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, Dorothy Stewart, Charlene Dyson, Anthony White, Justine Watanabe, Deborah Thomas, Leonard Jackson, Deborah Barberio, Mildred Casas, Sadie Rubin, Lena Boswell, Chardell Russell, Dorothy Cooley, Lula Johnson-Ham, and Jimmie Booker, 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 DEFENDANT'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MOTION TO DISMISS AND FOR A STAY OF DISCOVERY

Plaintiffs respectfully submit this opposition to Defendants' motions a) for leave to file a supplemental motion to dismiss *instanter* and b) for a stay of discovery pending outcome of the supplemental motion to dismiss.

Preliminary Statement/Background

Defendants' latest motions -- which come in the middle of fact discovery -- are nothing more than a delay tactic, and should be summarily denied.

The only new argument in the proposed supplemental motion to dismiss is premised on the erroneous assertion that Plaintiffs have sought relief only with respect to the recent November 2005 election and that, with that election over, Plaintiffs' claims are now moot or

barred by the Eleventh Amendment. Plaintiffs' complaint is quite clear that we are seeking *prospective* relief for statewide elections *in the future*. This understanding was confirmed at the prior status conferences in this case, including the original scheduling conference --when a trial date of June 2006 was set. Accordingly, the claims are ripe for decision.[1]

Defendants' motion is best understood in the context of the procedural posture of this case. Notably, the motion was filed after the Plaintiffs requested Defendants to make certain employees available for deposition, Plaintiffs noted significant deficiencies in Defendants' document production, Plaintiffs noted deficiencies in Defendants' Rule 26(a) and interrogatory responses, and Magistrate Judge King in the Southern District declined to quash Plaintiffs subpoenas to certain counties.[2] Defendants' motion is also best understood in the context of their discovery tactics, which include:

- Failing to produce documents in the possession of the State that were provided by County Boards of Election. For example, Defendants' production does not include reports on election results, or election planning reports that were provided by the Counties to the Secretary of State. The Court directed Defendants on August 30 to make such productions to alleviate the burden on the third party Counties. They have not done so.

- Failing to complete production of documents in a reasonable time frame. We note that on October 19, defense counsel represented that he expected that he would complete production of **all** documents responsive to Plaintiffs' requests shortly. He has not done so.

- Failing to identify current or past state employees who are likely to have discoverable information, or whom the state expects to call at trial. On October 19, defense counsel also committed to make a good faith identification of the witnesses he called at trial. He has not done so.

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[1] Defendants' other argument -- that the Institutional Plaintiffs (the League of Women Voters-Toledo and the League of Women Voters-Ohio) lack standing in this case -- is one that they raised and fully briefed in their original motion to dismiss.

[2] The referenced letters from Plaintiffs' Counsel to Mr. Coglianese, along with letters from Plaintiffs asking the State to identify its witnesses and make certain witnesses are available for deposition, are included in the Appendix to this opposition.

- Canceling depositions of Individual and Institutional Plaintiffs that were scheduled to take place this week. For certain witnesses, this was the second time the Defendants cancelled such depositions, although defense counsel specifically advised the Court on October 19 that he was prepared to proceed with certain of these depositions on October 25.[3]

- **Unilaterally** announcing the suspension of all discovery until the Court rules upon the present motion.

In light of the recent history of this case and the meritless arguments Defendants make in their motion, one is left with the question whether Defendants' real goal is simply to impede the progress of this case?

Plaintiffs request the Court to make clear that such delaying tactics should not be permitted. Since the proposed supplemental motion does not raise any new or serious grounds for dismissal, Plaintiffs ask that the Court deny Defendants' motions in their entirety, and direct Defendants to proceed forthwith with complying with the August 30, 2005 scheduling order.

A. Plaintiffs Claims Seek Relief Prospectively For Future Elections, And Accordingly Are Neither Moot Nor Barred By the 11th Amendment

Fairly read – read as the Court has have been reading them – the claims in the Complaint are not moot. "[A] case becomes moot only when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.' *Cleveland Brand, N.A.A.C.P. v. City of Parma*, 263 F.3d 513 (6th Cir. 2001)(quoting Cty of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The party claiming mootness has a "heavy burden"

[3] Upon learning of the cancellation of the depositions last week, Plaintiffs' Counsel promptly notified Mr. Coglianese of their objection; asked him to reconsider and, failing that, reserved the right to object to any request that the depositions be scheduled for a third time. Plaintiffs had similarly objected to Mr. Coglianese's refusal to proceed with the depositions in October, again, asking him to reconsider his decision not to proceed the week of October 24, and putting him on notice that Plaintiffs should not be in a position where our ability to take the depositions of the defendants or any other affirmative discovery we needed was compromised by his failure to adhere to the discovery schedule set by the Court. Included in the Appendix to this opposition are the letters, dated October 21 and November 11, sent to Mr. Coglianese on this subject.

to demonstrate such mootness. *Cleveland Brand, N.A.A.C.P. v. City of Parma*, 263 F.3d 513 (6th Cir. 2001). A case will not become moot if the injury complained of is capable of repetition, while evading review. *Cleveland Brand, NA.A.C.P. v. City of Parma*, *supra*. The Supreme Court has applied this exception to numerous election law challenges. *See, e.g. Norman v. Reed*, 502 U.S. 279 (1992); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (U.S. 1978); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Nor are such claims -- which seek prospective injunctive relief against state actors -- barred by the Eleventh Amendment. *See, e.g., Ex Parte Young*, 209 U.S. 123 (1908) ("[there is] ample justification for the assertion that . . . officers of the state . . . may be enjoined by a federal court . . . from such action").

Defendants' argument misconstrues the complaint by focusing on the term "the next statewide general election" out of context. It is clear from both the Complaint and the past discussions in this case that the Complaint seeks prospective relief for *future* elections. This was specifically discussed during the August 30, 2005 court conference, during which the Court set and the parties agreed to a pre-trial schedule to allow enough time for a trial court ruling (and time for any appeal) in advance of the 2006 election.[4] (8/30/05 Tr. at 24: "I think it is important, excuse me, that if possible to have the work in this Court done, assuming that the case survives both the motion to dismiss and summary judgment, to provide some modest opportunity for appellate review in the interim before the next November's election.") In fact, in response to the Court's question whether the case can be ready for trial in September 2006 (the date initially being considered), Mr. Coglianese stated: "We will do our best to be prepared for trial in

[4] Plaintiffs are not saying that the claims and relief sought were intended to apply only to the November 2006 election, but only that a schedule was worked out that called for trial in June on the theory that that would allow enough time for all the discovery that needed to be done, while also allowing time for ruling by the trial court and any appeal.

September, Your Honor." (8/30/05 Tr. at 25). If the State believed that the Complaint would have been moot or barred by the Eleventh Amendment, they should have raised such concerns at the August 30 conference, or at the latest, in their initial motion to dismiss. They did not.[5]

In this case, Plaintiffs are challenging a malfunctioning system of election administration, claiming that the Defendants have violated the constitutional rights of Ohioans by failing to take steps to ensure that every Ohioan entitled and wanting to vote, is able to cast an effective ballot. Between August 2005 and November 9, 2005, nothing has changed in terms of what laws apply or how they have been applied by the Defendants that would make it unnecessary for the Court to resolve the claims of constitutional violations that have been alleged. All that has happened is that **an** election has occurred. If anything, the press reports from this election show that Defendants have continued to violate the constitution and federal law, and accordingly, the relief sought is still germane. More elections will take place. This, then, is a classic example of a case "evading review, but capable of repetition." The matter is neither moot, nor barred by the Eleventh Amendment.

However, should the Court believes that the complaint requires clarification with respect to the relief being sought, Plaintiffs are prepared to serve an amended pleading.

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[5]Defendants' claim that "these defenses" [of mootness and immunity] could not have been raised prior to the date of the November 2005 general election is specious. It is true that November 8, 2005 did not occur until November 8, 2005. But, if as Defendants are now maintaining, the Complaint can *only* be read to seek relief with respect to the November 2005 election, then that would also have been the case in August 2005 and Defendants could certainly have contemplated a mootness or 11th Amendment argument at the outset. The fact that Defendants did not raise this spurious issue *then* proves how silly it is *now* and how much bad faith they have shown by half-heartedly engaging in discovery in this case, apparently while biding time to make their artificial "mootness" argument. This is the worst sort of "gotcha" argument, and is the type of motion that is subject to sanctions. *E.g. Miller v. Norfolk Southern Rwy.*, Co., 208 F. Supp.2d 851 (N.D. Ohio 2002)(sanctions imposed for motion which, at the outset, was an "exercise in futility" since it presented no basis on which it could be granted)

B. Defendants Should Not Be Allowed to Reargue the Standing Argument Made in their Original Motion to Dismiss

One of the grounds upon which Defendants moved to dismiss the complaint in August, 2005 was that the Institutional Plaintiffs lacked standing. (Defs. August 29, 2005 Mem. at 22-23)

There is no reason why Defendants should be able to reargue the League Plaintiffs' standing. Tellingly, Defendants do not claim (as they do with their mootness argument) that lack of standing is a defense that "could not have been raised" previously. Obviously, lack of standing could have been raised previously—because it was. The Defendants' new motion, insofar as it seeks leave to re-raise the issue of the League Plaintiffs' standing, should be denied on this ground alone.

Moreover, for the reasons already briefed by Plaintiffs (*see* Plaintiffs Mem. in Opp. at 27-29) the standing argument is unavailing. In their proposed supplemental motion, as in their original motion to dismiss, Defendants challenge only the League Plaintiffs' *associational* standing. However, the League Plaintiffs have each alleged both *organizational* standing and *associational* standing. (See Complaint at ¶¶ 9-10). Therefore, even if Defendants' argument had any force, which it does not, it would not establish the League Plaintiffs' lack of standing. (Moreover, there are a number of Plaintiffs other than the Institutional Plaintiffs, so even if Defendants were correct about the standing of the League Plaintiffs, that defense would not dispose of the case.)

Finally, Defendants are simply wrong about what it takes to establish associational standing. Plaintiffs do not need to establish that each and every league member has been individually harmed by the actions complained of in the Complaint. Nor is the participation of individual members, let alone all individual members, in the lawsuit required. *Sandusky County*

Dem. Party v Blackwell, 387 F.3d 565, 574 (6th Cir. 2004)(individual members "not normally necessary where an association seeks prospective or injunctive relief for its members.") Defendants' claim to need to depose every League member must be seen for what it is: a gross overstatement and a scare tactic.

C. Defendants Are Not Entitled to a Stay of Discovery

Defendants' motion for a stay is based on their argument that, with no more prospective claims for relief in the case, Plaintiffs would only be entitled to retrospective relief—implicating sovereign immunity under the 11th Amendment. In other words, Defendants' request for a stay is predicated ultimately on its mootness argument; such that if that argument fails, so does the request for a stay. There is no genuine, separate issue of sovereign immunity here. As noted above, Plaintiffs have never sought monetary damages, but only prospective relief. If Defendants are correct about the claims in this case being moot (which they are not), then Plaintiffs have no claims for effective relief. Defendants cannot bootstrap the mootness of claims that were explicitly for prospective relief into claims that somehow implicate the 11th Amendment in order to get a stay of discovery.[6]

In any event, because, as set forth above, Plaintiffs' claims for prospective relief are **not** moot, no immunity can possibly attach to the claims in this case and, therefore, Defendants are not entitled to a stay of discovery.

[6] Without engaging in speculation as to Defendants' reason for raising this "immunity" issue now, we note that some counties (including Franklin County, which still has not agreed to produce any documents) appear to believe that there is an immunity claim in this case and that might even be taken up on immediate appeal.

CONCLUSION

For all of the foregoing reasons, Plaintiffs ask that the Court promptly deny Defendants' motions in their entirety and direct Defendants to proceed forthwith with discovery in this case on the schedule set at the August 30, 2005 Court Conference.

Respectfully submitted,

November 17, 2005

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October 21, 2005

Via Email & Facsimile

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Re: *League of Women Voters of Ohio, et al. v. Blackwell*

Dear Rich:

I am writing to summarize the discussion you, Mike Geske, Brian Schusterman and I had this morning, concerning the scheduling of the plaintiffs' depositions.

You said that you were prepared to go forward with certain of the depositions next week, but only those in Columbus. You stated that there are two election attorneys on your staff, but in the discussion it became clear that you intended to take and/or defend virtually each deposition in this case. You also mentioned that you would be seeking the depositions of an "extensive number of fact witnesses" although you were not prepared to identify these witnesses with any specificity.

On the call with Judge Carr two days ago, you undertook to start depositions on Tuesday. At the time, you had before you a schedule (the one that we had discussed with you back in September) that included depositions not only in Columbus, but in Cleveland as well. You did not say anything on the call with Judge Carr about not doing the depositions in Cleveland. Your sudden announcement of your refusal to go forward with the Cleveland depositions next week, combined with your refusal to proceed with the Toledo depositions this week, puts unreasonable pressure on the schedule in this case. Let me also remind you that Judge Carr clearly indicated to you, at the initial court conference on August 30, that you were not necessarily going to be able to attend each deposition in this case, and that he expected you to staff the case accordingly (See Transcript p. 38). Based on the docket, Defendants are represented in this matter by two lawyers in addition to you.

Again, we ask that you reconsider your refusal to go forward with the Cleveland depositions next week. If you choose not to comply with the schedule we have proposed then, while we are not going to preclude you from deposing the plaintiffs, we will expect you to be done with all of the plaintiffs' depositions by November 15. Most importantly, we are not going to compromise our ability to take the depositions of the defendants. That November 15 deadline is more than generous, given that in August Judge Carr made clear that he expected the plaintiffs' depositions to be substantially completed in October—a deadline reflected in the Case Management Order entered in this case on September 28, 2005. The fact discovery deadline in this case is December 15 (see September 28, 2005 Order.)

Please let me know today if this arrangement is not satisfactory. Unfortunately, if we are unable to reach agreement, we will need to enlist the Court's assistance again. We would hope that this will not be necessary.

Sincerely,

Caroline S. Press

cc: John Freedman, Esq.
Michael Geske, Esq.
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November 2, 2005

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Re: League of Women Voters of Ohio, et al. v. Blackwell, et al.

Dear Counsel:

We write in yet another attempt to learn the identity of Defendants' potential trial witnesses, so that Plaintiffs may begin deposing those individuals. To date, Defendants simply have ignored our efforts to discover the identity of Defendants' witnesses through discovery propounded under Rule 33. Similarly, Defendants have failed to heed the Court's instructions to identify potential witnesses pursuant to Rule 26(a).

We address the Rule 26(a) issue first. Two weeks ago, during our October 19th telephonic hearing with the Court, Judge Carr directed the Defendants to narrow down their Rule 26(a) list of potential witnesses from the 528 county officials currently listed, so that the Plaintiffs may begin to notice individuals for depositions. You represented to the Court that you would do so. (Transcript of Case Management Conference, October 18 *[sic]*, 2005 ("Tr."), at 44). However, we have not heard anything further from you on this issue.

We emphasize the unfairness of the current situation. By listing 528 unnamed county officials as potential witnesses, Defendants have created a "needle in a haystack" dilemma for Plaintiffs. It would be tremendously unfair for Plaintiffs to have to guess which of the 528 unnamed officials the Defendants will call as witnesses at trial, and a tremendous waste of resources to depose numerous county officials simply in an effort to determine whether they likely will be called at trial. This is especially true given that Defendants are likely to call as trial witnesses only a small handful of the 528 persons listed in Defendants' Rule 26(a) Disclosures.

You also represented to the Court during the October 19th hearing that the Defendants would supplement their Rule 26(a) Disclosures to identify additional witnesses from the State who Defendants may use to support their defenses. (Tr. at 41). Thus far, Defendants have listed only one such witness by name, Pat

Wolfe. (Defendants' Initial Disclosures Pursuant to Fed. R. Civ. P. 26(A) at 12). Once again, we have not heard anything further from you on this matter.

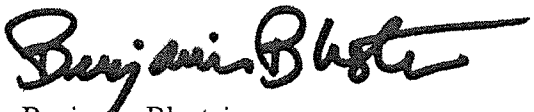
Given that the discovery schedule allows Plaintiffs a limited window of time to take depositions and that Plaintiffs' deposition window commenced yesterday on November 1st, we insist that the Defendants immediately: (a) narrow their Rule 26(a) list as directed by the Court, and specifically identify those county officials by name (rather than simply by official title, as Defendants identified the 528 county witnesses in Defendants' Rule 26(a) Disclosures) who have information that Defendants may use to support their defenses; and (b) identify all individuals from the State government who Defendants may use to support their defenses.

This brings us to Defendants' failure to answer Plaintiffs' discovery under Rule 33. In an effort to discover the identity of Defendants' likely trial witnesses, Plaintiffs served an Interrogatory on September 23, 2005 that asked the Defendants to identify "each and every person whom [Defendants] intend to call as a fact witness at the trial of this lawsuit." (Plaintiffs' First Set of Interrogatories, Interrogatory No. 1). Defendants simply have ignored this Interrogatory -- providing neither an answer, an objection, nor a request for additional time even though Defendants' response date under the discovery rules has long past. While we understand that your Interrogatory response will represent your best, current assessment of the witnesses you will call at trial, that should be sufficient for us to plan our deposition discovery.

It is our hope and expectation that Defendants will quickly provide the names of its trial witnesses so that Plaintiffs can begin noticing and taking depositions. However, the discovery schedule simply will not allow for any further delay by Defendants. We must receive Defendants' answer to Interrogatory No. 1, as well as Defendants' modified Rule 26(a) Disclosures (consistent with the Court's directions and Defendants' representations) by Friday, November 4, to ensure that Plaintiffs' opportunity to conduct discovery is not further prejudiced by Defendants' delay.

If you have any questions regarding the foregoing, or any other matter, please contact me at (202) 662-8320.

Sincerely,



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cc: Counsel for Plaintiffs

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November 9, 2005

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Re: League of Women Voters of Ohio, et al. v. Blackwell, et al.

Dear Counsel:

On November 2, 2005, we wrote to you asking that Defendants identify their likely trial witnesses – consistent with the Court's instructions and your own representations to the Court during the October 19th telephonic conference that you would do so – in order that Plaintiffs may begin noticing those individuals for deposition.

Your responsive letter of November 4, as well as Defendant Blackwell's Response to Plaintiffs' First Set of Interrogatories filed concurrently (and over 10 days tardily), clearly indicate that you have not taken seriously Judge Carr's instructions that Defendants identify the specific individuals whom Defendants may call at trial.[1]

Potential Trial Witnesses from the State Government

In our November 2 letter, we noted that Defendants to date have identified only one potential trial witness from the Secretary of State's office, Pat Wolfe, and we requested that Defendants supplement their Rule 26(a) Disclosures with the names of additional witnesses from the state. Indeed, you represented to the Court on October 19th that Defendants were in the process of modifying their Rule 26(a) Disclosures to add "a few folks from the state." (Transcript of Case Management Conference, October 18 *[sic]*, 2005 ("Tr."), at 41).

No such supplementation has occurred. Indeed, your November 4 letter now declares that Plaintiffs "have been given the names of all the state employees

[1] The Interrogatory Responses provided to us on November 4 are identified as the responses of "Defendant Blackwell" only, despite the fact that Plaintiffs' First Set of Interrogatories was addressed to both Defendants Blackwell and Taft. Please advise us whether Defendant Taft intends to serve separate responses (and, if so, when), or whether his name was inadvertently omitted from the responses served on November 4.

that, as of today, we believe might have discoverable knowledge." Thus, according to your November 4 letter, of all the state employees in Ohio, only Pat Wolfe has discoverable information that Defendants may use to support their defenses. Your letter goes on to assert that, because you believe that any problems described in the Compliant are the responsibility of local boards of elections rather than the Secretary of State, "there simply is no reason for [Defendants] to call anybody from the Secretary of State's office because those individuals would have not have discoverable knowledge about these claims."

Of course, it is improbable that only one person in the entire state government has discoverable information that Defendants may use to support their defenses. Nevertheless, if after having conducted a reasonable inquiry you have concluded that Pat Wolfe is the sole individual in the state government with discoverable information supporting Defendants' defenses, then we fully expect that Pat Wolfe's name, alone among state employees, will appear on Defendants' witness list.[2]

Potential Trial Witnesses from the County Boards of Elections

In our November 2 letter, we further asked you to follow up on Judge Carr's instructions to you during the October 19th hearing to specifically identify which of the **528 county officials** listed on Defendants' Rule 26(a) Disclosures would likely be called as trial witnesses by Defendants. We noted that Defendants' list of 528 individuals creates a "needle in a haystack" problem – forcing Plaintiffs either to guess which of the 528 persons will be called, or to depose substantial numbers of county officials simply to learn whether they likely will be called to testify.

The haystack has now grown even larger, based upon our review of your November 4 letter and Defendant Blackwell's Interrogatory Responses. Defendants not only have refused to identify which of the 528 current county officials likely will be called at trial, Defendants have expanded their list of potential trial witnesses to grosser proportions.

In response to Plaintiffs' Interrogatory No. 1, which asks Defendants simply to identify persons whom Defendants intend to call as fact witnesses at trial, Defendants once again have listed **all** of the Directors, Deputy Directors and Members of the 88 Boards of Elections ("BOE's"), totaling 528 individuals. Additionally, for each of the 88 counties, Defendants have listed the following trial witnesses:

> "Various unknown and unidentified election workers in [name of county]."

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2 Plaintiffs in any event will proceed with deposing officials and employees of the Offices of the Secretary of State and the Governor pursuant to Rules 30(a) and 30(b)(6). We will contact you shortly regarding the identity of the deponents and to discuss deposition dates.

"Various unknown and unidentified voters in [name and county]"

"Various prior members of the [name of county's] Board of Elections from 1971 to the present."

Defendant Blackwell's Interrogatory Responses repeat this boilerplate language about "various unknown and unidentified" individuals a total of 265 times. These nebulous additions to Defendants' witness list obviously are inconsistent with Judge Carr's instructions to Defendants during the October 19th conference to provide Plaintiffs' counsel with specific names of potential trial witnesses so that Plaintiffs can take effective discovery.

Your November 4th letter asserts that Defendants' so-called "witness list" is justified because, according to your letter, Plaintiffs likewise have claimed that they might call as a witness "every single poll worker and every single member of the League of Women Voters." Your assertion is untrue. Indeed, in response to Defendants' Interrogatory No. 1 – which asked Plaintiffs League of Women Voters of Ohio ("LWVO") and League of Women Voters of Toledo-Lucas County ("LWVT") to identify trial witnesses – the LWVO identified two (2) fact witnesses and the LWVT identified four (4) fact witnesses. Defendants' other excuse for not narrowing their witness list – that Defendants will need to put on evidence from each county in which Plaintiffs allege there was "unconstitutional activity" -- similarly mischaracterizes the record. As our Complaint makes clear, Plaintiffs allege that it is Defendants' actions and failures that have deprived voters of their constitutional rights.

In sum, Defendant Blackwell's Response to Interrogatory No. 1 is simply a non-response, in that, by naming countless and nameless individuals as potential trial witnesses, Defendants have refused to identify the individuals who are actually likely to be called a trial.[3] Please provide us, by November 11, with an actual response to Interrogatory No. 1 that specifically identifies the individuals that Defendants are likely to call as witnesses at trial.

Lastly, we briefly note our concerns regarding Defendants' apparent efforts in recent days to shift the focus of this case by naming Plaintiffs' counsel as potential trial witnesses, and by attempting to notice depositions relating to the Election Protection Coalition. We will address these issues in more detail in a separate letter. However, it is worth noting here that, at the same time that Defendants are playing "hide the ball" with respect to their trial witnesses, Defendants apparently are attempting to embark on satellite litigation relating to

[3] We further note that Defendant Blackwell's Response to Interrogatory No. 2, which asks for the identity of Defendants' expert witnesses, is simply nonsensical. Defendants have responded to Interrogatory No. 2 by referencing the response to Interrogatory No. 1 which seeks the identity of fact witnesses.

Plaintiffs' counsel. We will oppose any such efforts to derail discovery in this matter.

If you have any questions regarding the foregoing, or any other matter, please contact me at (202) 662-8320.

Sincerely,

Benjamin Blustein
Staff Attorney, Voting Rights Project

cc: Counsel for Plaintiffs

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November 11, 2005

Via facsimile, electronic mail and U.S. Mail

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Re: *League of Women Voters of Ohio et al. v. Blackwell et al.*

Dear Rich:

Since we understand by your November 10 letter that Defendants have concluded taking depositions of fact witnesses in this case, as provided for in the August 30 status conference, we now want to set a schedule for depositions of Defendants and their current and former employees.

For planning purposes, we will be issuing Rule 30(b)(6) notices to both Defendants early next week, calling for testimony on identified topics on December 1 and 2. Pursuant to Chief Judge Carr's direction, we would like to schedule the remaining witnesses between December 5 and December 16. With regard to each of the witnesses identified below, please advise (a) whether your office represents the individual in question, and (b) the witnesses' availability to be deposed prior to December 16.

Based on our investigation and review of the discovery record, we have identified the following current and former employees of the Division of Elections for deposition: Robin Fields, Judith Grady, Judith Hoffman, Karen Lafferty, Joe Leonti, Faith Lyon, Gretchen Quinn, Connie Seguro, Dana Walch, Richard Weghorst, Joy Went, and Pat Wolfe. We are still evaluating your production to determine whether we need to call other current and former employees of the Division of Elections, including Pat Garrity, Betty Hull, David Kennedy, Ramona Pannell, Traci Washington, Faith Whittaker, Dorothy Woldorf, Kate Yonkura, and the regional representatives. We assume that your office does not represent Samuel Kindred (dba Spirit Consulting and/or Excel Management) or Nola Hang (dba Hang Consulting), but if this is incorrect, we would be happy to coordinate their depositions through your office.

Based on our investigation and review of the discovery record, we have identified the following current and former employees of the Secretary of State's office for deposition: J. Kenneth Blackwell, Sherri Dembinski, Cassandra Hicks, Dilip Mehta, and Robert Taft. We are still evaluating your production to determine whether we need to call other current and former employees of the Secretary of State, including James Hocker, Monty Lobb, and Eric Seabrook.

As discussed in Shelby Hunt's letter also of today, the Defendants' document production for many of these individuals contain significant deficiencies. In order to minimize the inconvenience to these witnesses and the likelihood that these witnesses will need to be recalled, we would encourage you to complete your document production prior to the commencement of each deposition.

We also note that, to date, the document production from the Governor's office has not complied with the requirements of Rules 26 or 34, in that *inter alia*, it is clear that a reasonable search has not been conducted. Accordingly, we reserve the right to identify specific witnesses from the Governor's office when you have completed production. So that you may plan appropriately, our present intent is to call Jon Allison, Ann Aquillo David Payne, Brad Reynolds, Christopher Marston, Elizabeth Luper Schuster, and Robert Taft.

Please advise on these issues at your earliest convenience.

Sincerely,

Michael R. Geske

Michael R. Geske

cc: Jon M. Greenbaum, Esq.
Benjamin J. Blustein, Esq.
Caroline S. Press, Esq.
Jennifer R. Scullion, Esq.
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November 11, 2005

By E-Mail and Regular Mail

Richard N. Coglianese, Esq.
Office of the Attorney General of the State of Ohio
Constitutional Offices Section 17th Floor
30 East Broad Street
Columbus, Ohio 43215

Re: *League of Women Voters of Ohio, et al. v. Blackwell*

Dear Richard:

On behalf of all counsel for Plaintiffs, I am writing to object to your pronouncement, late yesterday afternoon in a letter to Mr. Blustein, that you are unilaterally canceling the depositions of the individual plaintiffs that were scheduled to take place in Cleveland and Toledo next week and that you will be seeking a stay of discovery (for which you specify no grounds). As you know, next week's depositions have now been scheduled twice—at considerable inconvenience and burden to the plaintiffs themselves as well as to their counsel.

We intend to take this issue up with Judge Carr at the next conference. If we do not hear back from you by the close of business today (that is, by 6 pm.), we will have no choice but to let our plaintiffs know that you have once again cancelled their depositions. We reserve the right to object to any request that their depositions be scheduled yet again for a future date.

Very truly yours,

Caroline S. Press

cc: John Freedman, Esq.
Michael Geske, Esq.
Ben Blustein, Esq.
Jon Greenbaum, Esq.
Jennifer Scullion, Esq.
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November 11, 2005

VIA E-MAIL AND FIRST CLASS MAIL

Richard N. Coglianese, Esq.
Deputy Attorney General
Constitutional Offices Section
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215

Re: *League of Women Voters of Ohio et al. v. Blackwell et al.*

Dear Rich:

I am writing with regard to Defendants Blackwell's and Taft's production of documents in response to Plaintiffs' Requests for Production of Documents, dated September 14, 2005. Based on our preliminary review of these materials, it is clear that there are serious deficiencies in Defendants' productions. While our review is ongoing, we wanted to bring these matters to your attention so that you may remedy them expeditiously.

1. *Failure to Produce a Privilege and Redaction Log:* In many cases, in lieu of producing documents, Defendants produced sheets of paper stating that certain documents have been withheld on grounds of privilege. In addition, Defendants produced many documents containing redacted material and, in certain cases, produced documents where the entire document had been redacted. *See, e.g.*, 1572, 1594, 1635, 1642, 1643, 1650, 1680, 1682, 1684, 2329, 2380, 2420, 2473, 2478, 2497, 2509, 14553, 24385, 25249, 26137, 28178, 28187, 28261, 28282, 26084, 38799, 38800, 38822, and 038827. We have no indication from surrounding materials why such documents have been withheld or redacted.

As you know, on the October 19 conference call, Judge Carr directed you to provide a privilege log of all withheld/redacted documents; a memorandum explaining the claimed privileges (to the extent they were other than 'garden variety' attorney client or work product privileges); and, in camera, a set of the withheld/redacted documents. To date, we have not seen any indication that you have complied with Judge Carr's directive; we have not, for example, been provided with a copy of your privilege log and have see no docket entries indicating that you have filed anything on the subject with Judge Carr. Please furnish Defendants' log to us by November 15, along with the

memorandum Judge Carr requested, so that we can be in a position to assess your claims of privilege.

2. *Failure to Conduct a Reasonable Search for Inter Alia, Responsive E-mail:* There appears to be significant deficiencies in Defendants' e-mail and electronic document production. Notably, neither Defendant Blackwell nor Defendant Taft produced any responsive e-mail. Moreover, we have seen only nominal amounts of e-mail responsive to Plaintiffs' document requests from current or former personnel in the Division of Elections. For example, while we saw some e-mail between Pat Wolfe, Myra Hawkins, and Gretchen Quinn and certain Board of Elections, we saw little to no internal e-mail, nor did we see e-mail involving the following current and past employees of the Division: Dana Walch, Judith Grady, Judith Hoffman, Keith Scott, Faith Lyon, Karen Lafferty, Conni Siegrus, Traci Washington, Pat Garrity, Fay Whittaker, Dorothy Woldorf, Kate Yonkura, Robin Fields, Joy Went, Richard Weghorst, Betty Hull, Joe Leonti, Michael Clarett, Andrew Shifflett, Richard Fais, Christian Lobb, Madhu Singh, Toni Slesser, Sarah Spence, Jeremy Demagall or other Division of Elections personnel. Further, Defendants produced only *de minimis* e-mail from personnel in other Divisions identified as working on election related issues. These individuals include: David Kennedy, Linda Brown, Jo-Ellyn Tucker, and Harry Huff, or from consultants employed by the Division, Samuel Kindred and Nola Hang.

In addition, there are a number of other individuals employed by the Secretary of State who do not appear to have made sufficient e-mail or document productions. These individuals include: Cassandra Hicks, Monty Lobb, Sherri Dembinski, Delip Mehta, James Hocker, Carol Taylor and Carlo LoParo. There are also a number of individuals in the Governor's office who have not produced any e-mails or responsive documents, including: Jon Allison, David Payne, Ann Aquillo, Elizabeth Luper Schuster, Brad Reynolds, and Christopher Marston.

We expect that your clients will make a complete search for materials responsive to our document requests. The negligible or nonexistent production from each of the individuals identified above suggests that a reasonable search (which would include a search for e-mails and other electronic documents) has not been undertaken. We expect such a search to be completed expeditiously, and responsive documents to be produced. Please advise when you plan to be in compliance with your obligations under Rules 26 and 34.

3. *Failure to Identify Custodian or File Owner:* Defendants produced minimal materials indicating the custodian or file owner of the documents produced to date. Please confirm that, pursuant to Fed. R. Civ. Pro. 34(b) you have produced documents as they are kept in the ordinary course of business and, if so, please provide us with a means of determining the custodian or file owner of the produced documents.

4. *Failure to Produce Relevant Materials Prior to 2001*: While the production to date includes materials following 2001, materials produced prior to that date are sporadic. In many cases, the Defendants' document retention policy and/or the Ohio Public Records Act specifically requires the Defendants to maintain documents existing prior to this time. For example:

- The Secretary of State retention policy requires that correspondence be maintained for six years. Correspondence produced prior to 2001 is sporadic. In particular, while we have seen correspondence from 1994 - 1996, we have seen little to no correspondence from 1997 - 2000.

- The retention policy requires county Board of Election reports to the Secretary of State are to be archived indefinitely, yet we did not identify any of these reports in the Defendants' production.

- Election results submitted by the Board of Elections are to be maintained for each county for 99 years, yet Defendants only produced results from one county.

- In addition, pursuant to 2005 Secretary of State Retention Schedule, budget allotments, appropriations and Controlling Board requests are to be maintained for four years, yet Defendants did not produce any underlying budget data and only negligible amounts of Controlling Board requests.

As you are aware, Plaintiffs requested records from 1994 to the present. Please let us know when we can expect to see all responsive records from this time period.

5. *Failure to Produce Documents Reflecting Budget and Funding Information (Request Nos. 8, 17 and 21):* Defendants failed to produce any detailed budget reports or any underlying budget information for the time period requested, nor have Defendants produced a complete or comprehensive set of reports to the Governor regarding election costs. In addition, while Defendants did produce some summary budget information, the

information provided is sporadic prior to 2001. Defendants produced only a nominal amount of correspondence with the Controlling Board, and did not produce any formal funding requests or proposals, including any proposals or requests reflecting efforts to obtain election-related funding from the federal government.. Given the relevancy of these materials, we expect all such materials to be produced expeditiously. Please advise on the timing of your production.

6. *Failure to Produce Documents Concerning Election Planning, Education, and Training (Request Nos. 13, 16, 22, 23 and 24):* Defendants have not produced Election Manuals prior to 2000, nor have Defendants produced documents concerning the projection of or estimated voter turnout, or any documents (such as internal reports or plans) reflecting consideration of election turnout, or planning for heightened turnout during 2004. With regard to voter education or poll worker training, Defendants little to no materials relating to the Citizen Education or any other voter education program, nor any materials relating to the Voter Education/Poll Worker Education Fund. All of these materials are germane to the complaint and should be produced.

7. *Failure to Produce Documents Reflecting Voter Complaints or Investigations of Voter Complaints (Request Nos. 7, 12, 14, 15)*: Defendants have produced field reports from two of the eight field representatives. Defendants did not produce any field reports from Michael Clarett, Richard Fais, Christian Lobb, Madhu Singh, Toni Slesser, Jeremy Demagall, nor any correspondence between these individuals and other employees of the Division of Elections. Defendants have produced one report concerning an investigation, but have failed to produce any other materials concerning receipt of or consideration or investigation of any election complaints. All of these materials are germane to the allegations in the complaint and should be produced.

8. *Failure to Produce Reports Required to be Generated State and Federal Law (Request Nos. 6 and 8)*: Defendants failed to produce numerous reports required under federal and state law from the relevant time period. For example, we did not see reports from county Board of Elections as required pursuant to Ohio Code Section 3501.05(L). Similarly, Defendants only produced Annual Reports to the Governor from FY 1994 and FY 1997 and not from any other years during the time period specified by the requests. Please let us know when we can expect to receive copies of election related reports required to be filed under state and federal law.

9. *Other Deficiencies in Defendants' Production.*

- Pursuant to Request 1, we have received one organization chart for the Department of Human Resources in the Secretary of State agency. We have not seen any other organization charts for either the Secretary of State or Governor's offices.

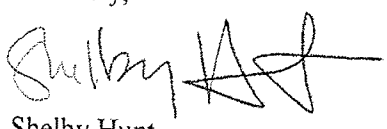
- Pursuant to Request 5, we have received one report on election results from Cuyahoga County. We are entitled to any and all reports provided by the counties to the Division of Elections.

- Pursuant to Requests 11 and 19, we have received only minimal documentation concerning disability access related election issues. For example, Defendants produced no information concerning how H.B. 262 was implemented, nor did Defendants produce internal communications or memoranda concerning accessibility issues. Please let us know when we can expect to see materials responsive to these requests.

We are still in the process of evaluating your production and will let you know if we have additional questions or concerns.

We would like to have a call with you early next week so that we can discuss how you intend to address the deficiencies expressed above. It is our hope that we can resolve these issues without the intervention of the Court.

Sincerely,



Shelby Hunt

cc: Jon M. Greenbaum, Esq.
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Jennifer R. Scullion, Esq.
John A. Freedman, Esq.
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Steven P. Collier, Esq.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

League of Women Voters of Ohio, League of Women Voters of Toledo-Lucas County, et al., 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 **ORDER**

Defendants having moved for leave to file a supplemental motion to dismiss *instanter* and for a motion for a stay of discovery (the "Motions"); and

The Court having considered the papers submitted in support of the Motions, along with the opposition papers submitted by Plaintiffs, and having heard oral argument on the Motions;

IT IS NOW HEREBY ORDERED, ADJUDGED, and DECREED that

1. The Motions are denied in their entirety; and

2. Counsel for Defendants is directed, within 24 hours of the date of this Order, to provide a copy of this Order to every one of Ohio's County Boards of Election that Defendants' Counsel had contacted about the Motions, with a copy of its notice to the Counties to Counsel for Plaintiffs.

Dated: November __, 2005

_____
The Honorable James G. Carr
United States District Court Chief Judge

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, Dorothy Stewart, Charlene Dyson, Anthony White, Justine Watanabe, Deborah Thomas, Leonard Jackson, Deborah Barberio, Mildred Casas, Sadie Rubin, Lena Boswell, Chardell Russell, Dorothy Cooley, Lula Johnson-Ham, and Jimmie Booker, 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

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2005, a copy of foregoing Opposition of Plaintiffs to Defendants' Motion for Leave to File a Supplemental Motion to Dismiss and for a Stay of Discovery, including Appendix and Proposed 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.

November 17, 2005

/s/ Caroline Press

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