UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

League of Women Voters of Ohio, League of Women Voters of Toledo-Lucas County, Darla Stenson, Charlene Dyson, Anthony White, Deborah Thomas, Leonard Jackson, Deborah Barberio, Mildred Casas, Sadie Rubin, Lena Boswell, Chardell Russell, Dorothy Cooley, and Lula Johnson-Ham, Plaintiffs, v. J. Kenneth Blackwell, Secretary of State of Ohio and Bob Taft, Governor of Ohio, Defendants.	Case No. 3:05-CV-7309 Hon. James G. Carr

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT AND FOR A STAY OF DISCOVERY

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Plaintiffs respectfully submit this opposition to Defendants' latest motion to dismiss ("Motion to Dismiss"), dated December 7, 2005, and latest motion for a stay of discovery ("Motion to Stay"), dated December 1, 2005. Plaintiffs also have filed an opposition to Defendants' Motion for Leave to Appeal the Court's December 2, 2005 Order.

INTRODUCTION

Flouting the Court's directives to file a motion "on the basis of sovereign immunity" (12/2/05 Tr. at 19; 12/05/05 Order), Defendants essentially rehash arguments already rejected by this Court in its December 2, 2005 Order ("December 2, 2005 Order") on Defendants' original motion to dismiss (which failed to assert any claim of supposed "sovereign immunity"). Defendants' strategy is obvious: to dress up their previously rejected arguments in the guise of "sovereign immunity" to try to manufacture a ground for interlocutory appeal review of the December 2, 2005 Order and thereby further stall the progress of this case. This is only the latest in Defendants' ongoing string of bad faith, dilatory – and wholly baseless – attempts to avoid complete discovery of the relevant facts and a trial on the merits. We respectfully submit that the Court put a prompt end to these transparent delay tactics so that Plaintiffs may fully discover and present their claims at trial in time to implement reforms before the November 2006 election.

The 11th Amendment is not implicated by this case. Plaintiffs allege a persistent, ongoing, and systemic violation of their federal rights under the Fourteenth Amendment to the U.S. Constitution arising from decades of unfair, inequitable, and materially deficient administration of elections in Ohio. Plaintiffs claims that responsibility for Ohio's constitutionally violative voting process lies with these Defendants as the Chief Elections and Chief Executive officers of Ohio. Each Plaintiff alleges injury stemming from Defendants' actions or inactions, and to anticipate similar injury in the future absent injunctive relief. Most importantly, ***Plaintiffs seek only prospective relief against these state officials solely in their***

official capacity. The claims in this case, in short, fit to a "T" the exception to sovereign immunity recognized by the Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908) nearly a century ago, and consistently reaffirmed since.

Defendants' brazen and strategic attempt to refashion their previously asserted grounds for dismissal into "sovereign immunity" should be rejected. Defendants are not the first to try this gambit: the case law flatly prohibits efforts to bootstrap arguments on the underlying merits of federal claims by assertions of "sovereign immunity." It is even more plain that Defendants cannot revisit already rejected arguments about whether Plaintiffs state cognizable claims for relief through their frivolous assertion of "sovereign immunity." Moreover, even if Defendants even arguably had any claim to "sovereign immunity" here (and they clearly do not under *Ex parte Young*), Defendants waived the right to try to put an 11th Amendment gloss on their arguments when they failed to make any assertion of "sovereign immunity" in their first (failed) attempt to dismiss Plaintiffs' § 1983 claims. The filing of Plaintiffs' Amended Complaint provides no ground to reargue or revisit the Court's December 2, 2005 Order since the Amended Complaint is identical in all material respects to the original Complaint.

We ask that the Court (1) promptly deny Defendants' latest meritless motions, (2) make a finding that Defendants' assertion of 11th Amendment immunity is frivolous and without a good faith basis (so that the denial of the motion will not engender further, needless delay through the meritless interlocutory appeal that Defendants otherwise would take in an attempt to strip this Court of jurisdiction), (3) immediately lift the stay of discovery that was imposed on December 2, 2005, and (4) schedule a telephonic conference to resolve the discovery issues raised in Plaintiffs' December 1, 2005 status report to the Court and to set a schedule to renew – and promptly complete – discovery in this case.

Plaintiffs' goal is to move this case forward to obtain necessary and timely relief to protect Ohio's voters against the Defendants' ongoing constitutional violations. Nonetheless – and particularly given the important issues at stake in this litigation, the need for timely relief, and the lack of any good faith basis for Defendants' purely strategic "sovereign immunity" motion – we believe it would be appropriate for the Court to invoke its authority (whether under Fed. R. Civ. P. 11 or the Court's inherent authority) to impose appropriate sanctions on Defendants for the unnecessary delay and inconvenience they have caused the Plaintiffs and the Court alike.[1] We respectfully suggest that an appropriate response to the delay Defendants have caused is to deem their "sovereign immunity" motion to be a motion for summary judgment – and to preclude Defendants from making any further motions for summary judgment so that the parties may proceed to trial promptly after the close of discovery.

PROCEDURAL BACKGROUND

We briefly review the relevant procedural background in this case to show that Defendants' "sovereign immunity" defense is not just wrong as a matter of law, but is being asserted in bad faith for purely strategic and dilatory reasons. The same facts also show that Defendants would have waived a "sovereign immunity" defense, even if they had one (which they do not).

[1] *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (federal courts retain inherent authority to sanction bad faith litigation conduct); *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). During the 12/8/05 telephonic court conference, the Court observed that Defendants' sovereign immunity claims were not "well taken" and we specifically advised Defendants that Plaintiffs would request sanctions if Defendants continued to press a defense that is clearly precluded by the controlling authority of *Ex parte Young*. We also submit that the present motion is exactly the type of improper "motion for reconsideration" this Court indicated may be worthy of sanctions. 12/8/05 Tr. at 3, 13-14.

Plaintiffs commenced this action on July 28, 2005. The original Complaint sought prospective declaratory and injunctive relief against the Defendants, state officials, solely in their official capacity to address alleged persistent and ongoing constitutional deficiencies in the Ohio elections system.

Defendants did not raise any claim of "sovereign immunity" until November 14, 2005. By that time, Defendants had already:

- Participated in a court conference on August 30, at which discovery and pretrial and trial schedule were discussed and set.
- Filed a motion to dismiss that argued only that Plaintiffs had failed to state cognizable claims for relief, but raised no claim of "sovereign immunity" either as an independent ground for dismissal or coupled with the Defendants' attacks on Plaintiffs' federal claims.
- Sought a stay of discovery at the August 30 conference based on the pending motion to dismiss, but not on any claims of "sovereign immunity."[2]
- Engaged in discussions with Plaintiffs' counsel regarding discovery in early September.
- Provided Rule 26 disclosures on behalf of the Defendants on September 15, 2005.
- Produced documents on a rolling basis in October and November.
- Participated in a telephonic conference with the Court on discovery issues on October 19, 2005.
- Served multiple document requests and interrogatories.
- Served answers to Plaintiffs' interrogatories.
- Noticed and took "merits" depositions of four Plaintiffs and scheduled, but then cancelled, depositions of additional Plaintiffs.

[2] By contrast, during the August 30 conference in the *Rios* case that immediately preceded the court conference in this case, Defendants counsel did raise supposed "11th Amendment" issues but only with respect to the *Rios* case. 8/30/05 Tr. at 14 (Mr. Coglianese: "And before both sides waste a lot of time, money, and effort going through discovery with various county and state officials, it may make the most sense to address the 11th Amendment issue first.").

- Asked for depositions of all Plaintiffs and engaged in extensive discussions with counsel for Plaintiffs on discovery matters as late as November 9 or 10—***after*** the November 8, 2005 Election.

Defendants clearly know that there is no "sovereign immunity" defense here or else they would have asserted it at the outset. Defendants only suddenly sought to assert a "sovereign immunity" defense when Plaintiffs began to bring to the Court's attention the numerous deficiencies in Defendants' document production, Defendants' failure to make witnesses available for deposition, and Defendants' failure to cooperate in discovery. The timing alone obviously suggests that Defendants' real goal is to avoid full and complete discovery in this case and to delay trial to the point that relief cannot be granted before the November 2006 election. Indeed, before hitting on "sovereign immunity" as an avoidance strategy, Defendants had unilaterally halted discovery and cancelled depositions of several Plaintiffs.[3] This further demonstrates that the belated assertion of "sovereign immunity" is an artificial and meritless strategy to avoid discovery – and litigation on the merits. It is particularly galling – indeed, perplexing – that Defendants would resort to such tactics in a case that implicates fundamental constitutional rights and important matters of public interest, and that seeks only to protect Ohio voters and remedy long-standing defects in the Ohio voting process.

Defendants' first failed attempt to make out a "sovereign immunity" defense was their November 14, 2005 proposed "Supplemental" Motion to Dismiss. Relying on a painfully cramped reading of Plaintiffs' Complaint, Defendants claimed that because an election was held on November 8, Plaintiffs' claims for relief were now moot so that Plaintiffs' requests for

[3] To the extent that Defendants actually thought that they had a legitimate claim to "sovereign immunity" – which, under *Ex Parte Young*, they plainly do not – Plaintiffs submit that Defendants, like the defendants in *Ku v. State of Tennessee*, 332 F.3d 431 (6th Cir. 2003), acted in bad faith in that they "had their] fingers crossed behind [their] metaphorical back the whole time." Accordingly, Defendants should be found to have waived any right to claim the benefit of "sovereign immunity." *Id.*

prospective relief somehow were transmuted into requests for retrospective relief in violation of the 11th Amendment. *See* 11/14/05 Motion for Leave to File Supplemental Motion to Dismiss. Although there was never any doubt that Plaintiffs always had been and still were still seeking prospective relief in advance of the November 2006 election (*i.e.* that is why the trial was set for June 2006), the Court immediately granted Plaintiffs' leave to file an Amended Complaint to reassert the request for prospective relief.

Significantly, when the Court granted Plaintiffs leave to file an Amended Complaint – and Plaintiffs represented that that Amended Complaint would be virtually identical to the original Complaint and would seek only prospective relief – Defendants' counsel agreed "philosophically" that "there's no bar to a claim for prospective injunctive relief" under *Ex parte Young*. 11/21/05 Tr. at 3. Yet, despite clear notice of its unavailability as a matter of law, Defendants continued to reserve an 11th Amendment argument. *Id.*

Plaintiffs served their Amended Complaint on November 30, in accordance with the schedule set by the Court on November 21. The Amended Complaint is virtually identical to the original Complaint – it asserts only claims for violations of Plaintiffs' federal statutory and constitutional rights, alleges threat of future injury, and, most importantly, still seeks only prospective relief against Defendants in their official capacities as state officials. The Amended Complaint removes the "next statewide general election" language that Defendants had latched onto in their original mootness/sovereign immunity argument. The Amended Complaint instead reaffirms that Plaintiffs seek relief with respect to all future statewide elections, including the November 2006 election. As such, the Amended Complaint eliminates even the artificial basis for a "sovereign immunity" argument that Defendants constructed.

That Defendants nevertheless persisted in their "sovereign immunity" strategy by filing the present, second motion to dismiss rehashing their already rejected arguments on the merits of Plaintiffs' § 1983 claims only further demonstrates that the supposed "defense" is a transparent attempt to manipulate the procedural rules. What Defendants really want is for this Court to ***deny*** their current motion so that they can claim a supposed "right" to an automatic interlocutory appeal – and strip this Court of jurisdiction over the case, delay discovery, and prevent Plaintiffs from having their claims discovered and tried before the November 2006 election. **As we show below, many other defendants have similarly tried to abuse the special rules governing "sovereign immunity." The courts, including the Sixth Circuit, are well aware of this gambit and have roundly rejected it. We urge this Court to do so as well.

ARGUMENT

I Plaintiffs' Claims Are Not Barred By the 11th Amendment: Plaintiffs Seek Prospective Relief to Remedy Ongoing Violations of Equal Protection and Due Process

Nearly a century ago, the Supreme Court ruled that the 11th Amendment provides no defense to claims like those asserted here: claims (1) against state officials, (2) in their official capacity, (3) premised on alleged failure to comply with federal law, and (4) seeking only prospective relief. *Ex parte Young*, 209 U.S. 123, 159-160 (1908). This bedrock doctrine of federal litigation has been consistently reaffirmed ever since. *See e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (11th Amendment does not bar claims for prospective relief against state officers acting in their official capacity); *Frew v. Hawkins*, 540 U.S. 431, 437; 124 S. Ct. 899, 903 (2004) ("to ensure the enforcement of federal law, the 11th Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law."); *Hutto v. Finney*, 437 U.S. 678, 690 (1978) (11th Amendment does not prevent an award of attorney's fees against State department's officers in their official capacities). As the Sixth Circuit itself

recently confirmed, a suit claiming that a state official's actions violate the U.S. constitution is not barred by sovereign immunity, "so long as the named defendant is sued in his official capacity and the relief sought is only equitable and prospective." *Westside Mothers v. Haveman*, 289 F.3d 852, 860 (6th Cir. 2002); *accord Johnson v. Ohio Dep't of Youth Serv.*, 2003 WL 21479080, *2 (N.D. Ohio 2003) (because plaintiffs sued defendant in her official capacity and sought only prospective injunctive relief, the 11th Amendment did not bar the suit.).

The unwavering doctrine of *Ex parte Young* applies regardless of the federal rights at issue and plainly applies to voting rights cases such as this. *See e.g.*, *Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999) (claims against secretary of state in her official capacity for prospective relief not barred by 11th Amendment regardless of alleged "ancillary" impact on state treasury); *Lawson v. Shelby County*, 211 F.3d 331, 335 (6th Cir. 2000) (district court erred in dismissing case based on sovereign immunity when plaintiffs' claim was for prospective injunctive relief against state and county elections officials in their official capacity).

To determine whether the *Ex parte Young* doctrine applies, a court need only conduct a "'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon v. Public Serv. Commn.*, 535 U.S. 635, 645 (2002). Here, Plaintiffs' allegations clearly satisfy the Supreme Court's "straightforward inquiry": the operative pleading is entitled "Amended Complaint for Injunctive and Declaratory Relief"; the Plaintiffs assert claims for ongoing violations of their federal rights that, they also claim, they reasonably believe will cause them injury in the future absent injunctive relief; the Defendants are state officials sued solely in their official capacities; and the

Prayer for Relief seeks only prospective equitable relief.[4] Thus, by the plain terms of the Amended Complaint, Plaintiffs' claims fall squarely within the *Ex parte Young* exception.

Defendants do not dispute the foregoing articulation of the legal standards established by *Ex parte Young*. Indeed, they concede – as they must – that *Ex parte Young* (and subsequent Supreme Court decisions) permit a federal court to "grant relief that serves directly to bring an end to a present violation of federal law." Motion to Dismiss at 4. Moreover, Defendants do not even attempt to argue that the Amended Complaint fails the "straightforward inquiry" mandated by the Supreme Court.

Defendants' only argument is there is no allegation of an ongoing "violation of federal law" because, Defendants claim, the facts Plaintiffs allege do not amount to an ongoing violation of equal protection or due process. *E.g.* Motion to Dismiss at 5 (arguing "Plaintiffs have simply said that they believe that some bad things happened in the past"), 6 & 10 (mischaracterizing Plaintiffs allegations as relating to mere "election irregularities," "garden variety polling place problems," and "regrettable human errors by local poll workers"). This is nothing more than an improper attempt to bootstrap arguments on the underlying merits of Plaintiffs' claims into a "sovereign immunity" defense.

First, Defendants' maneuver directly contravenes the controlling authority. The Supreme Court has ruled that an inquiry into "sovereign immunity" ***does not include an analysis of the underlying merits of the federal claims***. *Verizon*, 535 U.S. at 646.

Second, in ruling that Plaintiffs do state cognizable claims for relief against these Defendants under § 1983, this Court already specifically rejected the same arguments that

[4] Claims for declaratory relief based on past conduct do not run afoul of the 11th Amendment. *See, e.g., Verizon*, 535 U.S. at 646 (*Ex Parte Young* satisfied where declaratory relief is sought concerning past conduct, but no monetary recovery is sought for past breach). Accordingly, Plaintiffs' request for declaratory relief "adds nothing" to the *Ex Parte Young* analysis. *Id.*

Defendants now try to reassert through their groundless "sovereign immunity" claim. *See, e.g.* December 2, 2005 Order at 4 (recognizing that "LWV contends that defendants' election system provides different voting rights to different citizens based solely on where those citizens happen to reside and vote."); *id.* at 6 (finding that Defendants' efforts to characterize the problems as purely "local" "misconstrue the complaint," which alleges 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.* at 8 (confirming that "complaint explicitly alleges that Secretary Blackwell and Governor Taft acted with "reckless and deliberate indifference and/or willful blindness to the constitutional rights of voters in Ohio.") and *id.* at 10 (concluding that "plaintiffs allege systemic, rather than localized, problems")

Similarly, Defendants' suggestion that there is not an ongoing violation of federal law because the claims are moot is wholly unavailing. A party claiming mootness bears a "heavy burden"; "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 Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 531 (6th Cir. 2001) (quoting *City of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). A case is not moot where the injury complained of is capable of repetition, while evading review. *Id.* The Supreme Court has applied this doctrine in numerous election law cases. *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).

As this Court already has found, Plaintiffs seek injunctive relief to remedy the long-standing, systemic failures and inequities in Ohio's election system that, Plaintiffs allege (1) have injured Plaintiffs and ***thousands*** of other Ohio voters not just in 2004, but for decades and

(2) Plaintiffs reasonably fear will violate their constitutional rights in future elections. Plaintiffs further specifically allege that these Defendants have violated their constitutional rights by acting with "deliberate indifference" and failing to take steps to ensure that every Ohioan entitled and wanting to vote is able to cast an effective ballot. Am. Compl. ¶¶ 185-188.

Between August 2005 and November 9, 2005, nothing changed in terms of what laws apply in Ohio nor how they have been administered by the Defendants that would make it unnecessary for the Court to resolve Plaintiffs' claims. All that has happened is that ***one*** election has occurred.[5] If anything, press reports from the November 2005 election indicate that Defendants have not rectified the failings in the Ohio elections process, which continue to disenfranchise and unduly burden the Ohio electorate. *See, e.g.* Appendix A (Clyde Hughes, *Session on Voters Woes Won't Be Moved*, Toledo Blade, Nov. 16, 2005). More to the point, Defendants clearly have not carried their "heavy burden" to show that the long-history of unconstitutional voting failures in Ohio has, somehow, come to an end and will not recur in the future. To the contrary, Plaintiffs' allegations – which must be taken as true – are that the violations of equal protection and due process continue – and continue to threaten even more injury in the future. *E.g.* Am. Compl. ¶¶ 6, 195-98. Accordingly, the relief Plaintiffs seek is still germane. The matter is neither moot, nor barred by the 11th Amendment.[6]

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[5] Defendants' discussion of still-pending legislation (Motion to Dismiss at 9-10) is irrelevant since the legislation is not even yet Ohio law – and might never be. Appendix A (Jim Provance, *Ohio Election Bill Hits Roadblaock*, Toledo Blade, Dec. 15, 2005). Defendants concede that it is "impossible to predict" whether the pending legislation would have any impact on Plaintiffs' claims here – even if it is enacted. *Id.*

[6] Defendants also try to go beyond the allegations of the Amended Complaint to challenge certain of the Individual Plaintiffs' claims based on deposition testimony. Motion to Dismiss at 12-15. Suffice it to say that the excerpts relied on by Defendants fail to satisfy Defendants' "heavy burden" to show that the threat of future injury alleged in the Amended Complaint for these Plaintiffs (or, indeed, for any Plaintiff) has been eliminated. Whatever inferences

II Defendants' Claims of Sovereign Immunity are Frivolous: The Court Should Make a Certification of Frivolousness to Prevent Further Unwarranted Delay

Where there is a serious dispute over a claim of sovereign immunity, a defendant asserting the defense may seek immediate interlocutory appeal from a denial of a motion to dismiss on 11th Amendment grounds. *See Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). However, because such an appeal may strip the district court of jurisdiction and effectively halt the progress of the case, there is always the risk that a defendant may assert a frivolous "sovereign immunity" defense solely as a strategic maneuver to interfere with the case. *Id.*; *see also Kickapoo Tribe v. Kansas*, 1993 WL 192795, *5 (D. Kan. May 19, 1993) (noting potential for abuse). That is exactly what Defendants seek to do here.

The Courts are not oblivious to this potential for abuse or the havoc that improper assertions of the defense can wreak on a case. *Id.*; *see also Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990) ("[U]nless courts of appeals are careful, [sovereign immunity] appeals . . . could ossify civil rights litigation. Defendants may defeat just claims by making suit unbearably expensive or indefinitely putting off trial"). Nor are they "helpless in the face of manipulation." *Apostol*, at 1335; *see also Behrens v. Pelletier*, 516 U.S. 299, 310 (1996) ("if and when abuse does occur . . . '[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims.'"). Faced with a baseless assertion of "sovereign immunity," a District Court may (in addition to denying the operative motion) certify to the Court of Appeals that an asserted "sovereign immunity" appeal is frivolous; where the certification is made, the district court is not divested of jurisdiction during

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Defendants claim can be drawn from the deposition testimony is a matter to be decided at trial. At this juncture, the allegations of the Amended Complaint must be accepted as true.

the pendency of the groundless appeal. *Id.*; *see also Kickapoo Tribe*, 1993 WL 192795, *5 ("A baseless notice of appeal does not divest the district court of jurisdiction").

The Sixth Circuit recognizes the availability of this certification procedure. *Yates v. City of Cleveland*, 941 F.2d 444, 448-49 (6th Cir. 1991); *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994). To avoid further, unwarranted delay in these proceedings, Plaintiffs request that the Court not only deny the current motion with respect to "sovereign immunity," but also include in its decision a finding and certification that the Defendants' "sovereign immunity" claims are frivolous. In this way, even if Defendants do proceed (at their own risk) to pursue a baseless appeal on "sovereign immunity" grounds, this Court will not be divested of jurisdiction and Plaintiffs will be in the strongest position to expedite any proceedings on appeal.

III There is No Basis for Reconsideration of the Court's December 2, 2005 Rulings

The remainder of Defendants' motion improperly seeks to reargue matters that this Court rejected in its December 2, 2005 Order. Motion to Dismiss at 11 (reasserting rejected argument that Plaintiffs fail to state a claim for violation of the 14th Amendment), 15 (reasserting rejected argument that Defendants have no responsibility for the conduct of elections by local election workers), and 18 (reasserting rejected argument that the organizational plaintiffs lack standing).[7] Defendants have no basis for a "second bite at the apple."

[7] The Court already accepted Defendants' argument (Motion to Dismiss at 13) that Plaintiffs' claim under the Help America Vote Act ("HAVA") was premature when brought. December 2, 2005 Order at 12. Plaintiffs reserve the right to pursue their HAVA claim in the future. Defendants also argue that Plaintiffs' claims are barred by the two year statute of limitations. Motion to Dismiss at 18. Defendants raised the same "statute of limitations" argument in their first motion to dismiss (Original Motion to Dismiss at 21) and it was, therefore, rejected when the Court ruled that Plaintiffs have alleged cognizable claims under § 1983. The argument is groundless in any event; Plaintiffs plainly allege an ***ongoing*** violation of their constitutional rights and rely on the long history of such violations in Ohio as evidence of the magnitude of the violations, their continuing nature, Defendants' inexcusable inaction and indifference, and the resulting need for injunctive relief from this Court.

Defendants reliance on *Klyce v. Ramirez*, 852 F.2d 568 (6th Cir. 1988) for the proposition that the original complaint becomes moot upon filing of an amended complaint is misplaced – and simply misses the point. What matters here are the Court's December 2, 2005 rulings on what is sufficient to state a claim for relief under § 1983 against these Defendants. As we show in the accompanying opposition to Defendants' § 1292(b) Motion, this Court's December 2, 2005 Order recognizing Plaintiffs' § 1983 claims was firmly grounded in (a) the requirements of Fed. R. Civ. P. 12(b)(6) (*i.e.* accepting Plaintiffs' factual allegations as true and construing them in Plaintiffs' favor) and (b) decades of Supreme Court and Sixth Circuit (and other) authority recognizing Plaintiffs' claims under the 14th Amendment and § 1983. The law on these issues has not changed and the allegations in the Amended Complaint are virtually ***identical*** to the allegations of the original complaint – except to make even clearer that Plaintiffs seek prospective relief with respect to ***all*** future elections based on Defendants' on-going unlawful conduct. There is no reason why the earlier rulings are not fully applicable to the Amended Complaint.

Where, as here, a purported motion to dismiss an amended complaint merely repeats arguments already made and rejected with regard to the original complaint, it is deemed a motion for reconsideration. *Wrench LLC v. Taco Bell Corp.*, 36 F. Supp. 2d 787, 789 (W.D. Mich. 1998). Defendants make no effort to satisfy the "heavy burden" they bear on a motion for reconsideration. *Id.* (defendant seeking reconsideration of earlier motion to dismiss bears burden to show a "palpable defect" in earlier ruling and that a different result would be obtained from a

correction of the asserted mistake). Nor could they. Accordingly, the Court should reject Defendants' improper attempts to revisit these same arguments in the present motion.[8]

IV Defendants are Not Entitled to a Stay of Discovery

The sole basis for Defendants' Motion for Stay of Discovery is their meritless claim of "sovereign immunity." Because sovereign immunity has no application to this case, Defendants are not entitled to a stay of discovery and their motion should, therefore, be denied.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court:

(1) deny Defendants' motion to dismiss to the extent it is based on a claim of "sovereign immunity"; (2) find and certify that Defendants' assertions of "sovereign immunity" under the 11th Amendment are frivolous and that any appeal of the Court's denial of Defendants' motion would be baseless and should not delay the progress of this case; (3) deny Defendants' motion to the extent it seeks to reargue issues raised in rejected in the December 2, 2005 Order on Defendants' original motion to dismiss (or, alternatively, affirm that the rulings made in the December 2, 2005 Order apply to the Amended Complaint and, therefore, that Plaintiffs state cognizable claims for relief under § 1983); (4) deny Defendants' request for a stay of discovery; and (5) direct Defendants to proceed forthwith with discovery in this case on the schedule set at the August 30, 2005 Court Conference, beginning with a teleconference on outstanding discovery issues (as set forth in Plaintiffs' December 1, 2005 report to the Court) to be held at the Court's earliest convenience. A proposed order is provided.

Respectfully submitted,

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[8] To the extent the Court permits Defendants to renew any of their already rejected Fed. R. Civ. P. 12(b)(6) arguments, Plaintiffs incorporate by reference their Opposition to Defendants' Motion to Dismiss/Transfer venue (dated September 19, 2005) and ask that the Court once again reject Defendants' arguments for dismissal.

January 5, 2006

/s/ Jon M. Geenbaum
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
Jon M. Greenbaum
Benjamin J. Blustein
Jonah H Goldman
1401 New York Avenue, NW, Suite 400
Washington, DC 20005
(202) 662-8600 (phone)
(202) 268-2858 (fax)
jgreenbaum@lawyerscomm.org
bblustein@lawyerscomm.org
jgoldman@lawyerscomm.org

/s/ Jennifer R. Scullion
PROSKAUER ROSE LLP
Bert H. Deixler
Bertrand C. Sellier
Caroline S. Press
Jennifer R. Scullion
1585 Broadway
New York, NY 10036
(212) 969-3600 (phone)
(212) 969-2900 (fax)
bdeixler@proskauer.com
bsellier@proskauer.com
cpress@proskauer.com
jscullion@proskauer.com

/s/ John A. Freedman
ARNOLD & PORTER LLP
James P. Joseph
John A. Freedman
Anne P. Davis
555 Twelfth Street, NW
Washington, DC 20004-1206
(202) 942-5000 (phone)
(202) 942-5999
James_Joseph@aporter.com
John_Freedman@aporter.com
Anne_Davis@aporter.com

/s/ Steven P. Collier
CONNELLY, JACKSON & COLLIER
Steven P. Collier (0031113)
Jason A. Hill (0073058)
405 Madison Avenue
Suite 1600
Toledo, OH 43604
(419) 243-2100 (phone)
(419) 243-7119 (fax)
scollier@cjc-law.com
jhill@cjc-law.com

NATIONAL VOTING RIGHTS INSTITUTE
Brenda Wright
27 School Street, Suite 500
Boston, MA 02108
(617) 624-3900
bw@nvri.org

PEOPLE FOR THE AMERICAN WAY FOUNDATION
Elliot M. Minchberg
Deborah Liu
2000 M Street, Suite 400
Washington, DC 20011
(202) 467-2382

LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
Robert Rubin
131 Stuart Street, Suite 400
San Francisco, CA 94105
(415) 543-9444

ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
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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 January 5, 2006, a copy of foregoing Opposition of Plaintiffs to Defendants' Motion to Dismiss the Amended Complaint and Motion for a Stay of Discovery, including 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.

January 5, 2006

/s/ Jennifer Scullion

PROSKAUER ROSE LLP
1585 Broadway
New York, NY 10036
(212) 969-3600 (phone)
(212) 969-2900 (fax)
jscullion@proskauer.com