UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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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,<br><br>Plaintiffs,<br><br>v.<br><br>J. Kenneth Blackwell, Secretary of State of Ohio and Bob Taft, Governor of Ohio,<br><br>Defendants. | ) | Case No. 3:05-CV-7309<br><br>Hon. James G. Carr |

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'**

**MOTION TO DISMISS/TRANSFER VENUE**

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Plaintiffs submit this memorandum in opposition to Defendants' Motion to Dismiss or, In the Alternative, Motion to Transfer Venue ("Def. Mem."). Plaintiffs respectfully submit that both motions should be denied.

**PRELIMINARY STATEMENT**

Plaintiffs' Complaint ("Cmpl.") sets forth, in more than sixty pages of exceptionally detailed, factual allegations, the long history showing that the right to vote in Ohio is repeatedly and routinely denied by a patently unfair, dysfunctional, and ultimately arbitrary voting process. Plaintiffs allege that these facts demonstrate "widespread, serious, and deeply-rooted failings at the most basic levels in Ohio's voting system" for which these Defendants – the state's Chief Election Officer and Chief Executive Officer — are responsible. Cmpl. ¶¶ 6-7. The impact of these failings is alleged to be equally serious – impairing the right to vote of **more than 25% of Ohio voters** in 2004 alone. Cmpl. ¶ 78.

Plaintiffs do not seek to recount the votes or challenge the results of any past elections. Plaintiffs seek prospective relief to require Defendants to put in place a competent and fair voting system as required by the Constitution and federal voting rights laws to ensure that every Ohio resident eligible to vote can do so on fair and equal terms and that each eligible vote is fairly and equally counted – no matter where or how it is cast. Cmpl. ¶ 8. As this Court has previously observed:

> Having every ballot cast by every eligible voter is [] of fundamental importance. Where persons who are eligible to vote lose faith that their ballot will count, they will conclude that voting does not matter. They may decline to exercise the franchise, thereby giving up the most fundamental right of our democracy as completely as if it had been taken from them forcibly. Loss of faith in the efficacy of the individual ballot can also erode public confidence in the integrity of elections and the validity of their outcomes.

*League of Women Voters v. Blackwell,* 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004). Plaintiffs allege that, absent equitable relief from this Court, Defendants will continue to ignore their legal

obligations and stand by – as they have for decades – while the fundamental rights to vote and to equal protection continue to be denied to the Ohio electorate.

Notwithstanding Defendants' efforts to mischaracterize or dispute Plaintiffs' claims, Plaintiffs' allegations must be taken as true for purposes of deciding Defendants' motion. The detailed Complaint here more than satisfies the notice pleading requirements of Fed. R. Civ. P. 8 and plainly alleges cognizable claims for violation of federal constitutional and statutory voting rights. Plaintiffs do not seek a "perfect" election process. But they have the fundamental constitutional right to a fair and equitable one. Defendants' arguments about "the truth" of elections in Ohio will be the subject of proof on the merits at the appropriate stage. They are not a basis to dismiss the Complaint under Rule 12(b)(6).

Defendants claim that they are not responsible for and have "no control" over any of the myriad wrongs that plague Ohio's voting system. These, they say, are the sole responsibility of the 88 county boards of elections ("BOEs"). Defendants are wrong: as the Chief Elections Officer and Chief Executive Officer of Ohio, it is **Defendants'** affirmative duty to direct and ensure the lawful, equitable "conduct of elections" by the BOEs – who are appointed by and serve at the direction and under the control of the Secretary. Under the 14th Amendment, state officials may not discharge their duties by purportedly delegating them to others. Indeed, Defendants' "not me" argument is exactly the complete abdication of responsibility that Plaintiffs allege is corrupting the fundamental right to vote in Ohio. It is for these Defendants to fulfill their duties and exercise their authority to secure that right.

Finally, Defendants advance no legitimate basis to transfer this case to Defendants' preferred venue, the Southern District. Accordingly, both motions should be promptly denied.

## PLAINTIFFS' ALLEGATIONS

Even a cursory review of the 60 plus pages of the Complaint puts the lie to Defendants' repeated, erroneous claim that Plaintiffs' allegations are "conclusory." "Heightened" or "evidentiary" pleading is not required under Fed. R. Civ. P. 8. *Infra* at 13-14. Nonetheless, it cannot be overlooked that, as stated in the Complaint itself, these detailed factual allegations – which are presumed true for purposes of this motion – are based on the all too real experiences of the fifteen Individual Plaintiffs and the officers and members of two leading Ohio voting rights organizations – the League of Women Voters of Ohio ("LWVO") and the League of Women Voters of Toledo-Lucas County (the "Toledo League"). Cmpl. ¶¶ 9, 10, 12-26. The Complaint also cites the "thousands of voter complaints to public officials and voting rights organizations," "testimony at public hearings," the reported results of "two Congressional investigations," and the public reports and statements of Defendants and their appointees that document the decades-old, systemic failings of Ohio's voting system and the resulting, widespread, repeated denials of the fundamental right to vote to thousands of Ohioans. *E.g.* Cmpl. ¶ 6, 156, 157, 167, 188.[1]

We summarize here the allegations that Defendants ignore or grossly mischaracterize.

### A. Allegations of Systemic Failings in the Basic Administration of Voting Throughout Ohio

The Complaint includes more than **twenty pages** of detailed factual allegations attesting to the arbitrary and unreasonable burdens that Ohio voters faced at every step in the voting process in November, 2004, including:

- Failure to register voters that submitted timely, valid voter registrations. Cmpl. ¶ 51.
- Erroneous purging of voters from the voting rolls or placing them on "inactive" lists despite voting regularly for years or even decades. Cmpl. ¶¶ 22, 55.

[1] As part of the expedited discovery process directed by the Court, Plaintiffs will be providing copies of non-privileged documents on which Plaintiffs base their allegations.

- Failure to provide absentee ballots in a timely manner or, in some cases, at all, despite the submission of timely, valid requests for absentee ballots and, in many cases, repeated requests. Cmpl. ¶¶ 16, 68-77.
- Improperly closed or non-functioning polling places. Cmpl. ¶¶ 84-89, 120.
- Failure to keep polling places open for the full voting day. Cmpl. ¶ 120.
- Lines anywhere from two to more than nine hours long. Cmpl. ¶¶ 103, 107.
- Woefully inadequate number of voting machines to accommodate the expected voter turnout. Cmpl. ¶¶ 21, 90-121.[2]
- Broken and malfunctioning machines. Cmpl. ¶¶ 21, 23, 25, 122.
- Incorrect instructions on how or where to cast a valid ballot. Cmpl. ¶¶ 12, 124.
- Incorrect instructions on how or where to cast a valid provisional ballot. Cmpl. ¶¶ 12, 15, 17-20, 22, 130-134, 136, 142.
- Failure to provide provisional ballots when required and, conversely, encouraging improper and invalid use of provisional ballots. Cmpl. ¶¶ 12, 18-20, 22, 135-36, 142.
- Polling places housing multiple precincts, but lacking minimally adequate rules or procedures to ensure that voters were casting ballots – especially provisional ballots – in the correct precinct within the polling place. Cmpl. ¶¶ 12, 15, 17-20, 22, 132-134.
- Invalidating provisional ballots through erroneous processing and instructions. Cmpl. ¶¶ 12, 15, 17-20, 22, 131-136, 142.
- Failure to accommodate disabled voters. Cmpl. ¶¶ 13, 14, 26, 144-46.
- Polling places that literally ran out of ballots. Cmpl. ¶ 131.
- Polling places that closed early. Cmpl. ¶ 120.
- Local officials and workers refusing to permit all voters in line as of 7:30 p.m. to vote or arbitrarily cutting off lines at the door to the polling place, disenfranchising those in line outside. Cmpl. ¶ 120.

As discussed below (*infra* § D), the Defendants are legally responsible for ensuring the proper, equitable conduct of elections in each Ohio county. The obstacles to voting summarized above were not mere isolated irregularities, as Plaintiffs allege. Cmpl. ¶ 6. Based on voluminous voter complaints, public reports, and public testimony from voters, poll workers, and election observers, **thousands** of eligible voters in numerous counties throughout Ohio,

[2] Plaintiffs specifically allege, based on the Secretary's own press releases and other public statements, that the level of voter turnout in November 2004 was fully anticipated. Cmpl. 90,178.

including Plaintiffs, were prevented from voting entirely or forced to endure severe burdens to vote. Cmpl. ¶¶ 11-26, 67. For example:

- Plaintiffs allege that, "[i]n Cuyahoga County alone, it has been estimated that more than 10,000 people likely were disenfranchised in November 2004 due to failures to timely and properly process their registrations"; Plaintiffs allege that thousands more likely were disenfranchised specifically by the Secretary's illegitimate and changing rules and standards for voter registration. Cmpl. ¶ 67.
- Plaintiffs allege that upwards of 10,000 people were disenfranchised just by the unreasonably long lines at polling places throughout the state. Cmpl. ¶¶ 114, 115. Many voters, like Individual Plaintiff Ms. Stewart, were physically unable to wait in such long lines. Cmpl. ¶¶ 114, 115. Others were forced to leave to keep their jobs or to attend to children. Cmpl. ¶¶ 116.
- Plaintiffs allege that thousands of Ohio voters also encountered severe burdens in trying to locate or cast ballots at the polling place. Cmpl. ¶¶ 78. Plaintiffs' allegations are based, in part, on a recent study that found that **twenty six percent (26%)** of Ohio voters experienced polling place problems on election day. *Id.*
- Plaintiffs cite testimony that the failure to timely open one polling place in Franklin County disenfranchised hundreds of voters who were "forced to leave because they needed to be at work, needed to be at school, or they needed to take their children to school." Cmpl. ¶ 88

Plaintiffs allege that the sheer repetition and scope of the impact of the breakdowns in Ohio's voting system amply demonstrate that the burdens on Ohio voters are systemic both in nature and cause. Cmpl. ¶ 6. Plaintiffs allege that the nature and scope of these failings is so egregious as to unconstitutionally deny and burden the fundamental right to vote in Ohio. *E.g.*, Cmpl. ¶¶ 41, 43, 46, 48, 147, 186-91.

B. Allegations of the Non-Uniform and Arbitrary Administration of Voting in Ohio

Plaintiffs further allege that Ohio voters are denied equal protection with respect to their right to vote. As detailed in the Complaint, the voting system in Ohio is so lacking in basic, standardized rules and procedures for the proper conduct of elections that the rules and processes – and the burdens – that a voter faces vary dramatically from county to county and precinct to precinct. *E.g.*, Cmpl. ¶¶ 44, 48, 49, 54, 70-72, 80, 81, 91, 92, 124, 130. Plaintiffs allege the

"errors" are so pervasive as to be indicative of **general**, but unlawful, rules and processes adopted in certain jurisdictions, but not others. *E.g.*, Cmpl. ¶¶ 2, 6, 171, 177, 180.

For example, Plaintiffs specifically allege that: (1) counties employed wildly different rules and processes with respect to voter registration (Cmpl. ¶¶ 61-66); (2) different counties and precincts interpreted and applied the rules for disabled voter accommodation differently (Cmpl. ¶ 124); (3) counties established different requirements with respect to voter identification (Cmpl. ¶ 124); (4) different precincts imposed different limits on the time each voter had to cast a ballot (Cmpl. ¶ 124); (5) different precincts followed different rules concerning assisting voters with machines; (6) different precincts followed different rules and procedures with respect to provisional balloting (Cmpl. ¶¶ 131-32); and (7) different counties and precincts applied different standards to determine whether a voter was considered "in-line" as of 7:30 p.m. and, therefore, eligible to vote (Cmpl. ¶¶ 120-21).

Plaintiffs also allege that there are wide disparities in the voting facilities themselves from county to county and precinct to precinct. Cmpl. ¶ 91. Plaintiffs allege that:

- The ratio of voting machines to voters varies widely among the counties. In November, 2004, some counties averaged 70 voters per machine, while others averaged more than twice that amount. Cmpl. ¶ 110.
- Disparate treatment also occurs at the precinct level, where ratios in November, 2004 ranged from 56 to 500 voters per machine – a nearly **ten-fold** variation. Cmpl. ¶ 111.
- Particularly when compounded with other, multiple breakdowns in training, instructions, and equipment, the dramatically different ratios of machines to voters means that voters in different jurisdictions are subject to materially different burdens in exercising the right to vote. *E.g.*, Cmpl. ¶¶ 91, 95, 96, 98, 110. Thus, in 2004, voters in some precincts are in and out in minutes, while others were forced to wait in line anywhere from two to more than nine hours to vote. Cmpl. ¶¶ 103, 107. Plaintiffs allege that unreasonably long lines not only burden the right to vote generally, but impose a particularly severe burden on cognizable classes of voters such as the elderly, the disabled, and voters with young children. Cmpl. ¶¶ 113, 114.
- Voters also face substantially different burdens depending on how many precincts are housed in their polling place. The Complaint alleges in detail the facts demonstrating that voters assigned to polling places containing multiple precincts are subject to

substantially more burdensome and confusing rules and procedures and that, as a result, voters in such precincts are peculiarly at risk of allegedly "inadvertent" disenfranchisement. *E.g.*, Cmpl. ¶¶ 12, 13, 134, 135.

- There are no uniform, let alone reasonable, standards for allocating machines. Some precincts had only half as many machines available in November 2004 as in prior elections, while others precincts (within the same county) had many more than in the past. Cmpl. ¶ 95. The glaring disparities in the ratio of machines to voters in different locales means that the burdens on voters vary, arbitrarily, from one jurisdiction to the next. *E.g.*, Cmpl. ¶¶ 91, 95, 96, 98, 110.

Again, only these Defendants, not the individual counties, are responsible for and have the legal power to ensure uniformity of rules and processes among the counties. *See infra* § D.

C. Allegations of the Long History of Disenfranchisement and Failure to Protect the Fundamental Right to Vote in Ohio

Plaintiffs allege that "[t]he failings of Ohio's voting system are not new," but instead have been "well-known to Defendants and their predecessors since at least the early 1970's." Cmpl. ¶ 4. Accordingly, Plaintiffs allege that the recent breakdowns in November 2004 are "the predictable result of longstanding inadequacies in Ohio's voting system that have disenfranchised and severely burdened countless Ohio voters over the years." Cmpl. ¶ 147. The Complaint details:

- Specific, repeated instances over the course of the last decade of thousands of Ohio voters being disenfranchised in numerous counties by similar "problems," including failure to maintain accurate voting rolls, improper "purging" of voters from the rolls, failure to provide working voting machines or sufficient numbers of ballots, and failure to process properly cast ballots. *E.g.*, Cmpl. ¶¶ 148, 152, 153.

- A 1994 investigation by then-Secretary Taft demonstrating Ohio's voting system was chronically plagued by the basic failure to timely hire and adequately train poll workers. Workers testified that they had had no training at all or had not been trained for years. Officials conceded that the chronic shortage of workers resulted in untrained, first-time workers and unfilled positions. Cmpl. ¶¶ 155, 156.

- The admission by then-Secretary Taft in 1996 that properly trained poll workers are essential to a fair and orderly election, followed by repeated examples in 1996 and 1998 of the lack of adequate systems for or oversight of this admittedly key element of a minimally functioning voting system. Cmpl. ¶¶ 157, 158.

- The similar conclusion in 2001 – by a panel of election administration officials convened by the Secretary – that Ohio's voting system continued to lack the basic element of reliable, trained election workers. Cmpl. ¶ 159.

- The Secretary's testimony in 2001 before a U.S. Senate committee concerning the need for reform in Ohio's voting and election process, including his admission that "Ohio's election process has been under-funded for far too long." Cmpl. ¶ 163.

- Elections officials in multiple counties being removed from office in 2000, 2001, and 2005 after severe, documented breakdowns in the voting process. Cmpl. ¶ 167.

- Election processes in multiple counties being placed under heightened supervision by the Secretary's office after it was revealed that the processes in those counties were in shambles. Cmpl. ¶ 167.

- A recent investigation of the Lucas County election process that revealed thirteen areas of "grave concern". Cmpl. ¶¶ 7, 173. Among other things, the investigation (conducted by the Secretary's office) found that officials failed to "prepare and develop a plan for the processing of the voluminous amount of voter registration forms received" such that thousands and thousands of registration forms were being rushed through a haphazard and incompetently supervised system days before the November 2004 election. Cmpl. ¶ 173.

The foregoing are only the most recently documented examples of the breakdowns in Ohio's voting system. The Complaint further cites a 1973 U.S. GAO Report identifying major breakdowns in elections in Hamilton, Cuyahoga, and Summit Counties in 1971 and 1972, including: (1) the disenfranchisement of thousands of voters because dozens of precincts never opened or opened only very late in the election day; (2) failure to deliver adequate numbers of voting machines to precincts; (3) misprogramming of vote counting machines; (4) distribution of incorrect ballots; (5) lack of adequate staffing to administer the process; and (6) failure to train poll workers, resulting in massive confusion and delay at the polls. Cmpl. ¶ 149.

The 1973 GAO Report unhesitatingly concluded that "the election process broke down completely" in at least one county and that the pervasive nature of the failings in Ohio's voting system were symptomatic of an underlying failure to promulgate uniform standards, rules, and procedures, as well as the failure to provide adequate funding, staffing, and training. Cmpl. ¶¶ 4,

150. Of critical importance here is that these are the same fundamental problems that, Plaintiffs allege, continue to plague Ohio's voting system to this day – and that continue to regularly deny the vote to thousands of Ohioans in every election. Cmpl. ¶ 150; *see also* Cmpl. ¶¶ 3, 6, 9-11.

D. Allegations that Defendants Have Failed to Carry Out their Duties to Protect the Fundamental Right to Vote in Ohio

Defendants' false mantra notwithstanding, Plaintiffs **do not seek to hold Defendants liable on a respondeat superior theory**. *See infra* at III. Nor are Plaintiffs seeking to remedy "some mistakes" by "some local officials." Def. Mem. at 5. Rather, Plaintiffs allege that the myriad, chronic, and widespread failings of Ohio's voting system are the inevitable result of a much more fundamental, systemic failure to ensure the lawful, fair, and equitable administration of Ohio's voting system. Cmpl. ¶ 6, 7, 125, 137, 183, 191. Plaintiffs allege that, in their respective roles as the Chief Elections Officer and Chief Executive of Ohio, the Secretary and Governor have the **direct** duty and authority to ensure the lawful, even-handed administration of the voting and election processes in Ohio. Cmpl. ¶ 28, 31-34, 37.

The Secretary is the Chief Elections Officer. In that position, he oversees and controls the entire election process in Ohio. Cmpl. ¶ 28. The scope of the Secretary's power to control the "conduct of elections" is plenary. He not only appoints the BOEs (O.R.C. § 3501.05(A)), but literally writes the instructions and rules to tell BOEs and, in turn, pollworkers, how to carry out elections. Ohio law broadly provides that the Secretary "shall" "issue instructions by directives and advisories to members of the boards as to the proper methods of conducting elections" and "prepare rules and instructions for the conduct of elections." O.R.C. § 3501.05(B), (C); *see also* Cmpl. ¶ 34. 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 reimburses BOEs for such training. O.R.C. § 3501.27.

Section § 3506.15 of the Ohio Code, which Defendants ignore, further provides that the Secretary "shall . . . provide each board of elections with rules, instructions, directives, and advisories" regarding all manner of election details, including "the examination, testing, and use of the voting machine and tabulating equipment, the assignment of duties of booth officials, the procedure for casting a vote on the machine, and how the vote shall be tallied and reported . . . ." The Secretary's broad powers to oversee and instruct the "conduct of elections" extend to even the smallest details. *E.g.* , O.R.C. § 3501.30(B) (boards of election "shall follow the instructions and advisories of the secretary of state in the production and use of polling place supplies").

The Secretary has similarly broad powers over voter registration. The Secretary "shall prescribe . . . the form of registration cards . . . **and records**" (O.R.C. § 3501.05(F) (emphasis added)), as well as programs "to remove ineligible voters from official registration lists by reason of change of residence," "for registering voters or updating voter registration information, such as name and residence changes, at designated agencies" and for "distribution of voter registration forms" through specified venues. O.R.C. § 3501.05(Q), (R). The BOEs must "maintain voter registration records, make reports concerning voter registration as required by the secretary of state, and remove ineligible electors from voter registration lists in accordance with law and directives of the secretary of state." O.R.C. § 3501.11(U). Concomitantly, the Secretary must "prescribe by directive the schedule and format by which boards of elections must submit accurate and current lists of all registered voters in their counties" and maintain "a master file of all registered voters" in Ohio. O.R.C. § 3503.27.

BOEs are required to comply with lawful instructions and directives issued by the Secretary. O.R.C. § 3501.11. The Secretary also has the power to remove and replace any BOE official for any good cause. O.R.C. § 3501.16.

Finally, as the Chief Elections Officer, the Secretary is charged with ensuring that the voting process in Ohio is lawful. Ohio law is plain: the Secretary "shall" "compel the observance by election officers in the several counties of the requirements of the election laws." O.R.C. § 3501.05(M); *see also Sandusky County Dem. Party v. Blackwell*, 340 F. Supp. 2d 815, 817 (N.D. Ohio 2004) ("*Sandusky*") (Secretary's duty "to instruct Ohio's election officials about their obligations under federal law"). The Secretary likewise has an affirmative duty to "investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of elections laws." O.R.C. § 3501.05.

In sharp contrast to his "no control" claim here (Def. Mem. at 2), Plaintiffs allege that the Secretary has exercised his broad powers to control the elections process at the local level, although only when it has suited his purpose. For example, Plaintiffs allege that "[t]he Secretary has exercised his broad authority to regulate the election process in Ohio by, among other things, issuing numerous, detailed directives to the state and county election officials on nearly every aspect of that process and by assuming administrative oversight over and removing (or recommending the removal of) boards of elections members in at least six Ohio counties since 2000." Cmpl. ¶ 35; *see also* Cmpl. ¶ 61-67, 167-68. Indeed, in *Sandusky*, 340 F. Supp. 2d at 822, this Court found that it was the duty of the Secretary "to see to it that Ohio's election officials are accurately and fully instructed on their duties, so that they can perform those duties efficiently and effectively." *See also id.* at 817 (Secretary's "job" includes instructing pollworkers on proper conduct of provisional balloting under federal law). As Plaintiffs allege – and as this Court readily understood in *Sandusky* – the failure by the state's Chief Elections Officer to provide clear, uniform, and timely instructions on the proper conduct of elections leads to confusion and massive disenfranchisement. *Id.* at 817-22.

The Secretary's claim here that issues such as the allocation of voting machines and the hiring and training of pollworkers are somehow purely "local" issues (Def. Mem. at 2, 9) similarly flies in the face of the Secretary's unbounded duty and power to direct local officials on the "proper **methods** of conducting elections" and on "the conduct of elections" generally. O.R.C. § 3501.05(B), (C) (emphasis added). It also cannot be squared with Defendants' own admission that the allocation of machines has been claimed to be a **state** level issue in other litigation. *See* Def. Mem. at 14-15 (state intervened in action against local county boards of elections to assert counterclaims concerning the proper allocation of voting machines).

Defendants' claim that the Governor "is **merely the supreme executive power** of the State of Ohio" (Def. Mem. at 8) (emphasis added) is oxymoronic at best. It is even more perplexing as a denial of legal responsibility in a case seeking prospective relief to compel compliance with federal law. *See cases cited infra* at 22-25 (state executive officers are proper and only necessary parties to actions for injunctive relief under § 1983). The Governor is the Chief Executive Officer of the state in whom ultimate executive authority is vested. Cmpl. ¶ 37. He has final responsibility for the proper execution of all laws and the corresponding power to require subordinate executive officials to report to him regarding the proper discharge of their duties. Ohio Const. Art III §§ 5-6. He is sued here to ensure that Plaintiffs are able to obtain complete and effective relief in the event that any aspect of the voting process in Ohio is found to be beyond the broad powers of the Secretary. *Infra* at 22-24.

## ARGUMENT

### I The Legal Standards Applicable to a Motion to Dismiss

The federal rules embody a "liberal" "notice pleading" standard. *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002). A plaintiff is not required "to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Rather, Rule 8(a) requires

only "a short plain statement of the claim showing that the pleader is entitled to relief." *Id.* This requirement is satisfied by "fair notice of what the plaintiffs' claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512 (even conclusory allegations of discrimination sufficient to allege employment discrimination); *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (fair notice of essential elements of § 1983 claim is sufficient); *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850 (6th Cir. 2001) (impaired "major life activity" need not be specified).

In view of the "simple requirements of Rule 8(a)," the Court's task on a motion to dismiss "is necessarily a limited one." *Swierkiewicz*, 534 U.S. at 511. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 514. The court must construe the complaint in the light most favorable to Plaintiffs and accept all of the factual allegations and permissible inferences from the allegations as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (reversing dismissal of employment discrimination claim). Every complaint "shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f).

Rule 8(a) prohibits "heightened" pleading requirements, particularly in civil rights cases. *Swierkiewicz*, 534 U.S. at 512-14; *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 168-69 (1993). The Sixth Circuit has specifically cautioned against dismissal of civil rights claims on the pleadings. *Duncan v. Byrd*, 840 F.2d 359, 361 (6th Cir 1988) ("[d]ismissals of complaints under the civil rights statutes are scrutinized with special care"; reversing dismissal); *Lawler*, 898 F.2d at 1199 (Rule 12(b)(6) does not countenance dismissals based on a disbelief of factual allegations).

As shown below, Defendants' motion misreads the underlying voting rights law. Worse still, it improperly asks this Court to ignore Plaintiffs' actual allegations and, instead, to construe

the Complaint in **Defendants'** favor based on the Defendants' selective and self-serving reading of the allegations. Applying the proper legal standards, taking the allegations of the Complaint as true and construing it in **Plaintiffs'** favor – as required by Rule 12(b)(6) – it is clear that the Complaint states claims for relief. Therefore, Defendants' motions should be denied.

## II Plaintiffs Allege Cognizable Claims Under § 1983 for Violations of the 14th Amendment With Respect to the Fundamental Right to Vote

To state a claim under § 1983, a party must allege only two basic elements: (1) deprivation of a federal constitutional or statutory right, (2) by a person acting under color of law. *Duncan*, 840 F.2d at 361-62; *Lawler*, 898 F. 2d at 1199. Plaintiffs allege more than enough facts to state cognizable claims for violations of both the Equal Protection and the Due Process clauses for impairment of the fundamental right to vote.[3]

### A. Plaintiffs Allege Facts Establishing a Violation of Equal Protection with Respect to the Fundamental Right to Vote

The core of the fundamental right to vote "lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000). "One man, one vote" has been a foundational tenet of voting rights jurisprudence for at least forty-plus years. *Baker v. Carr*, 369 U.S. 186 (1962). The constitutional right to equal protection of the fundamental right to vote is violated not just by intentional discrimination based on class, but also by the "arbitrary and disparate treatment" of voters in different geographic jurisdictions within a state. *Bush*, 531 U.S. at 105-06.

As *Bush* further confirmed, it is not enough for a state to claim – as Defendants do here – that state law allegedly provides equality at an abstract level. The fair and equal protection of the

[3] Other than to generally deny responsibility for the events and injuries alleged in the Complaint, Defendants do not dispute that Plaintiffs have adequately alleged that Defendants have acted under color of law. Cmpl. ¶¶ 3, 203, 205, 208, 210, 212. Defendants also do not address at all Count Three of the Complaint, which alleges a violation of Procedural Due Process. Cmpl. ¶¶ 209-10.

right to vote requires an understanding of how local officials and workers actually carry out the election process in the field. *Id.*

> 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.

*Id.* (emphasis added). In *Bush*, the Court found that Florida's recount process violated equal protection because different counties – and, indeed, different "teams" within individual counties – were using different standards to determine the "intent of the voter." *Id.* Like this Court in *Sandusky*, the Supreme Court readily recognized what Defendants blithely ignore – that clear, specific, and uniform instructions on the practical application and implementation of elections laws are "necessary" to ensure equal protection of this most fundamental right. *Id.* at 106. "**The problem adheres in the absence of specific standards to ensure . . . equal application**" of abstract laws and principles. *Id.* (emphasis added); *accord Sandusky*, 340 F. Supp. 2d at 817-22 (faulting Secretary for failing to provide local officials with clear, precise, and practical directions concerning provisional balloting). Thus, the Court held "[t]he formulation of uniform rules . . . is practicable and, we conclude, necessary," and "[t]he want of those rules has led to unequal evaluation of ballots . . . ." *Bush*, 531 U.S. at 106.

Here, Plaintiffs similarly allege that Ohio's voting system violates Equal Protection because a voter is subject to arbitrary and irrational differences in rules, processes, and burdens depending solely on where the voter happens to reside. Cmpl. ¶ 2. Plaintiffs allege that, in complete abdication of their responsibilities under state law, Defendants have knowingly allowed the voting processes 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." Cmpl. ¶ 49. Plaintiffs further allege that Defendants also knowingly permit wide

variations among jurisdictions in the allocation of voting machines and training of election personnel. Cmpl. ¶ 125. The alleged cumulative effect of these geographic variations is that "the likelihood of being disenfranchised, was substantially — and arbitrarily — determined by where a voter happened to live." Cmpl. ¶ 112; *see also* Cmpl. ¶¶ 11-26 ("likelihood of being disenfranchised [is] materially greater" in jurisdictions where Individual Plaintiffs reside).

As shown above – and contrary to Defendants' assertion – Plaintiffs allege ample, specific facts demonstrating the non-uniformity of the voting rules and processes in Ohio. Defendants' view that the allegations reflect only local "errors" is nothing more than an attempt to construe the Complaint in their own favor. Rule 12(b)(6) requires the exact opposite. Crediting Plaintiffs' allegations and construing the Complaint in **Plaintiffs'** favor, the facts alleged are more than sufficient to support the Plaintiffs' assertions of non-uniformity.

Contrary to Defendants' claim (Def. Mem. at 6-7), the fundamental requirement of equal protection reaffirmed in *Bush* plainly is not limited to statewide recount orders nor to definitions of what counts as a vote. The Supreme Court has found equal protection violations in arbitrary and irrational legislative apportionment schemes. *Baker*, 369 U.S. 186; *Reynolds v. Sims*, 377 U.S. 533 (1964). Decades before *Bush*, *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) held that conditions nearly identical to those at issue here — inadequate, unequal allocation of voting facilities, long lines, and failure to provide sufficient numbers of trained workers — violated the equal protection rights of affected voters. Similarly, in *League of Women Voters v. Fields*, 352 F. Supp. 1053 (E.D. Ill. 1972), the court held that the plaintiffs stated a § 1983 claim for injunctive relief based on the inconsistent, "uneven" administration of elections. *Id.* at 1055. Where, as here, there are allegations of "serious and widespread" inconsistencies, "[t]he administration of valid state election laws in an uneven or unlawful manner could amount to

such arbitrary administration that citizens would be denied federal rights to vote, to have their vote counted equally, and to have substantially fair elections." *Id.* (denying motion to dismiss).

Cases decided since *Bush* similarly find that allegations of disparate voting systems and facilities among jurisdictions state cognizable claims for violation of equal protection. In *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001), an equal protection violation was stated based on the use of different voting technologies in different California counties because certain technologies were less reliable than others. *Id.* at 1107-08.[4] Such allegations were sufficient to state an equal protection claim under § 1983. *Id.* at 1109-10. Similarly, in *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002), the court found that alleged county to county variations in the reliability and accuracy of the voting systems being used was sufficient to state a claim for violation of equal protection. *Id.* at 899.[5]

*Papasan v. Allain*, 478 U.S. 265 (1986), cited by Defendants, is not a voting rights case and inapposite in any event. There, plaintiffs failed to allege that they had been deprived of any identifiable elements of a "minimally adequate education." *Id.* at 286. Here, Plaintiffs allege myriad specific ways in which Ohioans are denied a fair and equitable voting system.

Finally, Defendants also erroneously suggest that allegations of intentional discrimination and denial of the right to vote are required to state claims for violation of equal protection, although they do not seek dismissal on this basis. Def. Mem. at 4, 8. The right to equal protection of the vote may be violated even by unintentional disparities or disenfranchisement.

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[4] Plaintiffs also alleged an independent claim that the use of punch card systems discriminated against minority voters because counties using punch cards had higher minority populations than non-punch card counties. *Id.*

[5] In *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 808 (N.D. Ohio 2004), the District Court found – after a full trial on the merits – that the use of punch card and optical scan systems in certain Ohio counties did not violate equal protection. Nonetheless, it agreed as a matter of law that *Bush* and the protections of equal protection apply beyond the narrow circumstance of a statewide recount and that irrational variations in, for example, voting technologies may violate equal protection. *Id.* The decision in *Stewart* is on appeal to the Sixth Circuit. For the reasons set forth *infra* at § VIII, the decision in *Stewart* has no preclusive effect on these proceedings.

The Supreme Court has found violations of equal protection in arbitrary qualifications for voting (*Harper v. Virginia Bd. of Elec.*, 383 U.S. 663 (1966) (striking down poll tax)), inequitable legislative apportionments (*Baker* and *Reynolds, supra*), as well as the lack of uniform voting standards (*Bush*) all without proof of intentional discrimination because what is at stake – the right to vote – is a "fundamental political right." *Harper*, 383 U.S. at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). "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." *Ury*, 305 F. Supp. at 126 (citing *Monroe v. Pape*, 365 U.S. 167, 206-07 (1961) (no requirement under § 1983 to show specific intent to deprive plaintiffs of constitutional rights))[6]; *League of Women Voters*, 352 F. Supp. at 1055 (infringement of equal protection "need not be purposefully undertaken" to support § 1983 claim); *Black*, 209 F. Supp. 2d at 899 (irrational and arbitrary debasement of the vote violates equal protection "[e]ven without a suspect classification or invidious discrimination"). In any event, Plaintiffs sufficiently allege intent by alleging that Defendants have knowingly acted or failed to act with deliberate indifference and willful blindness to the on-going deprivations of the constitutional rights in Ohio. Cmpl. ¶ 191; *see also infra* at 21-22.

B. Plaintiffs Allege Facts Establishing a Violation of the Fundamental Right to Vote Under the Due Process Clause

A constitutionally adequate voting process need not be perfect, but it must be **fair**. Ohio's voting process falls far below the mark. Plaintiffs allege that substantial numbers of Ohio voters routinely are disenfranchised or severely burdened by Ohio's wholly inadequate and demonstrably dysfunctional voting system.

[6] *Monroe* was later overruled on other grounds (liability of municipal entities) by *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Due Process is violated where, as here, an election process is permeated by broad-gauged, patent, and fundamental unfairness or severely burdens the fundamental right to vote. *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978) (due process violated by unfair application of absentee ballot requirements); *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (due process violated by arbitrary application of election procedures); *Ury*, 303 F. Supp. at 126 (failure to provide adequate voting facilities "hindered, delayed and effectively deprived" plaintiffs of right to vote); *Black*, 209 F. Supp. 2d at 889 (plaintiffs stated due process claim based on a fundamentally unfair vote counting procedures).

Plaintiffs allege dozens of pages of specific facts describing the virtual gauntlet that substantial numbers of Ohio voters must run just to exercise their fundamental right to vote. The fundamental unfairness – indeed, the arbitrariness – of the current "system" described in the Complaint is plain. It is plain, for example, in the "Russian roulette" of the voter registration process: maybe your registration will be processed, maybe it won't, and even if it is, your registration may be wiped out in a massive purge. It is plain in the "gotchas" of the provisional balloting process: you can have a provisional ballot, but we won't give you any reliable way to figure out whether you are in the "correct" polling place – or the correct line in the correct polling place – so that your ballot will count. It is plain in announcing supposed "curbside voting" for disabled voters, but making no adequate provisions to provide the promised accommodation when voters actually arrive. And it is plain in failing to accommodate the expected voter turnout and forcing voters to stand in line for hours – or to leave without voting at all due to health, job, or family.

The severity of the burdens imposed by the current "system" is equally plain: **thousands** of Ohioans are disenfranchised altogether and **thousands** more must overcome or endure wholly

unreasonable burdens to vote. In short, Plaintiffs do not allege mere "garden variety" or isolated errors. Plaintiffs allege a chronically and systemically unfair voting system lacking even the minimally adequate standards, processes, supervision, and funding necessary to protect the fundamental right to vote. *See Black, supra*. Plaintiffs further allege that, far from serving any rational (much less compelling) interest, "Ohio's voting system promotes disorderly, confusing, and, ultimately, inequitable elections." Cmpl. ¶ 2. As such, Plaintiffs allege that Ohio's voting system violates Due Process as it affects the fundamental right to vote. Cmpl. ¶ 208, 210.

Again, to avoid the actual allegations of the Complaint, Defendants belittle the comprehensive allegations of systemic dysfunction as mere "allegations that some local officials may have made some mistakes during the 2004 election." Def. Mem. at 5. Defendants' efforts to minimize and mischaracterize are irrelevant. For purposes of the present motion, Plaintiffs' allegations are to be taken as true and cannot be divorced from their context. The Court "must read the complaint as a whole, viewing it broadly and liberally." *Smith v. Michigan*, 256 F. Supp. 2d 704, 709 (E.D. Mi. 2003) (denying motion to dismiss).

Taken as a whole, the Complaint alleges far more than just "some mistakes" in a single election. Plaintiffs cogently allege that substantial numbers of Ohio voters are repeatedly disenfranchised by a "system" that relies on a broad range of patently unfair practices affecting virtually every step of the voting process. These allegations are more than sufficient to state a claim for violation of Due Process as it affects the fundamental right to vote. For the same reasons, *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970), cited by Defendants, is inapposite. In contrast to the current case which seeks prospective relief to remedy a chronically dysfunctional system, the plaintiffs in *Powell* merely sought to overturn an election based on concededly inadvertent, one-time errors in a single district.

## III Plaintiffs Allege Direct Claims for Injunctive Relief Against Defendants as the State Officials Responsible for the Lawful Administration of Elections

Defendants also attempt to avoid Plaintiffs' actual allegations by repeatedly mischaracterizing Plaintiffs' claims as being based solely on a respondeat superior theory. *E.g.* Def. Mem. at 8-9. There can be no confusion on this point: **Plaintiffs do not assert claims based on a respondeat superior theory**. Plaintiffs allege that the repeated scope and pattern of what Defendants seek to characterize as mere "local errors" in the Ohio voting process is ample evidence that the "errors" are not isolated, unavoidable mistakes. Plaintiffs allege that they are symptomatic of a voting system that lacks even the most minimally adequate standards and systems that one would reasonably expect responsible election officials to put in place to protect the fundamental constitutional rights to vote and to equal protection of the vote and the voter. Cmpl. ¶ 183. Whether the events alleged are the result of a systemic breakdown – as Plaintiffs allege – or are mere isolated, purely local "errors" – as Defendants contend – is a classically factual dispute inappropriate for resolution on the pleadings.

What is relevant is that **these Defendants** are the state officials charged with supervising and directing the Ohio voting system and ensuring compliance with the law. Yet, Plaintiffs allege, Defendants have stood by for years – even decades – knowing that: (1) the voter registration rolls in numerous counties have descended into an intractable mire of missing voters, wrong addresses, and unlawful voter "purges"; (2) BOEs careen towards each election day with no discernible "election plans" and far too few trained pollworkers; (3) BOEs and pollworkers apply an inconsistent hodge-podge of actual laws, erroneous "interpretations" of laws, and arbitrary "local rules"; (4) thousands of properly registered Ohio voters are sent on hours-long wild goose chases in search of the "correct" precinct, or forced to wait in hours-long lines in the "correct" precinct due to the woefully insufficient and inequitable provision of voting machines

and election personnel; and (5) thousands of voters crowded into "multi-precinct" polling places are disenfranchised simply because no one bothers to tell them that, if they cast their vote in the wrong line, the vote will not count.

It is on the basis of this continued maintenance and promulgation of Ohio's broken voting system – and the deliberate indifference to the resulting disenfranchisement and severe burdens on the right to vote – that Plaintiffs claim that **these Defendants** are violating the constitutional rights of Plaintiffs and thousands of other Ohioans. Plaintiffs allege that for years Defendants have recognized the need for massive systemic reform and that, despite this, Defendants have "maintained Ohio's inequitable and arbitrary system from election to election, without adequate oversight, providing sufficient funding, or taking the remedial measures necessary to address pervasive and well-known deficiencies that have caused the disenfranchisement of thousands of Ohio citizens." Cmpl. ¶ 42; *see also* Cmpl. at ¶¶ 31(b), 41-43.

The chronic failure of state officials to remedy well-known and longstanding violations of fundamental constitutional rights and equal protection gives rise to a claim for prospective injunctive and declaratory relief against those officials under § 1983. *See, e.g., Penick v. Columbus Bd. of Ed.*, 519 F. Supp. 925, 928, 941-42 (S.D. Ohio 1981) ("studied indifference" and willful blindness of State Board of Education and Superintendent of Public Instruction to continuing violations of equal protection supported injunctive relief under § 1983 even absent evidence of actual racial animus); *Penick v. Columbus Bd. of Ed.*, 663 F.2d 24, 27 (6th Cir. 1981) (state officials amenable to injunction under § 1983 given proof of "hands off" policy and failure to remedy known constitutional violations in "clear derogation of the board's obligation under the law"); *see also Lawler*, 898 F.2d at 1199-1200 (complaint alleged facts supporting inference that defendants acted with deliberate indifference to harm to plaintiff).

The Defendants have the legal power and duty to bring order, fairness, and equality to Ohio's voting system. As such, as a matter of law, these Defendants, not the BOEs are the correct and only necessary subjects of Plaintiffs' claims for injunctive relief. In *Futernick v. Sumpter Township*, 78 F.3d 1051, 1055 n.5 (6th Cir. 1996), the Sixth Circuit rejected as "ridiculous" the very same argument that Defendants advance here – that only officers with immediate control over the challenged act are amenable to suit under § 1983. In *Futernick*, the Court declared that "[t]he 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." (emphasis original).[7] Similarly, in *Common Cause*, the court found that an equal protection challenge to California's allowance of different voting technologies in different counties necessarily had to be addressed to the Secretary of State, who possessed authority over all of the local officials, rather than to the officials themselves. *Common Cause*, 213 F. Supp. 2d at 1108.

Defendants also ignore their own authorities. In *Papasan v. Allain*, 478 U.S. 265 (1986), the Secretary of State and other state officials argued that they were not proper defendants to an equal protection claim because the day-to-day administration was carried out by local officials. *Id.* at 281, n. 14. The Court summarily rejected the argument because the Secretary of State was responsible for "general supervision" of the local officials. Accordingly, the Secretary of State was a proper respondent to the plaintiffs' claims for injunctive relief. *Id.*

Similarly here, although the fundamental flaws in Ohio's voting system necessarily manifest themselves at the local level when an Ohio citizen attempts to vote, Plaintiffs allege that the deficiencies are the direct result of Defendants' actions and inactions. BOEs have no power to promulgate statewide rules and standards, nor to supervise other BOEs to ensure uniformity

[7] *Futernick* was impliedly overruled on other grounds by *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), which lowered the standard to plead "selective enforcement" claims.

and equality of voting throughout Ohio. Those responsibilities necessarily lie with these Defendants. Accordingly, meaningful injunctive relief must be directed towards them.

Even if, as Defendants contend, certain aspects of complete relief might require legislative action, that possibility does not compel dismissal. *See Baker*, 369 U.S. at 586 (federal court has power to order constitutional election plan where legislature fails to timely cure); *see also Larios v. Cox*, 300 F. Supp. 2d 1320, 1356-57 (N.D. Ga.), *aff'd* 124 S.Ct. 2806 (2004) (enjoining Secretary of State from using unconstitutional plan; allowing opportunity for legislature to enact lawful plan); *Central Del. Branch, NAACP v. City of Dover*, 110 F.R.D. 239, 241-42 (D. Del. 1985) (joinder of state not required). Federal courts have wide latitude to fashion appropriate injunctive relief in voting rights cases. "[A]ny relief accorded can be fashioned in the light of well-known principles of equity." *Baker*, 369 U.S. at 198.

**IV Plaintiffs Have Joined All Necessary Defendants**

Defendants seek to unnecessarily complicate and delay this action by claiming that Ohio's 88 BOEs are necessary parties under Fed. R. Civ. P. 19 (Def. Mem. at 23). This is merely the flip-side of the same, unfounded denials of Defendants' duties and powers under Ohio law.

Local election officials are not "necessary" parties where, as here, injunctive relief would run against the state election officials responsible to supervise and direct the subordinate, local officials. *Harman v. Forssenius*, 380 U.S. 528, 537 n.14 (1965) (local election bodies not indispensable parties because the defendant State Board of Elections had the power to supervise the local bodies and ensure the legality of the election process); *Maryland Citizens Comm. for Fair Cong. Redistricting, Inc v. Tawes*, 226 F. Supp. 80, 81 (D. Md. 1964) (election supervisors not indispensable parties to redistricting action; decree rendered against Governor and Secretary of State would be effective without joining boards); *State Comm. of the Indep. Party v. Berman*,

294 F. Supp. 2d 518, 520 (S.D.N.Y. 2003) (county boards of elections not necessary parties where defendant State Board of Elections had power and obligation to oversee county boards). The same logic refutes Defendants' arguments here because Defendants undeniably have the power to compel the lawful conduct of elections by the BOEs.

## V The Individual Plaintiffs Allege Cognizable Claims

Each Individual Plaintiff alleges injury as the result of the systemic breakdowns and inequities that, Plaintiffs allege, Defendants are unlawfully perpetuating. *See* Cmpl. ¶¶ 11-26. As such, Defendants' general arguments with respect to all of the Individual Plaintiffs fail for reasons explained above. We address here only the additional, but equally unavailing, arguments that Defendants assert with respect to certain Individual Plaintiffs.[8]

**Misdirected Provisional Ballots**: Defendants seek to dismiss the claims asserted by Ms. Stenson, Mr. White, Ms. Thomas, Mr. Jackson, Ms. Barberio, Ms. Casas, and Ms. Boswell because each allegedly cast a provisional ballot in the wrong precinct. Def. Mem. at 10-15. Defendants ignore that each of these Plaintiffs alleges that (like thousands of other similarly disenfranchised Ohioans) they purportedly cast their ballots in the wrong precinct as a result of the systemic breakdowns in Ohio's voting system – inaccurately maintained voting rolls, untrained pollworkers, and crowded and confusing "multi-precinct" polling places – flowing from Defendants' actions and deliberate indifference. Cmpl. ¶¶ 12, 15, 18-20, 22.

**Unaccommodated Disabled Voters**: Plaintiffs Ms. Stewart, Ms. Dyson, and Ms. Booker are voters with disabilities who allege that they were disenfranchised in whole or part when officials or pollworkers failed to offer them an accommodation to vote. Cmpl. ¶¶ 13-14, 26. Defendants argue that the claims of all these disenfranchised voters should be dismissed

[8] Defendants raise no specific arguments with respect to Individual Plaintiffs Rubin, Russell, and Johnson-Ham other than those already refuted above. Accordingly, the claims of those Plaintiffs should not be dismissed.

because, as disabled persons, they should have stayed home and voted by absentee ballot rather than exercising their **right** to go to the polls and vote in-person like others. Def. Mem. at 10-11. Defendants are wrong. Regardless of whether they could have opted to vote by absentee ballot, these voters were told that they had the option to vote in-person and relied on that advice. Their fundamental right to vote was denied when they were arbitrarily precluded from exercising the franchise through their chosen, **lawful** means – in-person voting.[9]

**Ms. Watanabe**: Plaintiff Ms. Watanabe alleges that despite making a proper and timely request for an absentee ballot and diligently checking on its status as election day neared, she never received the requested ballot and, as a result, was precluded from casting her vote. Cmpl. ¶ 16. Defendants' argument for dismissal – that Ms. Watanabe's ballot was lost by the U.S. postal service – is another improper attempt to dispute the allegations and to draw adverse factual inferences. Ms. Watanabe alleges that she, like many other Ohio voters, was disenfranchised by the lack of uniform standards and procedures in Ohio for the processing of applications for absentee ballots and the failure to ensure adequate resources for timely and accurately processing such applications. Cmpl. ¶ 16. The difference between what Plaintiffs allege and what Defendants only hope to prove is not the proper subject of Rule 12(b)(6).

**Voter Intimidation**: Ms. Cooley alleges that election workers at her polling place improperly sought to bar her from casting a ballot because she (and her eight year old son) were wearing Bush/Cheney t-shirts – and intimated her by not so subtly suggesting that they would involve the police if she refused to change her shirt. Cmpl. ¶ 24. Defendants ignore or dispute

[9] Defendants' citation to *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (Def. Mem. at 20) is inapposite. Plaintiffs complain of a violation of their **federal** 14th Amendment rights by the non-uniform interpretation and application of state law regarding disabled voters and the resulting disenfranchisement and severe burdens on the right to vote. *E.g.* Cmpl. ¶¶ 13, 14, 26, 144-46. As *Bush* holds, the non-uniform application of state law violates federal Equal Protection. *See also League of Women Voters*, 352 F. Supp. at 1055 ("uneven administration by state officials of their duties" actionable when it "infringes on a federal right").

the actual allegations of voter intimidation and the failure of the Secretary to properly instruct officials and workers on the proper conduct of elections and on Ohio law. They also fail to cite any cases for the proposition that Ohio's prohibition on "electioneering" near polling place can lawfully be applied to prohibit the type of passive activity that Ms. Cooley alleges. (To the contrary, the provisions cited by Defendants only prohibit "election campaigning" – active attempts to "solicit" or "influence" other voters. O.R.C. §§ 3501.30, 3501.35)

## VI Plaintiffs' HAVA Claim is Ripe

Plaintiffs also allege a claim for violation of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301, *et seq*. Specifically, Plaintiffs allege a violation of the requirement that the Secretary implement and maintain "a uniform, official, centralized, interactive computerized statewide voter registration list." Cmpl. ¶¶ 192-97, 211-12. Defendants argue that the HAVA claim must be dismissed solely because the January, 2006 deadline for compliance with the database requirement "has not arrived." Def. Mem. at 21.[10]

The argument is meritless. Plaintiffs allege that Defendants already "**have implemented** their computerized statewide voter registration database" and that the database, as already implemented "is not uniform and permits counties to remove eligible voters from the statewide voter registration database without providing notice to the voter to be removed." Cmpl. ¶¶ 196-97 (emphasis added). These allegations, which must be taken as true, allege a ripe claim for relief. Plaintiffs should not have to wait until the "extension" deadline passes to seek relief.

## VII The LWVO and the Toledo League Have Standing

The LWVO and the Toledo League each allege standing on two independent and equally available grounds. First, each alleges "organizational standing" because Defendants' actions

[10] Ohio requested an extension from HAVA's original deadline for compliance of January 1, 2004 until January 1, 2006. Cmpl. ¶¶ 192-94.

threaten to substantially impede their organizational purposes and activities – promoting free and equal elections and conducting non-partisan voter-registration and education efforts – and divert organizational resources. Cmpl. ¶¶ 9-10. *See Am. Civil Liberties Union of Ohio v. Taft*, 385 F.3d 641, 646 (6th Cir. 2004) (ACLU had standing to challenge Ohio's refusal to hold special election; "This case addresses citizens' right to vote and right to equal representation, which falls squarely within the ACLU's purpose of guaranteeing constitutional and fundamental rights."); *Heights Comm. Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 138-39 (6th Cir. 1985) (allegations that defendants' conduct "perceptibly impaired" organizational activities and diverted resources sufficient to allege standing). Second, LWVO and the Toledo League allege "associational standing" because their members would have standing to sue in their own right, the interests at stake are germane to each organization's purpose, and the claims asserted and relief requested do not require participation of individual members in the lawsuit. Cmpl. ¶¶ 9-10. *Sandusky*, 387 F.3d 565, 574 (6th Cir. 2004) (individual members "not normally necessary when an association seeks prospective or injunctive relief for its members"). Where injunctive relief is sought to prevent future election maladministration, it is not necessary to identify individual organizational members that will be injured; "a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place." *Id.*

Importantly, Defendants do not challenge the organizational standing of the LWVO or the Toledo League other than to generally deny that Defendants are responsible for the failings alleged in the Complaint. Def. Mem. at 22. Whether Plaintiffs will prevail on the merits,

however, is distinct from whether they have standing. *Heights Comm. Cong.*, 774 F.2d at 139 (defendants improperly collapsed standing to litigate claim with adjudication on the merits).

Defendants also do not contest that the Toledo League has associational standing with respect to harms in Lucas County. Def. Mem. at 23. With respect to the LWVO, there is no requirement that the LWVO allege the specific counties in which its members reside. LWVO's allegations that its "members also **have been specifically aggrieved by Defendants' actions**, which have infringed their fundamental right to vote and to equal protection" and that "[i]t is reasonably anticipated that these or other individual members of LWVO will be similarly aggrieved by Defendants' actions in the future absent injunctive relief" (Cmpl. ¶ 9) (emphasis added) are presumed true and are sufficient. *See Sandusky*, *supra*.

**VIII Plaintiffs' Claims are not Barred by the Doctrine of Claim Preclusion**

Defendants assert in various, unspecified forms that Plaintiffs' claims here are somehow barred by other prior or pending actions. *E.g.*, Def. Mem. at 11, 14-15, 18, 19, 23-24. The only actual legal theory that Defendants try to argue – *res judicata* – fails.

First, *res judicata* requires complete identity of parties. *South Central Bell Tele. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999) (*res judicata* does not apply against "strangers" to earlier litigation); *Am. Postal Workers Union v. U.S. Postal Serv.*, 736 F.2d 317, 318-19 (6th Cir. 1984) ("identity of interests, without more," insufficient to establish identity of parties). Only one of the cases Defendants cite – *League of Women Voters et al. v. Blackwell*, 04-7622 (the "2004 League Action") – involved a Plaintiff here; Defendants do not contend otherwise. On this ground alone, none of the other actions Defendants cite could bar claims here. (Also, several of

the other actions lack a final decision on the merits[11] and thus have no preclusive effect. *E.E.O.C. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 462 (6th Cir. 1999) (*res judicata* requires final decision on the merits)).

Second, even where identity of parties is shown, *res judicata* only precludes "further claims by parties or their privies based on the **same cause of action**." *Frank's Nursery & Crafts*, 177 F.3d at 462 (emphasis added). Defendants erroneously assert that the 2004 League Action and the present case involve the "same cause of action" merely because both arise under § 1983. Def. Mem. at 23. For *res judicata* purposes, a "cause of action" is defined by the factual, not the legal, basis for the claim. Cases involve the "same cause of action" only when they arise from the same nucleus of operative facts – *i.e.* the same events. *See Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 265 (6th Cir. 1988); *accord, Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997). Where the facts necessary to the later action differ from those the prior action, there is no identity of the "cause of action." *Forry*, 837 F.2d at 265; *Duncan v. Peck*, 752 F.2d 1135, 1140 (6th Cir. 1985) (contract litigation did not bar § 1983 action).

Here, the facts necessary to Plaintiffs' broad, constitutional challenge to Defendants' administration of Ohio's voting system are entirely different from those needed in the other actions. None of the other actions challenged Defendants' fundamental failure to properly supervise and direct the proper conduct of elections as a whole, the basic lack of election "plans," the chronic failures to provide adequate numbers of competently trained pollworkers, etc. Rather, the other actions were narrowly focused on specific actions, statutes, or directives in the specific circumstances of the November 2004 election. As such, the facts underlying Plaintiffs' claims here are far broader with respect to the subject matters, time periods, and

[11] The *Ohio Democratic Party* and *Miller* cases were dismissed without prejudice. In *Spencer* and *Summit County*, the Sixth Circuit vacated preliminary orders, robbing them of any potentially preclusive effect. *Erebia v. Chrysler Plastic Prod. Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989).

relevant actors at issue, as well as the scope and nature of the injury. Accordingly, the 2004 League Action and other actions cannot bar Plaintiffs' claims here.

Similarly, Defendants' argument that LWVO's current claims purportedly "should have" been raised in the 2004 League Action (Def. Mem. at 23) misreads the law. Parties are barred from raising "issues" that could have been asserted in an earlier action **only if** those "issues" concern the same cause of action at issue in the earlier action. 18 Moore's Fed. Practice, § 131.10(3)(c) (3d ed. 2005). This is true even when two litigations arguably involve related matters. *Northeast Ohio Regional Sewer Dist. v. U.S. E.P.A.*, 411 F.3d 726, 732-33 (6th Cir. 2005); *accord Apparel Art Int'l, Inc. v. Amertex Enter. Ltd.*, 48 F.3d 576, 583-84 (1st Cir. 1995). This case and the 2004 League Action do not concern the same "cause of action." The 2004 League Action addressed narrow, immediate issues: whether the Secretary's provisional balloting directives complied with HAVA. That case turned on purely legal issues of statutory construction; virtually no historical facts were at issue. By contrast, this case goes far beyond provisional balloting and will require proof of current and historical facts concerning the maladministration of elections in Ohio. Finally, where, as here, the same course of conduct continues after judgment in a prior action, the party may bring a new action based on the continuing violation. *Cellar Door Prod. Inc. v. Kay*, 897 F.2d 1375, 1376-78 (6th Cir. 1990).[12]

## IX Defendants' Motion to Transfer the Case Should be Denied

Defendants do not contest that venue is properly laid in this Court. 28 U.S.C. § 1391(b). Some of the most egregious, documented failings in Ohio's voting system occurred in Lucas

[12] Defendants wrongly assert that the two-year statute of limitations for § 1983 claims somehow bars Plaintiffs' claims because Plaintiffs allege that the constitutional deficiencies in Ohio's voting system have persisted for decades. Def. Mem. at 21. Plaintiffs' claims were brought well within two years of the violation of their rights in November, 2004. The allegations of Ohio's historical denial of the right to vote do, however, support the claim that the **current** failings in Ohio's voting system are (1) chronic, systemic failings, not isolated errors, (2) have been well-known to Defendants, but deliberately allowed to persist, and (3) are reasonably anticipated to continue and to violate Plaintiffs' constitutional rights in the next federal election in 2006.

County. Cmpl. ¶¶ 7, 12, 23, 25, 167, 173-76. In addition, more than half the Individual Plaintiffs – as well as members of the LWVO and the Toledo League – reside in the Northern District, where the Toledo League is headquartered. Cmpl. ¶¶ 9-12, 15-19, 22-25. Defendants seek to transfer this case to the Southern District solely because that venue will be more convenient to them (Def. Mem. at 24-25). Defendants' request should be denied.

Plaintiffs' lawful choice of forum is entitled to "great deference," *Eberline v. Ajilon LLC,* 349 F. Supp. 2d 1052, 1054 (N.D. Ohio 2004), that "should rarely be disturbed" unless the balance of interests weighs "strongly in favor" of the defendant's request for transfer. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947); *LaCroix v. Am. Horse Show Assoc.*, 853 F. Supp. 992, 1000 (N.D. Ohio 1993). Transfer "is not appropriate where the transfer merely shifts the burden of traveling to a less convenient forum to the plaintiff." *Eberline,* 349 F. Supp. 2d at 1054; *LaCroix*, 853 F. Supp. at 1001. Any marginal inconvenience to Defendants or their staff also can be avoided by holding their depositions in Columbus. Accordingly, Defendants' request to transfer this case to the Southern District should be denied.[13]

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motions in their entirety. In the alternative, Plaintiffs request leave to amend the Complaint and/or join additional parties.

September 19, 2005

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[13] The only case Defendants cite in support of their request, *Moses v. Business Card Express, Inc.*, 929 F.2d 1131 (6th Cir. 1991), is inapposite. Transfer was upheld in that case based on an express forum selection clause in the agreement at issue. This case involves no such agreed upon choice of forum. *Id.* at 1136-37.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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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,<br><br>Plaintiffs,<br><br>v.<br><br>J. Kenneth Blackwell, Secretary of State of Ohio and Bob Taft, Governor of Ohio,<br><br>Defendants. | ) | Case No. 3:05-CV-7309<br><br>Hon. James G. Carr |

**CERTIFICATE OF SERVICE**

I hereby certify that on September 19, 2005, a copy of foregoing Opposition to Defendants' Motion to Dismiss or Transfer 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.

September 19, 2005 /s/ Jennifer R. Scullion

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