UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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.	Case No. 3:05-CV-7309 Hon. James G. Carr

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION AND APPLICATION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL FROM DECEMBER 2, 2005 ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Plaintiffs submit this opposition to Defendants' Motion and Application Under 28 U.S.C. § 1292(b) to Take Interlocutory Appeal from this Court's December 2, 2005 Order ("§ 1292(b) Motion"). Plaintiffs also have filed an opposition to Defendants' Motion to Dismiss the Amended Complaint (the "Sovereign Immunity" Motion).

INTRODUCTION

Certification for interlocutory appellate review under § 1292(b) is an extraordinary departure from the ordinary progress of a case. Accordingly, "review under § 1292(b) is granted sparingly and only in exceptional cases." *In Re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (citing *Kraus v. Bd. of County Rd. Comm'r*, 364 F.2d 919, 922 (6th Cir. 1966)) (denying leave to appeal). Defendants bear a heavy burden to establish both (1) the statutory requirements for certification under §1292(b) and (2) that "exceptional circumstances" supporting an immediate appeal exist. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Defendants plainly fail to carry either burden. To the contrary, Defendants' only arguments are entirely conclusory and essentially devoid of any supporting legal authorities.

The § 1292(b) Motion is simply the latest in a string of Defendants' baseless and dilatory attempts to avoid litigating this case on the merits – and to prevent this Court from resolving Plaintiffs' claims and granting timely relief to protect the fundamental, constitutional rights of Plaintiffs and, indeed, all Ohio voters. We respectfully request that the Court promptly deny Defendants' § 1292(b) Motion, as well as the pending Sovereign Immunity Motion, so that the parties may complete their discovery and present these important claims to the Court for adjudication on the merits. Given the extraordinary public interest in resolving Plaintiffs' claims prior to the November 2006 election, we further request that the Court permit discovery to proceed even if it grants Defendants' § 1292(b) Motion.

ARGUMENT

On December 2, 2005, this Court issued an Order denying Defendants' Motion to Dismiss the Plaintiffs' Complaint with respect to all but one claim (Count Four under the Help America Vote Act ("HAVA")). In rejecting Defendants' arguments, the Court repeatedly emphasized that the motion merely tested the sufficiency of Plaintiffs' allegations, not the merits of any of the claims. Order at 6, 8, 9. The Court principally relied on well-established legal standards articulated by the Supreme Court and the Sixth Circuit concerning (1) Fed. R. Civ. P. 12(b)(6), (2) the fundamental right to vote, and (3) claims for injunctive relief under § 1983. The Court correctly concluded that, except for the HAVA claim, each of Defendants' unsupported arguments was contrary to clear and controlling legal authority and misconstrued the allegations of the Complaint. In one instance, the Court compared Defendants' arguments to those that the Sixth Circuit characterized as "ridiculous." *E.g.* Order at 12.

Defendants now seek certification under § 1292(b) of five of the "questions" resolved against them in the December 2 Order:

1. Whether Plaintiffs state a claim for relief under the Fourteenth Amendment and § 1983 (the "§ 1983 Question").
2. Whether Plaintiffs state a claim for relief as to the Defendant Governor (the "Governor Question").
3. Whether Plaintiffs state a claim for relief as to the Defendant Secretary of State (the "Secretary Question").
4. Whether Plaintiffs League of Women Voters of Ohio ("LWVO") and League of Women Voters of Toledo ("Toledo League") have standing to assert their claims (the "Standing Question").
5. Whether the claims of Plaintiffs LWVO and the Toledo League are barred by claim preclusion (the "Claim Preclusion Question").

None of these questions should be certified for interlocutory appeal. For each question, Defendants must demonstrate (1) a controlling question of law, (2) substantial ground for difference of opinion on that question, and (3) that an immediate appeal would materially

advance the ultimate termination of the litigation. *In Re City of Memphis*, 293 F.3d at 350. The Sixth Circuit "requires strict compliance" with the statutory requirements of § 1292(b)). *Lynch v. Johns-Manville Sales, Corp.*, 701 F.2d 44, 45 (6th Cir. 1983) (appeal dismissed); *In Re Welding Fume Prod. Liability Litig.*, 2005 WL 1123657, *2 (N.D. Ohio May 2, 2005) (denying certification; § 1292(b) is "construed narrowly"). Thus, Defendants must satisfy all three elements for each issue for which they seek leave to appeal. *In Re City of Memphis*, 293 F.3d at 350 (denying leave to appeal). Defendants' motion fails with respect to each of the statutory elements of § 1292(b). Therefore, no certification is available.

Even if Defendants could satisfy the statutory requirements of § 1292(b), they also would be required to show that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand*, 437 U.S. at 475; *In Re Glenn R. Tetirick*, 84 B.R. 505, 507 (S.D. Ohio 1988). This is a heavy burden; routine resort to § 1292(b) does not comport with Congress' intent to reserve interlocutory review for exceptional cases. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996); *In Re Welding Fume Prod. Liability Litig.*, 2005 WL 1123657, *2 ("statute is not meant to be a 'vehicle to provide early review of difficult rulings in hard cases.'"). We show that Defendants plainly fail to sustain their burden to establish "exceptional circumstances." Accordingly, denial of Defendants' § 1292(b) Motion is mandated as a matter of law as to each of the five questions presented.[1]

[1] Defendants also suggest that they may be conditionally requesting certification of the "sovereign immunity" defense raised in their Sovereign Immunity Motion (*see* Mem. of Law at 1 n.1). The request is not only procedurally improper but also wholly deficient on its face as a substantive matter. As we show in our separate opposition to the "Sovereign Immunity" Motion: (1) Defendants' claims to a "sovereign immunity" defense patently lack merit because Plaintiffs' claims for prospective relief only against state officials solely in their official capacities fall squarely within the doctrine established by *Ex parte Young* nearly 100 years ago and (2) because

A. There Is No Substantial Ground for Difference of Opinion as to the Correctness of the Court's 12/2/05 Order: the Court's Order Is Based on Settled Law and Is Supported by Controlling Authority

Defendants' § 1292(b) Motion must be considered in the context of the procedural posture of this case. The Order Defendants seek leave to appeal denied most of Defendants' motion to dismiss under FRCP 12(b)(6). In considering such a motion, the Court was required to "construe the complaint in the light most favorable to plaintiffs and accept all the factual allegations and permissible inferences from the allegations as true" (Order at 4 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))), and it was Defendants' burden to show that Plaintiffs could not prevail "under any set of facts that could be proved consistent with the allegations." Order at 4 (quoting *Swierkiewicz v. Sorema*, 534 U.S. 506, 514 (2002)).

The Court relied on clear Supreme Court and Sixth Circuit authority to find that Defendants did not carry their burden under Fed. R. Civ. P. 12(b) with respect to any of the five questions they now seek leave to appeal, and that Plaintiffs had alleged facts which, when proven, would entitle Plaintiffs to relief. That Defendants disagree with the Court's Order plainly is not sufficient to satisfy the statutory prerequisites of § 1292(b). *Meyers v. Ace Hardware Corp.*, 1982 U.S. Dist. LEXIS 17707, *12 (N.D. Ohio Sept. 13, 1982). There is no ground for difference of opinion on any of the five issues Defendants identify, let alone the required "substantial ground." Indeed, Defendants make ***no effort*** to carry their burden on this element. Defendants cite ***no legal authority*** – not even one case – to provide any basis to question any of this Court's rulings on the five issues for which they seek certification. For this

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the claims to a "sovereign immunity" defense are so patently frivolous, Defendants are not entitled to any interlocutory appeal from the denial of the Sovereign Immunity Motion, let alone any stay of discovery. Defendants cannot use § 1292 to make an end run around the frivolous – and, therefore, non-appealable – nature of their "sovereign immunity" defense, particularly because there is no substantial ground for disagreement that *Ex parte Young* controls and mandates denial of Defendants' "Sovereign Immunity" Motion.

reason alone, certification under § 1292(b) must be denied for failure to satisfy the statutory prerequisite of "substantial ground for disagreement" on any of the supposed "controlling" questions of law. *See, e.g.*, *In Re City of Memphis*, 293 F.3d at 350.

1. The §1983 Question

As to whether Plaintiffs state a claim for relief under § 1983, the Court found that, based on the facts alleged, Plaintiffs stated not one, but three separate 14th Amendment violations providing grounds for relief under § 1983, namely violations of (1) substantive due process, (2) procedural due process, and (3) equal protection. Any one ground alone is sufficient to sustain Plaintiffs' claim for relief under § 1983. Yet, Defendants make no effort to address the substance of the Court's rulings, let alone to show any "substantial ground for disagreement" as to any of the three 14th Amendment grounds for Plaintiffs' § 1983 claim. It is plain from the Court's Order that there is no "substantial ground for disagreement" and, therefore, certification under § 1292 must be denied.

As to substantive due process, the Court correctly concluded, based on the applicable controlling Supreme Court and Sixth Circuit authority, that "[t]here is ***no question*** that [Plaintiffs have] alleged actionable constitutional violations." Order at 7 (emphasis added). The Court further found that Plaintiffs pled "detail[ed]" and "specific facts" that were more than sufficient to defeat Defendants' arguments to dismiss the substantive due process claim. *Id.* at 7-8. Similarly, with respect to procedural due process, the Court applied settled principles of constitutional law and found that, if true, the conduct Plaintiffs alleged "would be actionable under § 1983." Order at 9 (citing *City of Canton v. Harris*, 489 U.S. 378, 387 (1989), *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004)).

With respect to Plaintiffs' equal protection claim, the Court correctly summarized Plaintiffs' allegations in one sentence: "Defendants' election system provides different voting

rights to different citizens based solely on where those citizens happen to reside." Order at 5. Again, the Court concluded – based on ***decades*** of Supreme Court, Sixth Circuit, and other authority – that, if true, Plaintiffs allegations state a violation of equal protection. *Id.* at 6.

For example, the Court followed *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) to find that, as a matter of law, "a state may not directly condition the franchise on one's place of residence" and that "one's place of residence cannot cause his or her vote to be cheapened or devalued." Order at 5. Likewise, the Court adhered to *Bush v. Gore*, 531 U.S. 98, 109 (2000) – as well as older applications of the "one man, one vote" principle – to rule that "a state having power to ensure uniform treatment of voters cannot adopt policies leading to disparate treatment of those voters and thereafter plead 'no control' as a defense" (Order at 5), a "state's failure to exercise such power, where such inaction forseeably impairs the fair and equal exercise of the franchise, gives rise to an equal protection claim" (*id.*), and that "[e]qual protection is likewise violated where the state dilutes the votes of some voters by imposing barriers to the ability or opportunity to vote." *Id.* (citing *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969)). Under these precedents, the Court found that Plaintiffs' allegations of "arbitrary and irrational differences in rules, processes, and burdens depending solely on where the voter happens to reside," and "knowingly allow[ing] the voting process in the 88 counties in Ohio to devolve into an inconsistent and ultimately arbitrary crazy-quilt of actual laws, erroneous 'interpretations' of laws, and (often unannounced) 'local rules'" would, if true, plainly state a claim for denial of equal protection and, therefore, for relief under § 1983. *Id.* at 5-6.

In determining whether there is a substantial ground for disagreement, the Court must analyze the strength of arguments in opposition to the challenged ruling. *U.S. v. Atlas Lederer Co.*, 174 F. Supp. 2d 666, 669 (S.D. Ohio 2001); *Max Daetwyler Corp. v. Meyer*, 575 F. Supp.

280 (E.D. Pa. 1983). It is clear from the Court's Order that Defendants failed to present any sustainable argument to dismiss Plaintiffs' claims under § 1983. Indeed, as this Court found, Defendants misstated the controlling case law and misconstrued the Complaint. Order at 6. It is therefore not surprising that, once again on this Motion, Defendants fail to identify any authority to question this Court's Order.

2. The Secretary and Governor Questions

The second and third questions Defendants seek leave to appeal are whether the Secretary of State and Governor are proper defendants here. Again, Defendants make no serious attempt to demonstrate any substantial ground for disagreement with this Court's ruling that, as a matter of law, both the Secretary and Governor – and not the individual Boards of Elections – are the proper respondents to Plaintiffs' claims of statewide systemic failures and inequities in the Ohio voting process. Nor can they do so because, again, the controlling legal principles are clear.

When Defendants raised these same arguments on the motion to dismiss, the Court concluded that they were entirely "misplaced" and, indeed, that such arguments had been rejected by the Sixth Circuit in an analogous case as "***ridiculous***." Order at 12-13 (citing *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1055 (6th Cir. 1996) (emphasis added), *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001)). The Court found that "Secretary Blackwell is the chief elections officer of the state of Ohio. R.C. §35.01.04. Thus he is a proper defendant here." Order at 13. Relying on established Supreme Court, Sixth Circuit, and other authority, the Court likewise concluded that "[t]he governor, as the chief executive of the state, has sufficient connection to election law to be a proper defendant in a suit for prospective injunctive relief regarding election procedures" and, therefore, also "is also a proper defendant here." *Id.* at 14 (citing *Ex parte Young*, 209 U.S. 123, 157 (1908) ("[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the

important and material fact"); *Lawson v. Shelby City*, 211 F.3d 331, 335 (6th Cir. 2000) (governor had sufficient connection to elections to be proper party); additional citations omitted).

Defendants cite no contrary authority on these straightforward – and plainly correct – issues of law. Accordingly, the Governor and Secretary Questions are not appropriate for interlocutory appeal under §1292(b).

3. The Standing and Claim Preclusion Questions

As with each of the first three questions, Defendants provide ***no legal argument*** to demonstrate that the Court's rulings on routine issues of standing or claim preclusion are questionable in any regard. Nor can they. Accordingly, Defendants cannot satisfy their burden under §1292(b) to certify the Standing or Claim Preclusion Questions.

First, the Order correctly noted that Defendants had conceded that members of the Toledo League would have standing to challenge harm suffered in Lucas County and, therefore, that the Toledo League had standing to that extent. Order at 15. Defendants do not dispute this ruling. Second, the Court further correctly found that there was ***no authority*** for Defendants' proposition that the LWVO must specify its members' counties of residence to established standing. *Id.* Defendants once again fail to cite any authority to support their position, let alone call into question the Court's ruling. Third, and finally, the Defendants provide ***no authority*** to dispute this Court's entirely proper reliance on the established Sixth Circuit authority that "[t]o sue on behalf of its members, an organization must also show its members 'would otherwise have standing to sue in their own right, the interests are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Id.* at 14 (quoting *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 523-24 (6th Cir. 2001)). There is no substantial ground for disagreement that this is the correct legal standard to determine whether LWVO and the Toledo League have standing.

Similarly, on the "claim preclusion" issue, Defendants do not even attempt to dispute that the Court applied the correct legal standards. As the Order plainly shows, the Court rejected Defendants' "claim preclusion" arguments based on controlling Sixth Circuit authority. Order at 16 (citing *Mitchell v. Chapman*, 343 F.3d 811, 819 (6th Cir. 2003), *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 265 (6th Cir. 1988)). Defendants cite no authority to show any "substantial ground for disagreement" as to the Court's conclusion that, under the *Mitchell* and *Forry* standards, none of Plaintiffs' claims are precluded – including the Court's ruling that no prior litigation arose from the "same nucleus of operative facts" as this case. Order at 16.

4. None of the Five Questions Present Matters of "First Impression"

Defendants' sole attempt to satisfy the requirement of "substantial ground for disagreement" is to argue that this is a "case of first impression." Mem. of Law at 5. The assertion is wholly conclusory, wholly devoid of actual authority, and, thus, wholly fails to satisfy Defendants' burden of proof under § 1292(b). As a matter of law, whether there is "substantial ground for disagreement" necessary for certification under § 1292(b) turns on whether there is substantial divergent authority on the relevant legal issues, not on whether the case purportedly is one of "first impression." *See Atlas Lederer Co.*, 174 F. Supp. 2d at 669 ("the fact that the Court addressed an issue of first impression in its . . . Decision and Entry does nothing to demonstrate a substantial ground for difference of opinion as to the correctness of that ruling."); *see also FDIC v. First Nat'l Bank*, 604 F. Supp. 616 (E.D. Wis. 1985). Even if "first impression" status were significant, Defendants do not specify which of the five questions allegedly present legal issues of "first impression." As shown above, none do. To the contrary, the Court relied on well-established authority in rejecting Defendants' many erroneous arguments for dismissal. As shown above, Defendants utterly fail to carry their burden to show any substantial ground for disagreement. Defendants' motion must be denied on this basis alone.

B. The Questions Presented for Interlocutory Review Are not Controlling Questions of Law: None Would Materially Affect the Outcome of the Litigation and Because the Court Applied the Correct Legal Standards in Reaching Its Decision

In addition to failing to demonstrate any "substantial ground for disagreement" on any of the five issues presented for certification, Defendants also fail to show that any of the issues present "controlling" questions of law. To satisfy this element, Defendants must show that the Court relied on an incorrect legal standard, not just that they disagree with the application of the correct legal standard. *See, e.g.*, *In Re Cordis Corp. Pacemaker Product Liability Litig.*, 1993 U.S. Dist. LEXIS 21296, *16 (S.D. Ohio Dec. 8, 1993) (no controlling issue of law where moving party merely disagreed with court's conclusions and did not assert that court applied incorrect legal standards); *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 217 F.R.D. 235 (D.D.C. 2003) (no dispute that court applied correct legal standard). Here, as shown above, Defendants make no effort to show that this Court applied the wrong legal standards and, in fact, the Court relied largely on controlling Supreme Court and Sixth Circuit authority.

A controlling question of law is one that materially affects the outcome of the litigation. *In Re City of Memphis*, 293 F.3d at 351. Here, none of the questions Defendants identify would, by themselves, materially affect the outcome of the litigation. First, Defendants admit that the Standing and Claim Preclusion Questions are not controlling since resolution of either of those issues in their favor would not control the outcome of the litigation. Mem. of Law at 4 n. 2. For that reason alone, those questions cannot be certified for review under § 1292(b). Second, neither the Secretary nor the Governor Question alone is dispositive of this case and, therefore, neither is "controlling." As shown above, Defendants will not succeed on appeal on either issue, let alone on both. Finally, as also shown above, the § 1983 Question involves three distinct legal issues. Thus, for the § 1983 Question to be "controlling," Defendants would have to reverse this

Court's Order on all three constitutional claims. *Cf. Lorentz v. Westinghouse Elec. Corp.*, 472 F. Supp. 954 (W.D. Pa. 1979) (no interlocutory appeal on one count of multi-count complaint). Defendants cannot do so given (1) the standards applicable under Fed. R. Civ. P 12(b)(6) and (2) this Court's correct reliance on plainly controlling Supreme Court and Sixth Circuit authority.

Defendants' failure to demonstrate that each of the five questions presents a "controlling question" of "law" is yet another reason to deny the request for certification under § 1292(b).

C. Immediate Appeal Will Not Materially Advance the Ultimate Termination of the Litigation

Even if Defendants could satisfy either of the first two elements under § 1292(b) on any of the questions they present - which they cannot - certification still would be improper because an immediate appeal will not materially advance the ultimate termination of the litigation. *Int'l Union v. Midland Steel Products Co.*, 771 F. Supp. 860 (N.D. Ohio 1991); *In Re Welding Fume Products Liability Litig.*, 2005 WL 1123657, *3 (denying certification). To the contrary, interlocutory appeal would unnecessarily prolong this action and inconvenience Plaintiffs. Most important in this regard is that the parties may not get any more "prompt review" through an immediate appeal than by proceeding to trial in June 2006 as scheduled. *See Iron Workers Local Union No. 17 v. Philip Morris Inc.*, 29 F. Supp. 2d 825, 838 (N.D. Ohio 1998) (denying certification; given caseload in the Sixth Circuit, it is unlikely that the Court would decide the case within six months).

Interlocutory appeal is particularly inappropriate where, as here, the Defendants have an extremely low likelihood of success on appeal on any of the questions presented – let alone on all of the issues that would be necessary to dispose of the entire action (*i.e.* all three aspects of the § 1983 Question or both of the Governor and the Secretary Questions). *See Baxter Travenol Labs., Inc. v. LeMay*, 514 F. Supp. 1156, 1159 (S.D. Ohio 1981) (considering probability

decision was in error). The delay that would result from granting an interlocutory appeal also would be completely contrary to the undeniably significant public interest of Ohio's voters in having this Court resolve Plaintiffs' claims after a trial on the merits in sufficient time to grant appropriate relief to protect voters in the November 2006 election.

Defendants' contention that an interlocutory appeal would avoid supposedly burdensome discovery is misplaced. This is not, for example, a case in which the questions of law are new or unsettled. Defendants also greatly exaggerate the supposed burdens of discovery. First, Defendants offer no support at all for their assertion that discovery would be easier and less costly if the Organizational Plaintiffs were dismissed from the action. Both the LWVO and the Toledo League have been responding to and complying with Defendants' discovery requests. Declaration of Michael Geske ("Geske Decl."), ¶ 9. Plaintiffs remain willing to comply with all reasonable discovery requests in a timely manner. Second, much discovery already has been accomplished, including third party discovery. Indeed, nearly half of all 88 County Boards of Election already have produced documents in response to Plaintiffs' discovery requests. *See* Geske Decl. ¶ 4 (twenty-four counties from Southern District of Ohio producing documents) ; Declaration of Jennifer Scullion ("Scullion Decl.") ¶ 2 (eighteen counties from Northern District of Ohio producing documents). Experience also has shown that, with minimal communication between counsel and representatives of the Boards of Elections, Plaintiffs' requests generally can be complied with in a matter of a few days – or even a few hours. *See* Geske Decl. ¶¶ 6-8. Finally, Defendants cannot be heard to argue on this motion that an interlocutory appeal would relieve them of significant discovery burdens when Defendants previously represented to

Plaintiffs and the Court that the bulk of their document review and production already has been completed.[2]

Every case involves discovery. And parties in virtually every action object that certain aspects of discovery are burdensome. Defendants' mere claim that the discovery in this action is burdensome, without more, does not support the conclusion that an interlocutory appeal would materially advance the resolution of this case. Moreover, an interlocutory appeal would not serve the significant public interest in having the important questions about voters' fundamental rights promptly decided before the upcoming November 2006 election. Accordingly, Defendants' motion should be denied on this basis as well.

D. There are No Exceptional Circumstances Warranting Immediate Interlocutory Appeal

As explained above, § 1292(b) certification cannot be granted unless Defendants (1) satisfy the statutory requirements of § 1292(b) and then (2) also show that there are exceptional circumstances warranting an extraordinary departure from the normal requirements for appellate review under § 1291. Defendants fail to carry their burden on either requirement. Indeed, they offer no showing at all on the requirement of "exceptional circumstances."

While this case is indeed important and presents compelling issues about the ongoing, systemic violations of the fundamental rights of Ohio voters, those facts weigh in favor of ***less*** delay, not more. The interests of all affected constituencies (Plaintiffs, Ohio voters generally, and the local election personnel) and, we respectfully submit, of the Court, are best served by keeping this case on track, permitting the parties to conclude discovery, and resolving the

[2] We cite Defendants' representations about their production only to highlight their willingness to take inconsistent positions as it suits their needs. As the Court is aware, Plaintiffs have detailed substantial deficiencies in Defendants' discovery responses, which Plaintiffs intend to pursue when discovery resumes in this matter.

important claims on their merits sufficiently in advance of the November 2006 election. By contrast, Defendants' interest has been and continues to be delay. This motion is only the latest in a continuing line of motions that Defendants have made, but then failed to support with any real authorities or arguments. The questions they ask this Court to certify are entirely pedestrian, were correctly resolved against Defendants based on unrefuted authority, and, in each case, are not dispositive of the action. Certifying any of the questions will engender only more of the same utter waste and delay – and will leave unresolved and unredressed the ongoing violations of the fundamental right to vote that, Plaintiffs allege, impact not only their own rights, but the public interest in the fair and equal protection of that right. Far from there being any "exceptional circumstances" warranting § 1292(b) certification, these are exactly the circumstances in which certification should be denied so that the real issues in the case can be litigated and necessary relief promptly granted.

E. No Stay of Discovery is Warranted: Even if Requested, a Stay Would Substantially Prejudice Plaintiffs' Ability to Obtain Relief in Advance of the 2006 Election

Even if the Court certifies any of the five questions under § 1292(b), it should not impose a stay of discovery. First, Defendants provide no argument as to why such a stay would be appropriate, nor do they apply for such a stay. *See Baxter Travenol Labs., Inc.*, 514 F. Supp. at 1159 (declining to impose stay pending interlocutory appeal where parties do not show cause for staying pretrial proceedings or apply for such a stay). Second, it is well-established that "[a] stay of matters in an appeal taken pursuant to § 1292(b) is ***rarely appropriate under any circumstances***." *Smith v. City of East Cleveland*, 1974 U.S. Dist. LEXIS 7556, *7 (N.D. Ohio June 26, 1974) (citing *Fisons Ltd. v. U.S.*, 458 F.2d 1241, 1248 (7th Cir. 1972)) (emphasis added). Here, a stay would substantially prejudice Plaintiffs' ability to obtain relief before the 2006 election, and would be contrary to the important public interests implicated in this action.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully submit that there is no statutory basis for an interlocutory appeal under § 1292(b), that an interlocutory appeal is not appropriate, and that Defendants' § 1292(b) Motion should be denied.

Respectfully submitted,

January 5, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2006, a copy of foregoing Opposition of Plaintiffs to Defendants' Motion for Leave to Appeal 12/2/05 Order was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

January 5, 2006

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