and try again" may sometimes be good advice, but not necessarily in litigation. Defendants' latest attempt to stay discovery, this time pending the outcome of their planned appeal on sovereign immunity grounds, is nothing more than a rehash of prior, previously rejected, arguments, and should be rejected out of hand. It is well-settled that a district court may certify that an asserted "sovereign immunity" defense is frivolous, and where such a certification is made, the district court is not divested of jurisdiction while the appeal is pending. This Court should reaffirm the finding made in its February 10 Order that "any appeal on the issue of sovereign immunity shall be, and hereby is, certified as frivolous; [and] any interlocutory appeal of this decision shall, accordingly, not divest this court of jurisdiction."

Defendants' memorandum in support of their latest attempt to stop discovery consists of nothing more than a mischaracterization of the allegations of the Amended Complaint that blithely ignores this Court's repeated analysis of Plaintiffs' claims; an attempt to reargue the Court's determination that any appeal on sovereign immunity grounds would be frivolous based on (a) Defendants' contention that the Court issued "an advisory opinion about possible future

events," and (b) Defendants' reliance on a Pennsylvania district court case that predated the Supreme Court's dispositive decision in Verizon Maryland v. Public Service Comm. of Md., 535 U.S. 635 (2002);[3] a rehash of Defendants' prior attack on the Court's disposition of their motion to dismiss the Amended Complaint; and the puzzling assertion that this Court, which stated that Defendants had "persisted with a sovereign immunity motion that, in light of my previous ruling, was obviously unfounded," supposedly "failed to find any action by the Defendants which would meet the threshold for a frivolous appeal."

Because Defendants' latest motion is yet another attempt to reargue issues that have been not only thoroughly briefed, but actually decided by this Court, plaintiffs respectfully refer the Court to its prior decision, and their memorandum dated January 5, 2006 in opposition to Defendants' motion to dismiss the Amended Complaint and for a stay of discovery.[4] As a threshold matter, as this Court correctly recognized, the United States Supreme Court has made clear that "[t]o determine whether sovereign immunity applies, a court conducts only a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' Verizon, 535 U.S. at 645." (February 10 Order at 5) On several occasions, including its December 2 Order and February 10 Order, this Court has found that plaintiffs had indeed set forth such allegations. Defendants' repeated criticism of this Court's disposition of their motion to dismiss the Amended Complaint warrants little comment; whether by virtue of the December 2 Order, or a hypothetical de novo review,

[3] Of course, to the extent that Death Row Prisoners of Pa. v. Ridge, 948 F.Supp. 1282 (E.D. Pa. 1996) is inconsistent with the Supreme Court's decision in Verizon Maryland, it is wholly irrelevant. In any event, that case is readily distinguishable because the existence and nature of the alleged constitutional due process right at issue there, i.e., the right to know about the status of Pennsylvania's "opt-in" status under a federal statute, is markedly different from this case, where the constitutional rights on which Plaintiffs rely are well-settled as a result of numerous Supreme Court precedents, as cited in this Court's prior decisions.

[4] For the Court's convenience, a copy of that memorandum is annexed hereto as Appendix A.

since the amended pleading was virtually identical to the initial pleading, it is evident that the legal analysis in the December 2 Order is squarely applicable to the Amended Complaint. Finally, the Defendants' assertion that the Court made no finding that their appeal would be frivolous is belied by the Court's specific findings on that point in the February 10 Order. (February 10 Order at 6)

Defendants' attack on the Court's decision as a premature advisory opinion is itself frivolous. As both this Court and the Plaintiffs correctly anticipated, and consistent with their tactics throughout the course of this litigation, Defendants have appealed from the denial of their sovereign immunity motion on the same grounds that were repeatedly rejected by this Court. While this motion was pending, Defendants' motion pursuant to 28 U.S.C. §1292(b) for certification of an interlocutory appeal from this Court's denial of their motion to dismiss was also pending. Under these circumstances, the issue of an imminent appeal by Defendants concerning the sovereign immunity issue was fully briefed, properly before the Court, and ripe for adjudication. Accordingly, Defendants' assertion that the Court's determination of frivolousness was premature or "advisory" is wholly without merit. Furthermore, Defendants' argument is completely undercut by one of the cases they cite to in their own brief. In Blair v. City of Cleveland, 148 F.Supp.2d 919, 922 (N.D. Ohio 2000) the court specifically states "[u]nder the court's holding in *Apostol*, where a court finds than an appeal is frivolous, or where the defendants use claims of immunity in a manipulative fashion, the district court may certify that the defendant has surrendered the entitlement to a pretrial appeal and proceed with trial." See also, Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) ("Should the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may

proceed with trial.") Finally, the Court's finding that limited certification under §1292(b) was appropriate on the sufficiency of the Plaintiffs' claims has no bearing on the frivolousness of any appeal based on sovereign immunity, for, as the Verizon Maryland court recognized, those issues are separate and distinct.

None of the cases cited by Defendants support their application. For example, Defendants mistakenly cite Blair for the proposition that the Sixth Circuit has never adopted the frivolous appeal doctrine. In fact, the case states the opposite. "District courts are not without power to prevent defendants will from filing frivolous appeals or those employed for the purpose of delaying trials." Id. The court noted that in Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989) the 7th Circuit ruled that a district court can retain jurisdiction by certifying an appeal as frivolous, and observed that "[t]he Sixth Circuit, while not applying the holding in Apostol, has cited that court's logic with approval." Id. at 922. Indeed, the Sixth Circuit recognized the frivolous appeal doctrine in Dickerson v. McClellan, 37 F.3d 251, 252 (6th Cir. 1994). (District court may certify an appeal of a sovereign immunity claim as frivolous, but may not dismiss notice of appeal.)

Defendants reliance on Yates v. City of Cleveland, 941 F.2d 444 (6th Cir. 1991) is also misplaced. There, the court recognized that sovereign immunity appeals "can be used for the sole purpose of delaying trial," and cited with approval this statement from Abel v. Miller, 904, F.2d 394, 396 (7th Cir. 1990): "A sequence of pre-trial appeals not only delays the resolution but increases the Plaintiffs' costs, so that some will abandon their cases even though they may be entitled to prevail." The immunity claim was dismissed on the merits, rather than on the basis of frivolousness or waiver, because the district court had made no findings as to those issues, and not because the doctrine was inapplicable.

While defendants assert that the "common theme that appears on findings of baseless appeals is when district judges have failed to resolve a question of immunity prior to the interlocutory appeal," they cite only one case for that proposition, Andre v. Castor, 963 F.Supp. 1169, 1170 (M.D. Fla. 1997). In Andre, the court found that the "defendants' notice of appeal was in fact frivolous and made for the purposes of delay," where the court had delayed a decision on an immunity claim pending further discovery. Because there was no order to appeal, it was clear that "the only possible motivation behind the notice of appeal is delay." Id. at 1171. Andre obviously supports the proposition that a court can certify an appeal from a denial of immunity which is made for the purposes of delay. Defendants also cite Kickapoo Tribe v. Kansas, 1993 WL 192795 (D. Kan. 1993) to support their assertions that certifications of frivolousness are "incredibly rare," and that this Court's certification was "advisory." That decision supports neither of those assertions. However, the court did squarely hold that "a district court may regain jurisdiction following a notice of appeal if after a hearing and for clear and reasoned findings given it certifies that the appeal is frivolous or forfeited." Here, where this Court has received numerous briefs, heard argument on the sovereign immunity issue, and issued several decisions, any requirement for a "hearing" and "reasoned findings" has clearly been satisfied.

**Conclusion**

For the foregoing reasons, Plaintiffs respectfully submit that Defendants' motion for a stay pending an appeal on the sovereign immunity issue should be denied in all respects.

Respectfully submitted,

March 3, 2006

/s/ Jon M. Greenbaum

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing *Plaintiffs' Opposition to Defendants' Motion for Stay Pending Appeal on Sovereign Immunity Grounds* has been filed electronically this 3rd day of March, 2006. 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. All other parties will be served by regular U.S. Mail.

By /s/ Steven P. Collier
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