**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

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| **LEAGUE OF WOMEN VOTERS, *et al.*,** | **:** | |
| **Plaintiffs,** | **:** | |
| **VS.** | **:** | **CASE NO. 3:05-CV-7309** |
| **J. KENNETH BLACKWELL, *et al.*,** | **:** | **JUDGE CARR** |
| **Defendants.** | **:** | |

**DEFENDANTS' REPLY IN SUPPORT OF THIER MOTION AND APPLICATION FOR LEAVE TO BRING AN INTERLOCUTORY APPEAL OF THIS COURT'S DECEMBER 2, 2005 ORDER**

## *I. Introduction*

This case embodies the rare exception to the federal courts' general preference for avoiding piecemeal appellate review because an immediate appeal may prevent protracted and expensive litigation. Because of this case's magnitude and the extraordinary importance of the legal issues involved, interlocutory review of the questions presented is appropriate here. *See Zenith Radio Corp. v. Matsushita Elec. Inds. Col.*, 478 F. Supp. 889, MDL No. 189 (E.D.Pa. Aug. 21, 1979).

It is undisputed that four elements must be established before granting review of interlocutory orders under 28 U.S.C. §1292(b): "(1) the question involved must be one of 'law'; (2) it must be 'controlling'; (3) there must be substantial ground for 'difference of opinion' about it; and (4) an immediate appeal must 'materially advance the ultimate termination of the litigation.'" *Cardwell v. Chesapeake & Ohio Railway Co.*, 504 F.2d 444, 446 (6th Cir. 1974); s*ee*

*also, Vitols v. Citizens Banking Co.*, 984 F.2d 168, 170 (6th Cir. 1993). Because all four elements are present here, Defendants respectfully request this Court to grant them leave to appeal this Court's December 2, 2005 order partially denying their motion to dismiss Plaintiffs' complaint.

## *II. Law and Argument*

### A. The Issues Presented Involve Controlling Questions of Law.

The questions presented for review involve legal, rather than factual matters that control this case's outcome. Should the Sixth Circuit answer any of these questions in Defendants' favor, the outcome of the litigation in the district court would be materially affected. *See W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, (In re City of Memphis), 293 F.3d 345, 352 (6th Cir. 2002); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 885, 42 L.Ed. 2d 125, 95 S.Ct. 152 (1974). Accordingly, Defendants have met the first two elements of the well-established test for certifying an interlocutory appeal.

### B. Substantial Grounds Exist for Disagreeing with the District Court's Decision on These Issues.

A question of law is appropriately certified for interlocutory review if "the question is not settled by controlling authority and there is a substantial likelihood…that the district court ruling will be reversed on appeal." *Gamboa v. City of Chicago*, 2004 U.S. Dist. LEXIS 25105, at *11 (N.D. Ill. Dec. 13, 2004) (internal citations omitted). *See also, Praxair, Inc. v. Hinshaw & Culbertson*, 1997 U.S. Dist. LEXIS 16707, at *2 (N.D. Ill. Oct. 15, 1997) (same). In *Gamboa*, the defendants presented the district court with a question for certification—what constitutes "pattern of activity" under the federal RICO statute—that the Seventh Circuit had not yet settled. *Gamboa*, 2004 U.S. Dist. LEXIS, at *8. Moreover, the district court recognized that because of the complexity and scope of the question presented, a substantial likelihood existed that the

Seventh Circuit might disagree with its initial decision. *Id*. at *11. As a result, the district court certified the question to the Seventh Circuit, noting that "because Defendants pose a question that has not been settled and could ultimately overturn a jury verdict a year or more in the future, an immediate resolution of this question seems sensible." *Id*. at *12.

The same is true with the questions presented here. Because this appears to be a case of first impression, the attendant legal theories have not been tested in the Sixth Circuit. And, although this Court has every reason to believe it correctly decided Defendants' motion to dismiss, *Gamboa's* rationale is persuasive: because Defendants' questions presented have never been addressed in federal court and could ultimately obviate the need to conduct massive discovery on a statewide scale—as well as expensive and protracted litigation—immediate resolution of these questions is proper. *See also*, *Wieboldt Stores, Inc. v. Schottenstein Stores Corp.*, 1989 U.S. Dist. LEXIS 5216 (N.D. Ill. May 5, 1989) (noting that novelty and complexity will be key factors when considering §1292(b)'s "substantial disagreement" element).

**C. An Immediate Appeal Materially Advances the Ultimate Termination of the Plaintiffs' Case.**

In determining whether certification will materially advance the ultimate termination of the litigation, a district court is to examine whether an immediate appeal would eliminate: (1) the need for trial; (2) complex issues so as to simplify the trial; or (3) issues to make discovery easier and less costly. *Zygmuntowicz*, 828 F. Supp. at 353 (citing *In re Magic Marker Secs. Litigation*, 472 F. Supp. 436, 439 (E.D. Pa. 1979)). Certifying the above questions presented will give the Sixth Circuit the opportunity, at the outset, to resolve this case without dragging state agencies, Ohio's county boards of elections and hundreds of private individuals and organizations through an onerous discovery process and/or protracted and expensive litigation. And, even if some of Plaintiffs' claims remain after appellate review, the Sixth Circuit will have the opportunity to (1)

eliminate the organizational plaintiffs to make discovery significantly "easier and less costly;" and (2) set forth the legal standards Plaintiffs must meet to prevail on their claims before this Court.

Plaintiffs argue that discovery is largely completed and that what has not yet been completed is relatively simple in nature. However, in making these argument, they completely ignore the tremendous amount of discovery and the massive number of depositions that will need to be conducted for each and every one of Plaintiffs' allegations – allegations that essentially claim that the every election conducted by Ohio over the past twenty to thirty years has been conducted in an unconstitutional manner.

A Sixth Circuit review of the questions presented will materially advance the ultimate termination of the litigation.

**D. Exceptional Circumstances Warrant an Immediate Interlocutory Appeal**

Plaintiffs argue that there are no exceptional circumstances that warrant an immediate interlocutory appeal. Plaintiffs' Opposition To Defendants' Motion and Application for Leave to Take Interlocutory Appeal From December 2, 2005 Order, at 13-14. However, this case constitutes an exceptional circumstance. Due to the depth and breadth of Plaintiffs' sweeping claims, several state agencies and 88 county election boards are bracing for an unprecedented onslaught of discovery, which will significantly impair their ability to perform governmental services for Ohio's citizens. As a result, this case presents that rare exception to the federal courts' general preference for avoiding piecemeal appellate review: "where an immediate appeal may avoid protracted and expensive litigation." *In re Baker & Getty Fin. Servs.*, 954 F.2d 1169, 1172 (6th Cir. 1992); *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F. Supp. 346, 353 (E.D.Pa. 1993). Because of this case's magnitude and the extraordinary importance of the legal

issues involved, therefore, Defendants believe interlocutory review of these questions presented is appropriate here. *See Zenith Radio Corp. v. Matsushita Elec. Inds. Col.*, 478 F. Supp. 889, MDL No. 189 (E.D.Pa. Aug. 21, 1979).

**E. Discovery Should Continue to Be Stayed**

Plaintiffs argue that this Court should order the parties to continue discovery during the pendency of the interlocutory appeal. They further argue that staying discovery during the pendency of the appeal would prejudice their ability to obtain relief in advance of the 2006 general election. However, the magnitude of this case and the extraordinary importance of the legal issues involved, make it critical for both the Plaintiffs and the Defendants to have the time necessary to conduct thorough and comprehensive discovery. Even if discovery was to proceed during the interlocutory appeal, allowing the parties to have enough time to conduct the thorough and comprehensive discovery that this case requires will make it impossible for this case to be heard until long after the 2006 general election.

Even more importantly, ordering the parties to conduct discovery during the interlocutory appeal would contradict the very rationale for certifying the interlocutory appeal in the first place. Here, an interlocutory appeal is appropriate due to the complexity of this case and the staggeringly burdensome discovery it will entail. Permitting discovery to go forward while the appeal is pending would subject the parties, the 88 county boards of elections, and hundreds of other individuals and entities to thousands of hours of potentially wasted time and effort.

***III. Conclusion***

For the foregoing reasons, Defendants respectfully request this Court to grant their December 8, 2005 motion pursuant to 28 U.S.C. §1292(b), and certify the above questions presented for interlocutory review.

Respectfully submitted,

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**Certificate of Service**

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 13th day of January, 2005.

*/s Richard N. Coglianese*
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