Case Nos. 06-3335, 06-3483, 06-3621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEAGUE OF WOMEN VOTERS, ET AL.,
PLAINTIFFS-APPELLEES,

AND

JEANNE WHITE,
INTERVENOR-APPELLEE,

vs.

J. KENNETH BLACKWELL, ET AL.,
DEFENDANTS-APPELLANTS.

MERITS PROOF BRIEF
OF PLAINTIFFS-APPELLEES

Richard Kerger (0015864)
Kerger & Associates
33 S. Michigan St., Suite 100
Toledo, OH 43602
(419) 255-5990
(419) 255-5997 (fax)

Matthew J. Zimmerman
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333
(415) 436-9993 (fax)

Counsel for Plaintiffs-Apellees
League of Women Voters, et al.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

CORPORATE DISCLOSURE STATEMENT vi

ISSUES PRESENTED FOR REVIEW 1

INTRODUCTION 1

STATEMENT OF FACTS 3

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 9

STANDARD OF REVIEW 11

I. Intervenor Has Properly Pled Constitutional Violations. 11

A. Under Section 1983, Widespread, Systemic Infringement of the Right to Vote Is Actionable. 11

B. Under Section 1983, Intervenor Need Only Allege That She Was Deprived of a Federal Right By a Person Acting Under Color of Law. 13

1. Intent – Or Any Other Mental State – Is Not a Pleading Requirement of Section 1983 Itself. 15

2. Section 1983 Plaintiffs Need Only Allege the Mental State Required to Establish a Violation of the Underlying Constitutional Right 16

C. Intervenor Has Properly Pled Equal Protection and Due Process Violations. 17

1. Intervenor Has Properly Pled an Equal Protection Violation. 19

2. Intervenor Has Properly Pled a Substantive Due Process Violation. 23

3. Defendants' Authority Is Limited to Distinguishable Dicta and Propositions Contrary to Controlling Supreme Court Precedent. 25

II. Intervenor's Claims Are Not Moot. 29

III. Defendants Have Improperly Raised a New Argument – That They are Not Proper Defendants – In Order to Challenge Intervenor's Claims. 32

IV. CONCLUSION 36

CERTIFICATE OF COMPLIANCE 37

CERTIFICATE OF SERVICE 38

ADDENDUM – DESIGNATION OF JOINT APPENDIX CONTENTS 40

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186, 226 (1962) 20, 21, 26

Barner v. Pilkington N. Am., 399 F.3d 745 (6th Cir. 2005) 32, 33

Berger v. City of Mayfield Heights, 265 F.3d 399 (6th Cir. (OH) 2001) 14

Bodine v. Elkhart County Election Board, 788 F.2d 1270 (7th Cir. 1986) 27, 28

Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970) 13, 24

Bush v. Gore, 531 U.S. 98 (2000) ..... passim

City of Canton v. Harris, 489 U.S. 378 (1989) 17

Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962) 16

Common Cause v. Jones, 213 F. Supp. 2d 1106 (C.D. Cal. 2001) 34

Covington v. Jefferson County, 358 F.3d 626 (9th Cir. 2004) 32

Crawford-El v. Britton, 523 U.S. 574 (1998) 15

DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden, 448 F.3d 918 (6th Cir. 2006) 32

Daniels v. Williams, 474 U.S. 327 (1986) ..... passim

Dennis v. Higgins, 498 U.S. 439 (1991) 14

DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966) 15

Dorman v. District of Columbia, 888 F.2d 159 (D.C. Cir. 1989) 17

E.E.O.C. v. New York Times Broadcasting Service, Inc., 542 F.2d 356 (6th Cir. 1976) 32

Edelman v. Jordan, 415 U.S. 651 (1974) 30

Ernst v. Rising, 427 F.3d 351 (6th Cir. 2005) 30

Estate of Conners by Meredith v. O'Connor, 846 F.2d 1205 (9th Cir. 1988) 17

Ex parte Young, 209 U.S. 123 (1908) 30, 35

Futernick v. Sumpter Township., 78 F.3d 1051 (6th Cir. 1996) 34

Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980) 19, 20

Goad v. Mitchell, 297 F.3d 497 (6th Cir. (OH) 2002) 14

Gold v. Feinberg, 101 F.3d 796 (2nd Cir. 1996) 26

Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989) 14

Gomez v. Toledo, 446 U.S. 635 (1980) 14

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) 10, 13, 19, 24

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 12, 22, 27

Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975) 28

Hishon v. King & Spalding, 467 U.S. 69 (1984) 11

Lawson v. Shelby County, 211 F.3d 331 (6th Cir. 2000) 35

Lepard v. NBD Bank, 384 F.3d 232 (6th Cir.2004) 32, 33

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) 13

Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F.3d 862 (6th Cir. 2000) 11

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 14

Monroe v. Pape, 365 U.S. 167 (1961) 15

Nishiyama v. Dickson County, Tenn., 814 F.2d 277 (6th Cir. 1987) 17

Powell v. Power, 436 F.2d 84 (2nd Cir. 1970) 18, 25, 26, 27

Printz v. U.S., 521 U.S. 898 (1997) 26

Reynolds v. Sims, 377 U.S. 533 (1966) 12, 21, 22, 27

Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) 32

Swierkiewicz v. Sorema, 534 U.S. 506 (2002) 15

Trinsey v. Com. of Pa., Dept. of State, Bd. of Elections, 766 F. Supp. 1338 (E.D. Pa. 1991) 36

United States v. I.B.E.W., Local 38, 428 F.2d 144 (6th Cir. 1970) 32

United States v. Layne, 192 F.3d 556 (6th Cir. 1999) 33

Ury v. Santee, 303 F.Supp. 119 (N.D. Ill. 1969) 13, 16, 24

Verizon Md., Inc. v. PSC, 535 U.S. 635 (2002) 30

Ward v. Utah, 393 F.3d 1239 (10th Cir. 2005) 36

Weber v. Shelly, 347 F.3d 1101 (9th Cir. 2003) 29

Whitley v. Albers, 475 U.S. 312 (1986) 17

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 12

Statutes

42 U.S.C. § 1983 ..... passim

Ohio Revised Code § 3501 ..... 10, 34, 35

Ohio Revised Code § 3506 31

Other Authorities

Ohio House Bill 262 ..... 10, 30, 31, 32

Ohio House Bill 434 31

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellees certify that no publicly held corporation or other publicly held entity owns 10% or more of Plaintiff-Appellees.

DATED: 9/12/06

By _____

Matthew J. Zimmerman
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x127
Fax: (415) 436-9993

Richard M. Kerger (0015864)
Kerger & Associates
33 S. Michigan St., Suite 100
Toledo, OH 43602
Telephone: (419) 255-5990
Fax: (419) 255-5997

Attorneys for Plaintiff-Appellees

ISSUES PRESENTED FOR REVIEW

Whether the District Court correctly found that Intervenor adequately pled equal protection and due process violations with respect to the fundamental right to vote by alleging known, ongoing, systemic deficiencies in Ohio's electoral system and by alleging that the Defendants are acting with deliberate indifference and willful blindness by continuing to follow the longstanding state policies and practices that result in fundamental unfairness and disparities in the treatment of Ohio voters and their votes.

Whether the District Court correctly found that Defendants have no basis to claim sovereign immunity from suit under the 11th Amendment as Intervenor has sought only prospective relief against the Defendant state officials in their official capacities for alleged ongoing violations of Intervenor's federal rights.

INTRODUCTION

In her Complaint, Intervenor-Appellee Jeanne White ("Intervenor") alleges that Ohio's voting system is not simply prone to run-of-the-mill election-day shortcomings but is instead deeply flawed, inherently dysfunctional, responsible for widespread past disenfranchisement, and likely to rob future voters across the state of their fundamental right to vote. The systematic flaws cited by Intervenor (and Plaintiff-Appellees "Plaintiffs") are widespread over both space and time. They include serious failures that call into question the basic fairness of the system, from the most rudimentary tasks such as pollworker training to the selection and

implementation of complicated voting technologies. In short, Intervenor provides specific factual allegations "widespread, serious, and deeply-rooted failings at the most basic levels in Ohio's voting system: incoherent, inadequate, and inequitably funded systems; non-uniform standards; and inadequate planning and training." (R. 217-2, "Amended Complaint of Intervenor Jeanne White for Injunctive and Declaratory Relief ("Intervenor's Amended Complaint")," at ¶ 6; Appx at __.)

It is not an answer, as the District Court explained below, to attempt to pass culpability down to subordinates and volunteers who enjoyed neither the authority nor the ability to shape Ohio's statewide voting system. "This contention misconstrues the complaint. A possible cause of action against the [Boards of Election] would not address and does not bar a claim that, on a state-wide basis and under the supervision of state officials, Ohio's voting system breeds non-uniformity that defendants could and should correct." (R. 202, Order of December 2, 2005, Denying Defendants' Motion to Dismiss at p.6.) Nor is it an answer to explain away election flaws of constitutional magnitude by resting on the patriotism of volunteer pollworkers who are placed in an untenable administrative structure by Defendants themselves.

Defendants-Appellants ("Defendants") – Ohio's Governor and Secretary of State – have the authority and affirmative duty to protect the fundamental right to vote of Ohio citizens. Despite their efforts to place them on others, such duties and responsibilities cannot be discharged under the 14th Amendment. The District Court's recognition of Intervenor's right

to pursue and prove her claims should be upheld.

STATEMENT OF FACTS

Intervenor alleges that Defendants maintain a constitutionally defective voting system and because of this system, she believes that she was disenfranchised in November 2004 and that she will be disenfranchised in the future. (R. 217-2, Intervenor's Amended Complaint, at ¶ 23A; Appx at __.) Specifically, Intervenor alleges that "due to the promulgation and maintenance of non-uniform rules, standards, procedures, and training of election personnel throughout Ohio, and the inadequate and inequitable allocation of funds, facilities, and election personnel," Intervenor has a reasonable basis to believe that she was disenfranchised in the November 2004 election and that, absent injunctive relief, she will be disenfranchised or severely burdened in exercising her fundamental right to vote in future elections. (R. 217-2 at ¶ 23A; Appx at __.) Intervenor's extensive allegations cite not only the "front line" symptoms of the constitutional inequities – malfunctioning voting equipment – but also the root failures of the Defendants that led to her disenfranchisement and to the disenfranchisement of thousands of other Ohio citizens.

A brief examination of Intervenor's Amended Complaint demonstrates the scope and depth of Intervenor's allegations and belies Defendants' hollow assertions that Intervenor "merely" alleges that a specific voting machine malfunctioned on election day. First, Intervenor alleges that "Defendant Secretary has promulgated and promoted, through

action and inaction, non-uniform and wholly inadequate standards and processes among the counties with respect to, inter alia, voter registration, absentee ballots, provisional ballots, disabled voters, and poll worker hiring and training. Likewise, Defendant Governor has failed to provide adequate, equitable funding and resources to the county boards of elections to ensure that the boards timely and responsibly carry out their duties, including providing adequate numbers of properly functioning voting machines, adequately trained workers, and other facilities in each voting precinct." (R. 217-2 at ¶¶ 41-42; Appx at ____.)

The failure of Defendants to adequately perform their designated role in the Ohio electoral system has led to perhaps its most egregious impact in the area of voting technology. In addition to citing her own experience (as noted above, the touchscreen voting machine Intervenor used malfunctioned, causing her vote to " jump" from candidate choice to candidate choice; *see* R. 226 at ¶ 23A; Appx at __), Intervenor makes repeated, detailed factual allegations regarding elections prior to and including the November 2004 where "machines ... simply did not work and ... poll workers ... routinely gave voters erroneous instructions that invalidated the voters' ballots altogether." (R. 217-2 at ¶ 44; Appx at __.) These failures implicate arbitrary, inadequate, and unequal processes and funding from the top of the election system to the bottom, manifesting themselves in several ways.

Allocation of voting machines. Intervenor alleges, for example, that Defendants failed to ensure an adequate allocation of voting machines on

both election day November 2004 and before such that the registered voters of each precinct could not be reasonably accommodated. (R. 217-2 at, *e.g.*, ¶¶ 87-118; Appx at __-__.) With arbitrary and unequal technology policies relating to machine allocation in place, voters were frequently left with unreasonably long lines and overworked pollworkers who were forced, without adequate training, to try to fill gaps. (R. 217-2 at, *e.g.*, ¶¶ 5, 42, 87, 90, and 91 (Appx at _____), documenting multiple instances across the state in 2004 where insufficient machines were made available even though officials knew that voter turnout would be significantly higher.)

Selection of adequate voting systems. Intervenor also alleges that Defendants failed to adequately screen, certify, and make available accurate and reliable voting systems for the voters of Ohio. (R. 217-2 at, *e.g.*, ¶¶ 4, 5, 19, 21, 23, 42, 44, 86, 96, 119, 145; Appx at _____.) Examples of the symptoms of such failure included widespread reports of "jumping votes" (R. 217-2 at ¶¶ 23A, 119; Appx at ____); machines going "blank" or resetting when voters tried to vote, one voter explaining that it took "five times" to enter her vote because the machine "went blank" the first four (R. 217-2 at ¶ 119; Appx at __); and an entire polling location that shut down when it had no working machines (R. 217-2 at ¶ 119; Appx at __). (*See also* R. 226 at ¶ 145 (Appx at __), citing serious voting equipment malfunctions that led to the miscounting, misprocessing, and even loss of legitimate votes in previous elections.)

Election and pollworker training. Intervenor further alleges that

Defendants failed to adequately hire, train, and supervise election and poll workers: In the November 2004 election (as in numerous past elections) voters faced poll workers who were manifestly unfamiliar with even the most basic rules for voting, as well as with the machines and processes used to record votes. (R. 217-2 at, *e.g.*, ¶¶ 2, 4, 6, 23A, 41, 42, 44, 67, 78, 121-124, 135, 143, 146, 147, 152, 153, 154, 156-158, 168, 176-180; Appx at _____.) "The evident lack of training, and resulting incompetency, of the poll workers in many counties and precincts exacerbated the substantial burdens already facing Ohio voters as a result of other deficiencies in the voting system. As a foreseeable consequence, voters and their votes were subjected to non-uniform and frequently erroneous directions and purported applications of Ohio and federal voting laws by untrained or improperly training workers and, thus, tens of thousands of voters [including Intervenor] were disenfranchised altogether or unreasonably burdened in exercising their right to vote." (R. 217-2 at ¶ 121; Appx at __.) Intervenor alleges that her own disenfranchisement (resulting from foreseeable problems with voting equipment) was at least in part due to the "promulgation and maintenance of non-uniform rules, standards, procedures, and training of election personnel throughout Ohio, and the inadequate and inequitable allocation of funds, facilities, and election personnel." (R. 217-2 at ¶ 23A; Appx at __.) Plaintiffs make similar allegations. (R. 217-2 at, *e.g.*, ¶¶ 12-23 (Appx at ____), documenting the insufficiency of pollworker training and the failure of

pollworkers and other election officials to properly ensure that Plaintiffs' votes were properly cast and counted.)

Intervenor alleges that these and other related problems are not random, unpredictable, "garden variety" election problems. Rather, Intervenor alleges that this track record of systematic breakdowns and shortcomings "[has] been well-known to Defendants and their predecessors since at least the early 1970's." For example, "a 1973 General Accounting Office report concluded that the election process in Hamilton County 'broke down completely' in November, 1971, and that 'thousands of electors were disenfranchised' in Cuyahoga County in May 1972 due to failure to deliver enough machines to the precincts, misprogramming of machines, and the lack of trained personnel." (R. 217-2 at, *e.g.*, ¶ 4; Appx at __.) While different voting technologies have been introduced over the years, the same structural shortcomings have remained, and similar breakdowns were seen in these and other counties throughout Ohio in the past two decades. (R. 217-2 at, *e.g.*, ¶¶ 4, 145-163; Appx at _____.) Intervenor further alleges a known history of systemic problems (and points to specific documentation) relating to "failure to timely hire and adequately train poll workers" (R. 217-2 at, *e.g.*, ¶¶ 2, 4, 6, 23A, 41, 42, 44, 120-124, 146, 147, 152-159, 168, 176-180; Appx at _____.), underfunding of election administration (R. 217-2 at, *e.g.*, ¶¶ 2, 6, 23A, 39, 42, 83, 147, 154, 159-161, 163, 167-169, 180, 187; Appx at _____), equipment malfunctions (R. 217-2 at, *e.g.*, ¶¶ 4, 5, 23A, 44, 86, 119, 121, 145, 146; Appx at

_____), and other repeated breakdowns in the voting process (R. 217-2 at, *e.g.*, ¶ 144-165; ; Appx at _____).

STATEMENT OF THE CASE

Plaintiffs League of Women Voters of Ohio *et. al.* commenced this case by filing their original complaint against Ohio Secretary of State Blackwell and Ohio Governor Taft on July 28, 2006. (R. 1; Appx at __.) On October 4, 2005, Intervenor filed her Motion to Intervene (R. 43; original complaint at R. 46) which was granted by the District Court on November 7, 2005 (R. 182; Appx at __.).

On November 14, 2005, Defendants filed a Motion to Dismiss Intervenor's Complaint (R. 198) based on three arguments: first, that with the intervening November 2005 election, Intervenor's claims were moot; second, that sovereign immunity barred her claims; and third, she had failed to plead any actionable violation.[1] On March 23, 2006, the District Court rejected all of Defendant's arguments, referencing its in-depth discussion of these same arguments raised by Defendants in previous motions to dismiss Plaintiffs claims. (R. 254, Order of March 23, 2006; Appx at __. *See also* R. 197, 202, and 237 (Appx at _____), Orders of November 21, 2005, December 2, 2005, and February 10, 2006, respectively.) In summary, the Court found that the claims were not moot as the respective complaints

[1] Defendants do not challenge Count Three of Intervenor's Complaint – a Section 1983 claim based on violations of the procedural due process of the 14th Amendment.

sought prospective relief[2] to prevent a repeat of alleged systemic breakdowns of the voting process, that Defendants were not immune from suit due to Eleventh Amendment sovereign immunity because the complaints sought prospective injunctive relief for ongoing violations, and that the complaints – alleging broad-based, "systemic violations" – sufficiently stated claims for which relief could be granted. *See* March 23, 2006, Order (R. 254; Appx at __). *See also* Orders of November 21, 2005 (R. 197; Appx at __); December 2, 2005 (R. 202; Appx at __); and February 10, 2006 (R. 237; Appx at __).

On April 3, 2006, Defendants filed an appeal of the District Court's decision denying the Defendants' Motion to Dismiss Intervenor's Complaint. (R. 259; Appx at __.)

SUMMARY OF THE ARGUMENT

The District Court rejected the three arguments Defendants raised in their motion to dismiss Intervenor's Complaint. The District Court's decision was proper, and its analysis is correct.

First, Intervenor adequately pled claims for relief under 42 U.S.C. § 1983. Contrary to Defendants' argument, Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the

[2] On November 30, 2005, and December 8, 2005, Plaintiffs and Intervenor, respectively, filed amended complaints clarifying that the relief sought in this case was not limited to the 2005 election but prospective in nature. *See* Plaintiffs' Amended Complaint (R. 200; Appx at __) and Intervenor's Amended Complaint (R. 217-2; Appx at __).

underlying constitutional right." *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). In order to state a valid Equal Protection claim under 42 U.S.C. § 1983, a plaintiff need not allege intentional discrimination by the defendant. *See e.g., Bush v. Gore*, 531 U.S. 98, 105 (2000). Intervenor's allegations of arbitrary and disparate treatment as a result of deliberate indifference and/or willful blindness satisfy Equal Protection pleading requirements.

Intervenor has also stated a valid Due Process claim under 42 U.S.C. § 1983. While "garden variety" election problems do not implicate constitutional concerns, widespread, "broad-gauged" unfairness will trigger a 14th Amendment cause of action under Section 1983, "even if derived from apparently neutral action." *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978). Intervenor's detailed allegations of widespread unfairness satisfy this requirement.

Second, Intervenor's claims are not moot. While the 11th Amendment shields state actors from suit in limited circumstances such as claims for retroactive relief, Intervenor's Complaint seeks prospective relief for ongoing constitutional violations. Consequently, her Complaint was not mooted with the passing of the November 2005. Similarly, her Complaint was not mooted due to the passage of recent legislation as that legislation – Ohio House Bill ("H.B.") 262 – did not resolve the constitutional shortcomings at issue.

Third, the Secretary of State and Governor failed to raise before the District Court their argument that they were the improper Defendants to

grant relief sought by Intervenor. Consequently, it is improper for them to raise such an argument here. Even if such an argument had been properly raised below, it is incorrect. The Secretary of State and Governor of Ohio are the proper Defendants. The Secretary of State is the state's chief elections officer with the statutory authority to appoint the various Boards of Election, issue orders to the Boards, and train and fund election officials. (Ohio Revised Code ("R.C.") §§ 3501.04, 3501.05, 3501.27.) The Governor is the state's chief executive officer in whom ultimate executive authority is vested and has sufficient connection to election law to be a proper defendant in a suit for prospective injunctive relief regarding election procedures.

STANDARD OF REVIEW

"Where the district court bases its denial of a motion to dismiss for failure to state a claim purely on the legal sufficiency of the plaintiff's case, [the appellate court] review[s] the decision *de novo*." *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 865 (6th Cir. 2000). In such a review, "all factual allegations in the complaint are accepted as true." *Michigan Bell* at 865. *See also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Contrary to Defendants' claims, all of the Intervenor's claims meet the necessary standard to survive a motion to dismiss.

I. Intervenor Has Properly Pled Constitutional Violations.

A. Under Section 1983, Widespread, Systemic Infringement of the Right to Vote Is Actionable.

Courts have consistently recognized the prerogative and obligation of

the federal judiciary to carefully defend the right to vote – the "fundamental political right" – from systemic interference by state actors. In *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." In *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1966), the Court underscored this commitment, stating that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court noted that "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined" and that "the right to vote is too precious, too fundamental to be so burdened or conditioned" by arbitrary restrictions. In *Bush v. Gore*, 531 U.S. at 104, the Court reaffirmed that fundamental right to vote was not a limited or mechanical right: "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."

Widespread, "broad-gauged" unfairness that permeates an election

will trigger a 14th Amendment cause of action under Section 1983, "even if derived from apparently neutral action." *Griffin v. Burns*, 570 F.2d at 1076. *See Ury v. Santee*, 303 F.Supp. 119, 126 (N.D. Ill. 1969) (invalidating an election on equal protection and due process grounds because of a failure to provide adequate voting facilities that led to widespread disenfranchisement: "It is sufficient to establish that the deprivation of law, rights or privileges was the natural consequence of the actions of defendants acting under color of law, irrespective of whether such consequence was intended."); *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970) (finding a due process violation resulting from a board of election commissioners' failure to effectively announce new guidelines which resulted in a rejection of multiple candidate petitions). Where an election procedure is in its basic aspect flawed, "due process, '(r)epresenting a profound attitude of fairness between man and man, and more particularly between individual and government,' is implicated in such a situation." *Griffin v. Burns*, 570 F.2d at 1078 *citing Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

B. Under Section 1983, Intervenor Need Only Allege That She Was Deprived of a Federal Right By a Person Acting Under Color of Law.

42 U.S.C. § 1983 was passed "for the express purpose of enforcing the provisions of the 14th Amendment." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 934 (1982) (citing *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972)). A broad construction of Section 1983 is compelled

by the statutory language, which speaks of deprivations of "any rights, privileges, or immunities secured by the Constitution and laws." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991). Accordingly, the Supreme Court has "repeatedly held that the coverage of [Section 1983] must be broadly construed." *Id*; *see also Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989). The legislative history of the section also stresses that as a remedial statute, it should be "liberally and beneficently construed." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 684 (1978) (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)). *See also Dennis*, 498 U.S. at 443.

Two – "and only two" – allegations are required in order to state a cause of action under 42 U.S.C. § 1983. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez*, 446 U.S. at 640 (1980) *citing Monroe v. Pape*, 365 U.S. 167, 171 (1961) (overruled on other grounds by *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). *See also Goad v. Mitchell*, 297 F.3d 497, 502 (6th Cir. (OH) 2002); *Berger v. City of Mayfield Heights*, 265 F.3d 399, 405 (6th Cir. (OH) 2001).

The Supreme Court and the Sixth Circuit have repeatedly held that "under a notice and pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case." *Swierkiewicz v.*

Sorema, 534 U.S. 506, 511 (2002). As the Supreme Court noted in *Swierkiewicz*, Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited specified exceptions (such as Rule 9(b)'s requirement for greater particularity in all averments of fraud or mistake). The Court, however, has declined to extend such exceptions to other contexts. *See Swierkiewicz*, 534 U.S. at 513. Indeed, the Supreme Court has specifically declined to supercede Rule 8(a)'s simplified pleading standard and impose a heightened pleading requirement for certain actions under Section 1983, repeating an axiom of statutory interpretation: *"expressio unius est exclusio alterius"* – the expression of one is the exclusion of the other. *Id.* Declining to add additional procedural bars to Section 1983 claims on its own initiative, the Supreme Court noted that "our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process." *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

1. Intent – Or Any Other Mental State – Is Not a Pleading Requirement of Section 1983 Itself.

Contrary to Defendants' assertions, it is not necessary in order to state a valid claim under 42 U.S.C. § 1983 to allege a purpose on part of a state actor to deprive a plaintiff of a federal right. *See Monroe*, 365 U.S. at 187 (no requirement under Section 1983 to show specific intent to deprive plaintiffs of constitutional rights); *DeWitt v. Pail*, 366 F.2d 682, 685-86 (9th Cir. 1966) ("In order to state a due process claim under [Section 1983], it is

not necessary to allege a purpose on the part of the defendant to deprive plaintiff of any federal right"); *Cohen v. Norris*, 300 F.2d 24, 29 (9th Cir. 1962) ("An allegation of a purpose to discriminate or a purpose to deprive one of any federal right, is not essential to the statement of a claim under § 1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment"); *Ury v. Santee*, 303 F.Supp. 119 (D.C. Ill. 1969) ("In order to maintain an action under 42 U.S.C. 1983, it is sufficient to establish that the deprivation of law, rights or privileges was the natural consequence of the actions of defendants acting under color of law, irrespective of whether such consequence was intended"). Instead, as discussed below, any mental state requirement of a Section 1983 claim results from the underlying federal right that has been allegedly violated.

2. Section 1983 Plaintiffs Need Only Allege the Mental State Required to Establish a Violation of the Underlying Constitutional Right.

In *Daniels v. Williams*, the Supreme Court affirmed its prior holdings that 42 U.S.C. § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels,* 474 U.S. at 329-30. However, the Court also clarified that "the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." *Id. at 330.* In *Daniels*, the Court held that an allegation of mere negligence was not sufficient to support a Section 1983 claim premised on a violation of the due process clause of the 14th Amendment. The

Daniels Court further refused to decide whether allegations of negligent acts could serve as the basis of Section 1983 claims based on violations of other constitutional rights. *Id.* Subsequent courts, however, have confirmed that the mental state requirement for a wide range of Section 1983 causes of action does not rise to the level of "intent." *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) (deliberate indifference standard is appropriate in determining questions of adequacy of police training); *Whitley v. Albers*, 475 U.S. 312, 319-21 (1986) (deliberate indifference standard is appropriate in determining questions of prisoner well-being); *Dorman v. District of Columbia*, 888 F.2d 159, 164-64 (D.C. Cir. 1989) (same); *Estate of Conners by Meredith v. O'Connor*, 846 F.2d 1205, 1208 (9th Cir. 1988) (gross negligence standard, equivalent to a "conscious indifference" standard, is appropriate to determine questions of hospital patient care); *Nishiyama v. Dickson County*, Tenn., 814 F.2d 277, 283 (6th Cir. 1987) (reckless indifference to risk posed by allowing inmate to drive sheriff's car while unsupervised sufficient to establish a violation of substantive due process).

C. Intervenor Has Properly Pled Equal Protection and Due Process Violations.

In both her original and amended Complaint, Intervenor alleges that Defendants maintain a constitutionally defective voting system and because of this system, she believes that she was disenfranchised in November 2004. (R. 217-2, Intervenor's Amended Complaint, at ¶ 23A; Appx at __.)

Intervenor further alleges that she and significant numbers of voters in Ohio were disenfranchised by "jumping" votes on electronic voting machines, and that absent injunctive relief, she and other Ohio voters will be disenfranchised or severely burdened in exercising the fundamental right to vote in future elections. (R. 217-2, Intervenor's Amended Complaint, at ¶ 23A; Appx at __.) Finally, Intervenor alleges that voters in the Ohio counties that utilized the voting machines were subjected to different standards from voters in other counties and so were disadvantaged. (R. 217-2, Intervenor's Amended Complaint, at ¶ 23A; Appx at __.)

Intervenor's allegations do not recount isolated incidents and "garden variety" election day problems – regrettable though unavoidable errors resulting from the "ordinary human frailties" of "hardworking individuals" whose only true desire is to "exhibit their patriotism and pride in democracy." (R. __, Final Merits Brief of Defendants-Appellants, at p.3; Appx at __). *See also Powell v. Power*, 436 F.2d 84, 88 (2nd Cir. 1970). Rather, Intervenor points to "systemic failings of Ohio's voting system and the resulting, widespread, repeated denials of the fundamental right to vote to thousands of Ohioans." (R. 28, [LWV] Plaintiffs' Opposition to Defendants' Motion to Dismiss/Transfer Venue at p.3; Appx at __.) As the District Court noted below in construing the LWV Complaint:

> [Defendants'] contention misconstrues the complaint. ... Citing "arbitrary and irrational differences in rules, processes, and burdens depending solely on where the voter happens to reside," LWV argues that Blackwell and Taft "have knowingly allowed 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.'" If true, these facts give rise to a cause of action.

(R. 202, Order of December 12, 2005 at pg.6; Appx at __).

Intervenor's Complaint reaches well beyond any isolated mistake by her local pollworker. Intervenor explicitly challenges the "fairness of the official terms and procedures under which the election was conducted." *Burns*, 570 F.2d at 1078.

1. Intervenor Has Properly Pled an Equal Protection Violation.

In addition to pleading broad-based, systemic violations that implicate the fairness of Ohio's election process, Intervenor has met any mental state requirement implicit in such claim. Defendants' assertions notwithstanding, a plaintiff need not plead intentional discrimination in order to state an equal protection or due process claim based on an infringement of the fundamental right to vote. The Supreme Court has consistently held as much for the last 40 years.

Defendants' own citations offer an opportunity to properly frame the issues in this case. The Fifth Circuit's opinion in *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980), perhaps best illustrates the critical distinctions. In *Gamza*, a candidate for school board of a Texas independent school district brought a Section 1983 equal protection suit, alleging that election votes were improperly counted and, as a result, the candidate's opponent was improperly declared to be the winner. No evidence was introduced that "the

initial error in setting up the matrices and the subsequent miscount of the ballots resulted from anything but entirely innocent human error." *Gamza*, 619 F.2d at 452. The Court held that "the denial of a nominee's right to a position on a ballot by an episodic election irregularity in a county primary election does not deprive his supporters of a federal constitutional right." *Id.* at 454.

The *Gamza* Court explained that the plaintiff's suit did not implicate the kinds of systemic failures that would properly give rise to a Section 1983 equal protection claim: "[w]e must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote." *Id.* at 453. Implicitly recognizing that successful election-related claims could in fact be made, the Court went on to note that "[w]e intimate no opinion concerning the circumstances in which election laws may operate so unfairly as to constitute a denial of equal protection or due process, *even without a showing of discriminatory intent*." *Id.* at 454 fn.6 (emphasis added).

The Supreme Court, on the other hand (both before and after its ruling in *Daniels*), has repeatedly found that equal protection violations can be found from infringements on the fundamental right to vote even where state actors did not intentionally discriminate. In *Baker v. Carr*, 369 U.S. 186, 226, 335 (1962), the Supreme Court held that Tennessee's geography-based apportionment scheme which diluted the relative power of some voters was

arbitrary and therefore violated Equal Protection. *See Baker*, 369 U.S. at 226. The violation was based not (as discussed by Justice Harlan in his dissent) on a claim that:

> Tennessee has arranged its electoral districts with a deliberate purpose to dilute the voting strength of one race ... or that some religious group is intentionally underrepresented ... [n]or is it a charge that the legislature has indulged in sheer caprice by allotting representatives to each county on the basis of a throw of the dice, or of some other determinant bearing no rational relation to the question of apportionment. Rather, the claim is that the State Legislature has unreasonably retained substantially the same allocation of senators and representatives as was established by statute in 1901, refusing to recognize the great shift in the population balance between urban and rural communities that has occurred in the meantime.

Baker, 369 U.S. at 335. The majority in *Baker* found that no intent to discriminate was required to establish the constitutional violation.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court again struck down a state's (in this case, Alabama's) geography-based legislature apportionment scheme, finding that the criteria was arbitrary and violated Equal Protection:

> Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race ... or economic status.

Reynolds, 377 U.S. at 565-66 *citing Brown v. Board of Education*, 347 U.S.

483 (1954); *Griffin v. People of State of Illinois*, 351 U.S. 12 (1956); *Douglas v. People of State of California*, 372 U.S. 353 (1963). The Court underscored that the discriminatory impact resulting from the apportionment method necessitated the finding, regardless of the motivation behind it: "Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" *Reynolds*, 377 U.S. at 563 *citing Lane v. Wilson*, 307 U.S. 268, 275 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960).

In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Supreme Court held that a Virginia poll tax violated the Equal Protection clause, finding the tax to be arbitrary and irrational but not necessarily intentionally discriminatory: "For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper*, 383 U.S. at 670. Indeed, the Court specifically declined to consider whether discriminatory intent was behind the tax: "[w]hile the 'Virginia poll tax was born of a desire to disenfranchise the Negro' [in *Harman v. Forssenius*, 380 U.S. 528, 543 (1965)], we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end." *Harper*, 353 U.S. at 666 fn.3.

In *Bush v. Gore*, 531 U.S. 98 (2000), the Supreme Court's must recent statement on the subject, the Court again found that a successful equal

protection challenge did not require an allegation of willful discrimination. In *Bush*, the Court found that the "recount mechanisms implemented in response to the decisions of the Florida Supreme Court [regarding the recount of Florida's tally of votes cast in the 2000 presidential election] do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." *Bush*, 531 U.S. at 105. The constitutional violation resulted not from motive but from the geography-based differences and "the absence of specific standards to ensure . . . equal application" of abstract laws and principles. *Id.* at 106.

Supported by the specific factual allegations in her Complaint, Intervenor's equal protection allegations – that "Defendants, acting under color of state law, have maintained an unequal system of voting that lacks uniform standards and processes, severely burdens and denies equal access to the right to vote, and results in arbitrary and disparate treatment of voters from county to county, precinct to precinct, and ward to ward" and that "these chronic and systemic exclusions from and severe burdens on the right to vote reflect Defendants' reckless and deliberate indifference and/or willful blindness to the constitutional rights of voters in Ohio" – meet all of the substantive and procedural requirements identified by the Supreme Court in order to survive a motion to dismiss.

2. Intervenor Has Properly Pled a Substantive Due Process Violation.

Intervenor's substantive due process allegations – that "Defendants,

acting under color of state law, are maintaining an election process in Ohio that is permeated with broad-gauged, patent, and fundamental unfairness that denies and severely burdens the fundamental right to vote and that violates substantive Due Process under the Fourteenth Amendment to the U.S. Constitution" – similarly meet the pleading requirements imposed by both Section 1983 and the 14th Amendment.

Despite Defendants' assertions to the contrary, Intervenor's Complaint alleges the kind of widespread, "broad-gauged" unfairness that will trigger a due process cause of action. *See Griffin*, 570 F.2d at 1076; *Ury*, 303 F.Supp. at 126; *Briscoe*, 435 F.2d 1046. Far from pointing to the typical range of technological problems that might emerge in any election, Intervenor has alleged systemic shortcomings that fundamentally impair the electoral system and the ability of the state to protect the rights of its citizens to vote. Instead of alleging "inevitable" malfunctions of new voting machines, Intervenor alleges a known, ongoing, and preventable pattern of failing to adopt policies, procedures, and standards for the certification, screening, and acquisition that would lead to functioning machines in the first place. (R. 217-2 at, *e.g.*, ¶¶ 4, 5, 19, 21, 23, 42, 44, 86, 96, 119, 145, X5; Appx at _____.) Intervenor also alleges arbitrary and unequal technology policies relating to machine allocation, creating a pattern of voters who were frequently left with unreasonably long lines and overworked pollworkers who were forced to try to fill the gaps. (R. 217-2 at, *e.g.*, ¶¶ 5, 42, 87-118; Appx at __.) Finally, Intervenor alleges not a single

or isolated example of undertrained pollworkers but a near-abdication of Defendants' responsibility for and control over pollworker and election official training that has led, through no fault of their own, to an election workforce manifestly unfamiliar with even the most basic rules for voting, as well as with the machines and processes used to record votes. (R. 217-2 at, *e.g.*, ¶¶ 2, 4, 6, 23A, 41, 42, 44, 67, 78, 121-124, 135, 143, 146, 147, 152, 153, 154, 156-158, 168, 176-180; Appx at _____.)

As discussed in detail below, Defendants offer no authority to counter the argument that deep-seated, chronic failures of this magnitude are actionable due process violations under the 14th Amendment.

3. Defendants' Authority Is Limited to Distinguishable Dicta and Propositions Contrary to Controlling Supreme Court Precedent.

The authority Defendants rely on to support their contention that plaintiffs must allege "intentional and purposeful discrimination"[3] as part of any Section 1983 equal protection claim" amounts to distinguishable dicta at best and holdings contrary to controlling Supreme Court precedent at worst. Moreover, Defendants concede that no Sixth Circuit case stands for the extraordinarily broad proposition upon which their primary argument rests. Furthermore, the precedent cited by Defendants to support their substantive

[3] Defendants repeatedly misquote the dicta in *Gold v. Feinberg*, implying an even higher standard than the one Defendants argue the Second Circuit has articulated. The language cited by the *Gold* court (originally from *Powell v. Power*, 436 F.2d at 88) should be "intentional *or* purposeful discrimination" (emphasis added), not "intentional and purposeful discrimination." *Gold v. Feinberg*, 101 F.3d 796, 800 (2nd Cir. 1996).

due process argument is unavailing as its narrow requirements are satisfied by Intervenor's Complaint.

Gold v. Feinberg, 101 F.3d 796 (2nd Cir. 1996), stands for the uncontested proposition that plaintiffs who can establish nothing more than isolated "unintended irregularities" are barred from obtaining Section 1983 equal protection relief in federal court. *Gold*, 101 F.3d 796 at 800. In *Gold*, the Second Circuit additionally noted that "there [were] no substantiated allegations of any wrongful intent on the part of state officials," a condition that would be sufficient but not necessary to satisfy the Supreme Court's Section 1983 decision in *Daniels v. Williams* and its election-related equal protection cases cited above. To the extent that the *Gold* court implies that equal protection litigants must demonstrate "intentional or purposeful" discrimination, its dicta contradicts Supreme Court precedent. *See, e.g.*, *Printz v. U.S.*, 521 U.S. 898, 963 (1997) (language wholly unnecessary to the decision of the case is dicta and it is "beyond dispute" that courts are not bound by it).

The purported "holding" of *Powell v. Power*, 436 F.2d 84 (2nd Cir. 1970) upon which the *Gold* court relies – that "[u]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination'" (*Id.* at 88) – contradicts the Supreme Court's prior holdings in *Baker*,

Reynolds, and *Harper* (which it does not consider[4]) and the subsequent holding of *Bush v. Gore*. Once again, the narrow holding of the *Powell* court, resolving the only question before it, was the uncontested proposition that negligence alone cannot form the basis for a Section 1983 equal protection violation. *See, e.g., Powell*, 436 F.2d at 85-6 (noting no potential reason for the election law violation at issue other than officials making mistakes due to the "unusual" circumstances surrounding the election) and p.88 (noting that the Constitution is not "hypersensitive" to "human frailties").

Similarly, in *Bodine v. Elkhart County Election Board*, 788 F.2d 1270 (7th Cir. 1986), rejecting a due process claim predicated on the failure of voting equipment to tally votes correctly because election officials negligently failed to properly calibrate the machine, the Seventh Circuit explicitly found that "[a]ppellants, in the present case, have alleged nothing more than garden variety election irregularities that could have been adequately dealt with through the procedures set forth in Indiana law." *Bodine*, 788 F.2d at 1272. Not content to rest on this thin reed, Defendants make the further extraordinary leap that *Bodine* stands for the proposition that "errors with voting tabulation are not cognizable under the due process clause." (R. __, Final Merits Brief of Defendants-Appellants, at p. 39; Appx

[4] Indeed, the *Powell* court notes that "[t]hese claims do not require extended consideration" and proceeds to dedicate only three sentences to its analysis of the plaintiffs' Section 1983 claims. *Powell*, 436 F.2d at 88.

at __.) *Bodine*, of course, holds no such thing. Rather, *Bodine* correctly holds that the "due process clause is simply not implicated by the negligent act of an official." *Id.*, citing *Daniels*, 474 U.S. at 328. Such concerns are not at issue in this case.

The Seventh Circuit in *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975), rejected the plaintiffs' due process claims on similar grounds and at a similar procedural stage. *Hennings*, a class action suit based on a series of "[m]echanical and other operating difficulties of various degrees of seriousness" that occurred with voting machines in several Illinois polling places. The Court of Appeals affirmed the denial of relief on a Section 1983 claim after trial. The Court of Appeals found no clear error in the district court's decision that the plaintiffs did not adequately prove that the alleged violations amounted to more than garden variety election problems. In fact, plaintiffs failed to submit any evidence whatsoever to support some of their allegations. *Hennings*, 523 F.2d at 863. Moreover, the Court of Appeals in *Hennings* rebukes Defendants' argument that plaintiffs must prove an intent to discriminate: "the lack of intent to violate the plaintiffs' constitutional rights would not necessarily be a defense if the defendants should have known that their conduct would have that effect." *Id.* at 864. *Hennings* supports Intervenor's position that it is inappropriate to dismiss at the pleading stage claims alleging widespread, systematic failures of the electoral system that call into account the fundamental fairness of the process.

Finally, Defendants citation of the Ninth Circuit's decision in *Weber v. Shelly*, 347 F.3d 1101 (9th Cir. 2003) is inapposite. In *Weber*, the Ninth Circuit affirmed a District Court's grant of summary judgment to the defendants Secretary of State and country registrar of voters, rejecting a claim that the "lack of a voter-verified paper trail" in a specific model of voting system (not previously or currently in use in Ohio) "violates her rights to equal protection and due process." *Weber*, 347 F.3d at 1103. Most notable, of course, is that the court affirmed a summary judgment ruling, not a motion to dismiss. The court affirmed a holding that "found no evidence that use of Riverside County's touchscreen system constitutes differential treatment of voters," not that the plaintiff had failed to state a claim. *Id.* Moreover, Intervenor's claims – which focus on the "incoherent, inadequate, and inequitably funded systems," "non-uniform standards," and "inadequate planning and training" – implicate violations much broader than those suggested by the plaintiff's complaint in *Weber*. Regardless of whether Defendants believe she will ultimately prevail, Intervenor is entitled to the opportunity to prove those claims. As demonstrated by *Weber*, a motion to dismiss is the inappropriate device with which to challenge the strength of Intervenor's evidence.

II. Intervenor's Claims Are Not Moot.

Defendants' contention that Intervenor's Complaint runs afoul of the Eleventh Amendment ignores a century of precedent allowing equitable relief against state officials. "The States' federal-court immunity ... does not

apply if the lawsuit is filed against a state official for purely injunctive relief enjoining the official from violating federal law." *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005). Filing a request for declaratory and injunctive relief is a time-honored way of remedying unconstitutional behavior by state officials authorized by the U.S. Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645-46 (2002).

Defendants argue that Intervenor's claims have been "mooted by the passage of H.B. 262 and 434" and therefore fail to clear the immunity bar established by the Eleventh Amendment. In short, Defendants argue that "Intervenor's complaint has been mooted by the requirements of a paper audit trail. ... If there ever is to be a recount of an electronic voting machine, this paper audit trail will be used as the official tabulation for purposes of the recount. Thus the Intervenor's complaint has been mooted by the requirements of a paper audit trail." (R. __, Final Merits Brief of Defendants-Appellants, at p. 48-49; Appx at __) (internal citations omitted). A review of Defendants' analysis demonstrates that that this argument is incorrect.

Intervenor's allegations of constitutional deficiencies do not rest simply on the existence or lack thereof of a paper audit trail. Indeed, nowhere in her Complaint does Intervenor even *mention* a paper audit trail. Intervenor instead alleges "widespread, serious, and deeply-rooted failings at the most basic levels in Ohio's voting system: incoherent, inadequate, and

inequitably funded systems; non-uniform standards; and inadequate planning and training." (R. 217-2, Intervenor's Amended Complaint, at ¶ 6; Appx at __.) The requirements of H.B. 262 and 434 do little to address these structural shortcomings.

It is true that the "voter verified paper audit trail" as defined by R.C. § 3506.10(P) requires that a voter be able to visually or audibly inspect the physical print out of the voter's ballot choices. However, this is the entirety of the protection provided by H.B. 262 with regard to voting technology. The statute does not require that the audit trail is used to help ensure that votes are properly counted, except in the narrow situation of a recount. By comparison, Intervenor's Complaint seeks specific remedies from the Defendants to include pre-election and parallel election day testing, post-election auditing, transparency, and poll worker training specific to voting machines (R. 217-2, Intervenor's Amended Complaint, at p. 59; Appx at __), all of which will be supported by the voter verified paper audit trail provided in H.B. 262, but none of which are now required by the statute. Put simply, Intervenor's Complaint seeks relief above and beyond what H.B. 262 provides.

Even with the limited audit trail H.B. 262 is intended to address, the act provides the Defendants with an enormous amount of discretion to delegate. H.B. 262 does not make the Secretary of State or Governor accountable or even responsible for ensuring that voters are not disenfranchised. H.B. 262 does not specifically require the Defendants to

cure the constitutional defects in Ohio's voting system. It is exactly this accountability that Intervenor and the Plaintiffs seek.

Even assuming H.B. 262 will make *some* positive improvement in Ohio's election system, a voluntary corrective action does not render litigation moot, it merely affects the relief a court may order. See *E.E.O.C. v. New York Times Broadcasting Service, Inc.*, 542 F.2d 356, 361 (6th Cir. 1976); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972); *United States v. I.B.E.W., Local 38*, 428 F.2d 144 (6th Cir. 1970). In *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004), the court held that new state regulations that imposed stricter land-use rights did not render environmental claims against a state agency moot because they "[did] not address all asserted ... violations." *Covington*, 358 F.3d at 639 fn. 17. Similarly, here, the provisions in H.B. 262 do not make Intervenor's claims moot. Rather, H.B. 262 will merely impact the relief fashioned by this court; i.e., the court may supplement or build on the base set forth in the legislation.

III. Defendants Have Improperly Raised a New Argument – That They are Not Proper Defendants – In Order to Challenge Intervenor's Claims.

It is axiomatic that it is not the role of the Court of Appeals to review issues raised for the first time on appeal. *See DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 922 (6th Cir. 2006); *Barner v. Pilkington N. Am.*, 399 F.3d 745, 749 (6th Cir. 2005); *Lepard v. NBD Bank*, 384 F.3d 232, 236 (6th Cir.2004). The function of the Court is to

"review the case presented to the district court, rather than a better case fashioned after a district court's unfavorable order." *Durden*, 448 F.3d at 922; *Barner*, 399 F.3d at 749. The Court will consider an issue not raised below "only when the proper resolution is beyond doubt or a plain miscarriage of justice might otherwise result." *Durden*, 448 F.3d at 922; *Lepard*, 384 F.3d at 236.

Defendants did not seek to dismiss Intervenor's claims based on the argument that they were the improper subjects of such a suit. Consequently, this question is not properly raised against Intervenor here, although it is raised against the Plaintiffs.[5]

Yet even if this claim was proper against Intervenor, Defendants are simply wrong. Defendants' arguments that they are not the proper parties against which to bring charges of mismanagement of the state's electoral process are, in the words of the District Court, "misplaced" and "misconstrue the complaint." (R. 202, Order of December 2, 2005, Denying

[5] It is not entirely clear that Defendants are in fact attempting to make this argument against Intervenor. On page 52 of Defendants' Merits Brief, Defendants include a title: "The Plaintiffs and Intervenor Have Failed to Allege Any Claim Against Governor Taft." However, nowhere in the body of Defendants' discussion of this subject (pages 49-56) are the Intervenor or her Complaint discussed. It is a well-established principle of appellate review that issues unaccompanied by developed argumentation are deemed waived. *See, e.g., United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1999). Appellant does not concede that this question is properly before this Court or argued in any substantive way. However, out of an abundance of caution, Intervenor briefly addresses the matter and further incorporates the more detailed arguments of Plaintiff-Appellees that appear in their own Opposition.

Defendants' Motion to Dismiss at 6; Appx at __). "A possible cause of action against the BOEs would not address and does not bar a claim that, on a state-wide basis and under the supervision of state officials, Ohio's voting system breeds non-uniformity that defendants could and should correct." *Id.*

As the Sixth Circuit stated in an analogous case:

> [Defendants] also argue that only the officer with immediate control over the challenged act or omission is amenable to § 1983. We find this claim ridiculous. Such a rule would allow a state agency to avoid, or defer, liability merely by transferring the defendant in a particular case, or by changing the scope of the defendant official's authority. The directors of a state agency, no matter how far removed from the actions of agency employees, are proper parties to a suit for an injunction under § 1983.

Futernick v. Sumpter Township, 78 F.3d 1051, 1055 (6th Cir. 1996) *overruled on other grounds*; *see also Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1108 (C.D. Cal. 2001).[6]

The Secretary of State is the state's chief elections officer (R.C. § 3501.04) and his power to control the administration of elections is plenary. His statutory powers include, for example, appointment of Boards of Election (R.C. § 3501.05(A)) and creation of the regulatory framework –

[6] As stated in *Common Cause*, "Plaintiff's choice of the secretary of state as a defendant is appropriate. Plaintiff claims that the denial of the right to vote arises from the collective choices of voting system by various counties. No choice by any single county is the source of the problem. Hence the only way to address the issue is to change the provision which allows counties to choose voting systems of widely disparate quality. The Secretary of State [sic] is the individual with the authority to make this change." 213 F. Supp. 2d. at 1108.

literally, dictating the Boards' duties and how they will perform them – in which the Boards operate (R.C. § 3501.05(B), (C)). The Secretary also controls "the instruction of members of boards of elections and employees of boards in the rules, procedures, and law relating to elections" and provides funding for that training (R.C. § 3501.27).

Similarly, Governor Taft is an appropriate Defendant by virtue of his role as the state's chief executive officer:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.
>
> It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed .... but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. The 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, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

Ex parte Young, 209 U.S. at 157.

The 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. (R. 202, Order of December 2, 2005, Denying Defendants' Motion to Dismiss at p.6; Appx at __). *See also Lawson v. Shelby County*, 211 F.3d 331, 335 (6th Cir. 2000) (governor had sufficient connection to Tennessee election law to be proper party);

Trinsey v. Com. of Pa., Dept. of State, Bd. of Elections, 766 F. Supp. 1338 (E.D. Pa. 1991) (same); *see also Ward v. Utah*, 393 F.3d 1239 (10th Cir. 2005) (governor was proper defendant in suit for prospective injunctive relief concerning allegedly unconstitutional state policy). Thus Governor Taft is also a proper defendant here.

IV. CONCLUSION

For the reasons stated, Defendants' appeal from the District Court's finding in its Order of March 23, 2006, should be denied.

Respectfully submitted,

DATED: 9/12/06

Matthew J. Zimmerman
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x127
Fax: (415) 436-9993

Richard M. Kerger
Kerger & Associates
33 S. Michigan St., Suite 100
Toledo, OH 43602
Telephone: (419) 255-5990
Fax: (419) 255-5997

Attorneys for Plaintiff-Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 version 9 in Times New Roman, 14-point font.

DATED: 9/12/06

Matthew J. Zimmerman
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x127
Fax: (415) 436-9993

Richard M. Kerger (0015864)
KERGER & ASSOCIATES
33 S. Michigan St., Suite 100
Toledo, OH 43602
Telephone: (419) 255-5990
Fax: (419) 255-5997

Attorneys for Plaintiff-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2006, a copy of the foregoing was served upon the following via regular U.S. Mail:

Counsel for the Appellant/ Defendants

Richard N. Coglianeese
Ohio Attorney General Office
Constitutional Offices Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for the Appellee/Plaintiffs

Lawyers' Committee for Civil Rights Under Law
Jon M. Greenbaum
Benjamin J. Bluestein
1401 New York Avenue, NW Ste. 400
Washington, DC 20005

John A. Freedman
Michael R. Geske
ARNOLD & PORTER
555 Twelfth Street, NW
Washington, DC 20004-1206

Connelly, Jackson & Collier
Steven P. Collier
Jason A. Hill
405 Madison Avenue Ste. 1600
Toledo, OH 43604

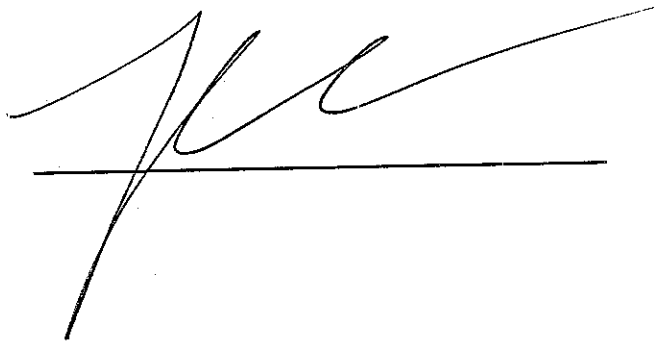
Dykema Gossett PLLC
Kathleen M. Lewis
400 Renaissance Center, Suite 3800
Detroit, MI 48243-1668

Jennifer R. Scullion
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

National Voting Rights Institute
Brenda Wright
27 School Street Ste. 500
Boston, MA 02108

People for the American Way Foundation
Deborah Liu
Elliott M. Mincberg
2000 M Street Ste. 400
Washington, DC 20011

Lawyers' Committee for Civil Rights of the San Francisco Bay Area
Robert Rubin
131 Stuart Street, Suite 400
San Francisco, Ca 94105



ADDENDUM – DESIGNATION OF JOINT APPENDIX CONTENTS

Plaintiffs-Appellees, per Sixth Circuit Rules 28(d) and 30(b), hereby designates the following portions of the record below for inclusion in the Joint Appendix:

Description of Entry	Date	Record Entry No.
Amended Complaint of Intervenor Jeanne White for Injunctive and Declaratory Relief	12/8/05	217-2
Order	11/21/05	197
Plaintiffs' Opposition to Defendants' Motion to Dismiss/Transfer Venue	9/9/05	28