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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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THE NORTHEAST OHIO COALITION
FOR THE HOMELESS, et al, :
PLAINTIFFS, :
V. : CASE NO. 2:06-CV-896
J. KENNETH BLACKWELL, :
DEFENDANT. :

MOTION TO INTERVENE

BEFORE THE HONORABLE ALGENON L. MARBLEY, UNITED STATES
DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, ON FRIDAY,
OCTOBER 27, 2006.

APPEARANCES:

SUBODH CHANDRA, CAROLINE GENTRY, RITCHEY HOLLENBAUGH,
ATTORNEYS AT LAW,

ON BEHALF OF THE PLAINTIFFS.

RICHARD COGLIANESE, DAMIAN SIKORA, WILLIAM TODD,
ATTORNEYS AT LAW,

ON BEHALF OF DEFENDANT BLACKWELL.

SHARON JENNINGS, HOLLY HUNT, ATTORNEYS AT LAW,

ON BEHALF OF THE PROPOSED INTERVENOR.

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JOAN E. KOENIG, FEDERAL COURT REPORTER
COMPUTERIZED TRANSCRIPTION

FRIDAY MORNING SESSION

OCTOBER 27, 2006

- - -

1 THE COURT: Mrs. Clark, would you please call the
2 case.

3 THE CLERK: 2:06-CV-896, The Northeast Ohio
4 Coalition for the Homeless v. J. Kenneth Blackwell.

5 THE COURT: Would counsel please enter their
6 appearances, beginning with counsel for the plaintiff.

7 MR. CHANDRA: Subodh Chandra for the plaintiff,
8 your Honor.

9 MS. GENTRY: Caroline Gentry for the plaintiff,
10 your Honor.

11 MR. HOLLENBAUGH: Ritchey Hollenbaugh for the
12 plaintiff.

13 MS. JENNINGS: Sharon Jennings for the proposed
14 intervenor, State of Ohio.

15 MS. HUNT: Holly Hunt for the proposed intervenor,
16 State of Ohio.

17 MR. COGLIANESE: Rich Coglianese for defendant
18 Blackwell.

19 MR. SIKORA: Damian Sikora for defendant
20 Blackwell.

21 MR. TODD: William Todd for defendant Blackwell.

22 THE COURT: Just for clarification, Mr. Coglianese,
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1 you are employed by the Attorney General's Office; is that
2 correct?

3 MR. COGLIANESE: That is correct, your Honor, both
4 me and Mr. Sikora are A.G. employees.

5 THE COURT: And Mr. Todd represents the Secretary
6 of State; is that correct?

7 MR. TODD: Yes, your Honor. I have been retained.

8 THE COURT: You were specially retained?

9 MR. TODD: Yes, sir.

10 MR. COGLIANESE: Your Honor, just if I may clarify
11 for purposes of the record, Mr. Todd is retained as special
12 counsel through the Attorney General's Office. The
13 appointment comes from the A.G.

14 THE COURT: But it is through the Attorney
15 General's Office to represent the Secretary of State?

16 MR. COGLIANESE: That's correct, your Honor.

17 THE COURT: We have convened this morning on the
18 motion of the proposed intervenor defendant State of Ohio.

19 Ms. Hunt, are you arguing this morning or is
20 Ms. Jennings arguing?

21 MS. HUNT: Your Honor, Ms. Jennings will be
22 arguing.

23 THE COURT: Ms. Jennings, please proceed.

24 Ms. Jennings, unlike almost every other case I
25 have in this courtroom, do not presume that I have had an

1 opportunity to review thoroughly your motion to intervene.
2 I have reviewed your motion to intervene that was filed in
3 King Lincoln. The motion to intervene in this case was
4 filed this morning. I have looked at it in a rather cursory
5 manner. We discussed it off the record with Mr. Chandra
6 present, but don't presume that I have had a chance to
7 peruse it carefully.

8 Please proceed.

9 MS. JENNINGS: Thank you, your Honor. I
10 appreciate that. I think it was a late night for many
11 people who are in the courtroom this morning.

12 We have filed this morning a motion to intervene
13 in this case that is somewhat similar but yet contains some
14 different arguments than the motion to intervene that was
15 filed in the King Lincoln Bronzeville case.

16 And to back up a little bit, the motion to
17 intervene was filed in this case not until this morning in
18 part because it was counsel's understanding that as of the
19 conclusion of the proceedings on Wednesday, that the two
20 cases were to be consolidated. Therefore I was operating
21 under the assumption yesterday that my motion that was
22 already pending in the King Lincoln case would necessarily
23 apply to both cases.

24 THE COURT: You understand now that under our
25 local rules, what happened was the Northeast Ohio Coalition

1 case was transferred to my docket because it is a case
2 deemed by this Court under our local rules and by Judge
3 Frost, to whom the Northeast case was originally assigned,
4 they were both deemed to be related. And because they were
5 related, the younger case would be transferred to my docket
6 but not by operation of law or by operation of local rule
7 consolidated with the older case, transferred to my docket
8 but not consolidated.

9 MS. JENNINGS: Yes. At of late last evening that
10 is in fact now my understanding; that the two cases will not
11 be consolidated, at least not sua sponte. I would add for
12 the Court's benefit that I was in Judge Frost's courtroom on
13 Wednesday, as well as in the courtroom all day yesterday, so
14 I am completely apprised as to what has occurred up to
15 this point.

16 THE COURT: Let me ask you this: Are you going to
17 ask, in terms of the relief you seek, to have the cases
18 consolidated, or are you satisfied with the cases simply
19 being transferred to me as a related case?

20 MS. JENNINGS: Your Honor, I have to tell you
21 honestly, I have not had an opportunity to discuss that
22 issue with my clients. That's not the purpose of us being
23 here this morning.

24 THE COURT: That's fair enough.

25 MS. JENNINGS: The point of being here this

1 morning is that the Attorney General on behalf of the State
2 of Ohio is moving to intervene in this case, just as it
3 moved to intervene in the King Lincoln Bronzeville case, for
4 purposes of fully defending the constitutionality of the
5 State statute.

6 To go back to my chronology, as of yesterday I
7 thought I had a motion to intervene pending in what I
8 thought was a consolidated case. At that time I took the
9 step of contacting all counsel in both cases to see if I
10 could get consent to intervene, figuring that that would be
11 the easiest way to intervene promptly so that our position
12 could be heard in this litigation. I did in fact receive
13 that consent from Ritchey Hollenbaugh as well as Bill Todd
14 and Larry James on behalf of the Secretary of State.

15 THE COURT: To intervene in the Lincoln
16 Bronzeville case?

17 MS. JENNINGS: By that time I thought I was
18 intervening in the consolidated case, which is why I
19 contacted all counsel in both cases.

20 Anyway, going from there, now we have straightened
21 that out, the cases are not consolidated. Basically pretty
22 much immediately upon finding that out, we took steps to
23 move to intervene in this case. The motion to intervene was
24 filed this morning. It is both an intervention as of right
25 and a permissive intervention. It is intervention as of

1 right under both 24(a)(1) and 24(a)(2).

2 24(a)(1) permits the State, or permits a party to
3 intervene when there is a statutory right to do so. The
4 statute that we cite to in this case is 28 U.S.C. 2403
5 subsection (b) which provides a right for the Attorney
6 General to intervene on behalf of the State of Ohio in a
7 case in which the State is not already a party.

8 THE COURT: The section provides:

9 "In any action, suit or proceeding in a court of
10 the United States to which a State or an agency,
11 officer or employee thereof is not a party, wherein
12 the constitutionality of any statute of that State
13 affecting the public interest is drawn in question,
14 the Court shall certify such fact to the Attorney
15 General of the State and shall permit the State to
16 intervene for presentation of evidence, if evidence
17 is otherwise admissible in the case and for
18 argument on the question of the constitutionality."

19 In this case I don't know that 2403(b) would give
20 you an automatic right to intervene because the State is a
21 party through Secretary of State Blackwell. Secretary of
22 State Blackwell is not being sued in his individual
23 capacity. He is being sued in his official capacity. And
24 so if you didn't intervene as of right when the suit was
25 initially filed, query why you would intervene as of right

1 after the TRO hearing.

2 MS. JENNINGS: I would remind the Court,
3 respectfully, that the action was filed two days ago --

4 THE COURT: I understand.

5 MS. JENNINGS: -- and is still a pending case in
6 this court.

7 THE COURT: That's correct.

8 MS. JENNINGS: The preliminary injunction is
9 scheduled to be heard next Wednesday. There is still a
10 meaningful opportunity to be heard.

11 Although I agree -- you know, obviously the
12 2403(b) normally applies only in situations where there is
13 no State party. The difference here is we now have a State
14 party, the Secretary of State, who has indicated he does not
15 desire to appeal decisions from this Court.

16 THE COURT: I don't know that that's the case. I
17 don't know that it is correct to say that he does not desire
18 to appeal decisions from this Court. The Secretary of State
19 may not have appealed the decision on the temporary
20 restraining order.

21 This may get us to Yniguez quickly, but here is
22 the distinction between this case and Yniguez, however it's
23 pronounced. Mrs. Koenig, for the record, it is
24 Y-n-i-g-u-e-z versus the State of Arizona, 939 F.2d 727
25 (9th Cir. 1991.)

1 But in this case, all that has happened is that a
2 temporary restraining order has been granted. The Secretary
3 of State is still defending this case. The temporary
4 restraining order by its nature is just a temporary measure
5 that has a shelf life of I think maybe four business days:
6 today, Monday, Tuesday, and it is my belief that we will
7 conclude the preliminary injunction hearing on Wednesday and
8 I will issue a ruling on that day.

9 So it would be different if the Secretary of State
10 said, all right, I'm conceding all of the relief that the
11 plaintiffs have requested. I'm conceding that the statute
12 itself is unconstitutional.

13 In that case, I would agree that the Secretary of
14 State would likely, as of right, have a right to intervene
15 because then the interests of the people of the State of
16 Ohio in at least challenging the Court's ruling as to the
17 constitutionality of the statute would not be protected
18 because there would not be a party.

19 In this case, the Secretary of State is the State
20 official charged with the orderly conduct of elections. And
21 the Court's ruling doesn't eviscerate House Bill 3 in toto.
22 It only went to the constitutionality of certain defined
23 portions of that act. And so, technically, we have a
24 Secretary of State who is still in the case, who is still
25 defending the case, and who is going to defend the case at

1 this preliminary injunction hearing on Wednesday.

2 Now if I reach the same conclusion on Wednesday
3 that I reached yesterday and the Secretary of State says
4 I'm not going to appeal this ruling, then the landscape in
5 this Court's view is entirely different. Because then you
6 don't have a State entity arguing in favor of or protecting
7 the interests of the people of the State.

8 Tell me how, now, this is nothing more than a
9 situation in which two state agencies or two state officials
10 disagree on litigation strategy? That's what this has
11 become in the Court's view. Because you have the person
12 charged with the orderly conduct of elections says, I'm
13 not going to appeal this decision, I'm going to save my
14 bullets for the PI hearing, and then you have the Attorney
15 General saying, I disagree with that. I want this opinion
16 appealed. Let's not wait until the preliminary injunction
17 hearing.

18 What you are asking me to do is, Judge, bring in
19 the Secretary of State because he wants to do it this way
20 and we think it should be done this way, and in derogation
21 of 2403 bring in the Secretary anyway, even though we have
22 someone who is protecting the interests of the state.

23 I know I said a mouthful. You can take a minute
24 to sort it out.

25 MS. JENNINGS: Your Honor, the biggest point I

1 would say is you're saying okay, what if we go through the
2 PI hearing and there's a different result, then you have the
3 right. My point to you would be then it's too late. It's
4 too late for me to preserve the State of Ohio's right to
5 fully defend the constitutionality of its statutes if we go
6 ahead and have a PI hearing on a much broader subject than
7 the topics discussed yesterday, although I note that the
8 motion for PI hasn't been filed yet so we're not sure
9 exactly what is going to be challenged.

10 You will have cut off our right to present
11 argument to this Court and our right to decide if there is
12 evidence that we need to present that was not presented.

13 THE COURT: How will your right be cut off?
14 Because you will be able to raise, after the PI hearing, the
15 same issues that were litigated in the suit yesterday.
16 Because the absentee ballot issue will be part and parcel of
17 the PI hearing, as will the voting day issue. So that
18 doesn't change. Your rights aren't affected. Your right to
19 defend is not affected because, as you stand here today,
20 your right to defend is being vindicated by the Secretary
21 of State. He is just not defending it in a way that you --
22 not you, obviously -- but that the Attorney General wishes.

23 It really comes down in this Court's view to a
24 matter of litigation strategy. One wants to appeal the TRO
25 decision; the other one doesn't. But the Secretary is

1 continuing to defend this case through the PI hearing, which
2 is the more dispositive proceeding anyway.

3 MS. JENNINGS: You, your Honor, respectfully, are
4 asking the State of Ohio, the Attorney General, the General
5 Assembly, to take it on faith that that is what the
6 Secretary of State is going to do. And that's why we should
7 be permitted to intervene as would any other party in this
8 circumstance.

9 THE COURT: Here is why I say that, Ms. Jennings:
10 The Secretary of State has not withdrawn. If the Secretary
11 of State has withdrawn, then nobody is defending the case.
12 The Secretary of State is still in this case and still
13 defending the case.

14 Mr. Coglianese, has the Secretary of State
15 withdrawn from the defense of this litigation?

16 MR. COGLIANESE: He has not, your Honor.

17 THE COURT: There you have it.

18 MS. JENNINGS: The standard though, your Honor --
19 if we want to say okay, 2403(b) sort of applies in spirit
20 but not literally, look to Civil Rule 24(a)(2) which talks
21 about when a party should be granted the right to
22 intervene. And I'll go through the prongs in a second, but
23 what we're talking about here is how do we show that there
24 is inadequate representation by the parties already in the
25 case. And that standard is not a strict standard.

1 The question is maybe, could it be that the
2 parties' interests may not be adequately represented?
3 I think, given, you know, the fact that the Secretary of
4 State has said that they do not want to appeal a decision
5 from this Court finding statutes unconstitutional, that
6 that's enough to make the State of Ohio, the General
7 Assembly, assume that his continued representation in this
8 matter may be inadequate. And maybe inadequate doesn't mean
9 he won't put on a defense. It means will he make every
10 argument that the intervening party would want to be made.
11 And I think at this point we can't conclude that that
12 is true.

13 THE COURT: That is speculative, it appears to me,
14 Ms. Jennings. Because what you're saying in effect is that
15 the one officer who is charged with the responsibility for
16 the orderly conduct of elections is either incapable or
17 unwilling to defend the constitutionality of the statute
18 which governs in part how he runs elections. And there is
19 nothing that I have seen in this courtroom in this
20 litigation which would support that quantum leap.

21 Certainly, and this is no reflection on you, but
22 there are very few lawyers who have appeared before me who
23 seem to be more capable of defending the Secretary of State
24 than Mr. Coglianesse. He has as much experience before me as
25 any lawyer who practices, civil or criminal, and he always

1 does an exemplary job, just as yesterday's courtroom
2 performance in my view at least indicates, and he is
3 prepared to defend the statute and the Secretary's position
4 in court on Wednesday.

5 If you can demonstrate to me how the Secretary's
6 decision not to appeal a TRO decision, but to continue to
7 defend the same position with the production of evidence at
8 the preliminary injunction hearing, if you can show me how
9 that does not amount to a zealous defense, then perhaps you
10 can persuade me to allow the Attorney General to intervene
11 permissively.

12 MS. JENNINGS: Your Honor, at that point it's too
13 late. It's too late for the State of Ohio to make arguments
14 to the contrary.

15 THE COURT: How?

16 MS. JENNINGS: It's too late for them to put
17 evidence before the Court. You're essentially going to --
18 you have a PI hearing and then, only when the ruling is
19 unfavorable, decide whether the State of Ohio can
20 intervene. Is it not better to simply let the State of Ohio
21 intervene now and have its voice heard? There is no
22 prejudice to any other party.

23 THE COURT: But Ms. Jennings, the State of Ohio is
24 already in -- I mean, it would be different if there was a
25 private party, as in Yniquez, the sponsors of the

1 proposition had been dismissed out. If there had been a
2 sponsor of House Bill that was a private entity and they
3 weren't going to prosecute the appeal perhaps, or they had
4 been dismissed out -- excuse me. I'm sorry.

5 Let's say that there was a private sponsor of
6 House Bill 3 that was the only remaining defendant, then
7 your argument I think would be meritorious. But the fallacy
8 that you can't get around in your argument is that you have
9 a representative of the State still in this litigation
10 defending it, and there is probably no better entity left to
11 defend this case because he, the Secretary of State, is
12 charged with election law.

13 So you don't have anybody with more expertise at
14 the state level than the Secretary of State because that's
15 his bailiwick. But because the Secretary is pursuing, it
16 appears to me, a different litigation strategy than the
17 Attorney General, then you're saying that that's not
18 defense. And I don't think that there is any case law or
19 any other type of jurisprudence that would support that
20 proposition. That's my point.

21 Please respond.

22 MS. JENNINGS: One point I would make is that the
23 process of intervening was begun in this case well before
24 yesterday's hearing, well before this Court's decision, well
25 before the decision by the Secretary to indicate his desire

1 not to appeal.

2 As I mentioned, you know, the only thing that that
3 changes is the arguments under 24(a)(2) as to whether the
4 four factors are met: timeliness of intervention,
5 substantial legal interest, the possibility of impairment of
6 the ability to protect that interest absent intervention,
7 and inadequate representation by parties already in the
8 case.

9 The Sixth Circuit has spoken in Michigan State
10 AFL-CIO, 103 F.3d 1240 in 1997, and previously in Purnell v.
11 The City of Akron, 925 F.2d 941 in 1991, that these
12 standards are to be interpreted leniently; that the parties
13 seeking to intervene need not have the same standing that
14 other parties to the action have; that this rule is to be
15 broadly construed. And it is to be broadly construed just
16 so a proposed defendant is not placed in the position of
17 having to stand idly by watching proceedings and only then
18 being able to say, oh, my God, do you see? See now that I
19 was right, that my interests were not adequately
20 represented. Adequate representation in this context is
21 simply, you know, is it possible --

22 THE COURT: Adequate representation, it appears to
23 me, is doing it your way.

24 Let me invoke the doctrine of reductio ad
25 absurdum. Let's say that we have a case, same scenario, the

1 Attorney General's Office is not involved in the case, the
2 Secretary of State is the named defendant. Mr. Coglianesi
3 is representing the Secretary. When he takes a particular
4 position with the witness and you're sitting out in the
5 audience saying, no, he should be asking this witness these
6 questions, and he should stop asking nonleading questions on
7 cross-examination because the witness is getting the better
8 of Mr. Coglianesi. He's just rambling on, volunteering all
9 sorts of information that a good cross-examiner would never
10 allow to get in.

11 Now, at the break you say to Mr. Coglianesi, I
12 don't like the way that you are handling this witness, and
13 it's a pivotal witness, and unless you can gain control of
14 this witness, our case is in peril.

15 Does that mean that you can come to me with an
16 emergency motion, your Honor, the interests of the State are
17 not being fully vindicated because this cross-examination is
18 far from textbook, it's terrible, and the witness is being
19 allowed to offer testimony and opinions that if the Attorney
20 General's position were introduced, and if the Attorney
21 General's lawyers were allowed to question him, we wouldn't
22 imperil the case. That could be the practical effect.

23 Because as of this time, the Secretary of State is
24 still in the case, is still defending the case, he has three
25 lawyers here defending the case, and the only issue is that

1 he refused to appeal. You didn't say that he took the wrong
2 position, he argued the wrong point. You have not made that
3 argument. Presumably he argued the right points. I just
4 wasn't persuaded. That's the presumption that I'm going
5 to indulge.

6 The Secretary of State did what you wanted him to
7 do, or at least what he did is consonant with what you did
8 but now, because the Secretary of State has decided to focus
9 on preparing for the PI hearing and decided not to appeal,
10 that's the predicate for another party coming in and saying
11 I don't like the way he is running the litigation. Let me
12 in so we can run it this way and the Secretary of State can
13 run it that way.

14 I don't think that that was what Rule 24 was
15 designed to do and I know that's not what 2403(b) was
16 designed to do because that only comes into play if there is
17 no State party involved in the litigation. And so we agree
18 -- you don't agree but I'm going to find that 2403(b) is
19 not applicable here because there is a State party still.

20 I need you to point me to the facts, the evidence
21 that would give me a basis to allow the Attorney General to
22 intervene without at the same time me having to see you come
23 down every time Mr. Coglianese is representing the Secretary
24 of State and you second-guessing him and then intervening if
25 he's not asking the right questions.

1 MS. JENNINGS: This isn't about second-guessing a
2 specific of trial strategy. This is about two different
3 clients with different interests. As your Honor said, the
4 Secretary of State is the chief elections officer of the
5 State, his interest is in administering the laws regarding
6 elections. The State of Ohio, the General Assembly
7 essentially, has an interest in seeing that their duly-
8 enacted statutes are upheld as constitutional, and that
9 interest may not necessarily coincide with that of our
10 Secretary of State.

11 The State of Ohio, if you will, is not just one
12 big blob where every state agency and every state entity has
13 the same interests.

14 THE COURT: That's a very good argument.

15 MS. JENNINGS: Thank you. There are different
16 roles here to fill.

17 THE COURT: That's a good argument.

18 MS. JENNINGS: It is the General Assembly that is
19 asking our office to intervene on their behalf to ensure
20 that their statutes are fully defended. There was another
21 instance earlier this year where the Attorney General of the
22 State of Ohio was not a party and the Attorney General --
23 I'm sorry, pardon me -- the Secretary of State entered into
24 a consent decree of a permanent injunction of the General
25 Assembly statute.

1 The General Assembly never had the opportunity to
2 be heard in that case. They don't want that to happen
3 again, your Honor. And it serves the interest of justice,
4 it serves the interest of this Court to hear full and
5 complete arguments regarding the constitutionality of the
6 statute. Not after the fact, not second-guessing, but
7 before this Honor enters his decision next week.

8 Thank you, your Honor.

9 THE COURT: Thank you, Ms. Jennings.

10 Mr. Chandra, I want you to address the argument
11 that Ms. Jennings just made. I don't need to hear you on
12 2403(b).

13 MR. CHANDRA: May it please the Court, thank you,
14 your Honor:

15 As a threshold matter, I guess the plaintiffs'
16 concern is that with this motion to intervene filed today,
17 under the typical local rules we would have 21 days to
18 respond or we'd have at least some more time to respond, and
19 I know that we are reacting on the fly here and I just
20 wanted to --

21 THE COURT: I think that you all filed a motion
22 for expedited discovery. We are all aware of the fact that
23 we are going to proceed on an expedited basis. That is not
24 an argument that we are going to --

25 MR. CHANDRA: That's understood, your Honor, but I

1 say that just as a cautionary note that the analysis here
2 may be a bit incomplete.

3 Your Honor, on the issue of there being separate
4 interests: I go back to the fact, and your Honor was back
5 talking about this a little bit, I go back to the fact that
6 the Attorney General of Ohio was here at the table
7 representing the Secretary of State yesterday, we all saw
8 the advocacy, we all saw all the arguments that were made
9 which struck me as all the arguments that could be made.

10 In fact, it is my understanding that even in the
11 chain of command in the Attorney General's office that
12 Ms. Jennings is Mr. Coglianese's supervisor. She was in the
13 courtroom yesterday watching those proceedings. And so to
14 suggest that somehow there wasn't this full and fair
15 opportunity to weigh in, respond, make all of the necessary
16 arguments, it's just simply not the case.

17 And when one looks at the rule that Ms. Jennings
18 cited, it specifically says that if the person isn't being
19 adequately represented, if the interests aren't adequately
20 being represented, and I just don't see how that could
21 possibly be argued here.

22 In terms of also there being a separate and
23 distinct interest somehow that emerges out of this based
24 upon the Secretary of State, the chief election officer's
25 decision not to disrupt the elections further by appealing

1 here, based on that decision, if there is some sudden
2 interest emerging, who are they? Who are these clients?

3 To just say vaguely the General Assembly, who is
4 that? Has there been a resolution of the General Assembly
5 saying we need to appeal this right away? Attorney General,
6 please represent us. That's just too amorphous for the
7 attorneys in the case to now simply diverge from their
8 client and say we just want to go off, with all respect, on
9 a frolic of our own, I just don't think that's appropriate.

10 Finally, your Honor, and I hope the Court will
11 forgive me because we are all on the fly here, but I think
12 it's important to be blunt and clear so that we make our
13 record. Let's talk about what's really happening here.

14 What's really happening is the Secretary of State
15 has decided not to appeal. It's in all the newspapers.
16 Mr. Todd, who is the only person that I am aware of in the
17 courtroom who represents the Secretary of State exclusively
18 and is not an employee of the Attorney General's Office,
19 perhaps serving two masters, he has also represented that
20 that's the Secretary of State's interests. He has
21 represented to us and yesterday in chambers.

22 So what is happening here, a notice of appeal was
23 filed with this court, a notice of appeal by the Attorney
24 General's Office on behalf of a client who doesn't want to
25 appeal. So perhaps to try to deal with that rather strange

1 conduct on behalf of a client that doesn't want it, now
2 there is this motion to intervene to perhaps create that
3 colorable right to appeal on behalf of someone else, and
4 this Court already denied a stay, said that there would be
5 no certification that an appeal would be well taken or
6 appropriate, that was in the discretion of this Court and
7 this Court ruled that.

8 The reality is, again I'm sorry to be so blunt,
9 the practical implications of what is being suggested here
10 are further elections chaos. And it goes to the substance
11 of what the Court decided yesterday; that the Secretary of
12 State issued a directive that caused further chaos
13 yesterday, even with the issue pending, then the Court
14 ordered yesterday that we need to go back to a simpler
15 system, and now there are going to be appeals and perhaps
16 further stays and further chaos and the boards of elections
17 that were confused to begin with under the Voter ID Rules
18 will be even more confused.

19 So I'm not sure, and this is why I was talking
20 about the need for further deliberation and consideration,
21 but I really think that it's important to get that out on
22 the table. Because while we agree with the Court's comments
23 about the rules here and the analysis under the federal
24 statute, the federal statute plainly says that it applies to
25 -- in plain English it says it's when the State, agency,

1 officer or employee is not a party.

2 And although the Ninth Circuit in Yniguez said
3 that they would take a little bit more liberal view of that,
4 the reality is that in the end they agreed that the Attorney
5 General could not be a party. The Attorney General could
6 simply make arguments about constitutionality so they could
7 be heard. That has already occurred here. It was
8 Assistant Attorney Rich Coglianesse who made all of these
9 arguments. I don't know what more there is to be said
10 about constitutionality.

11 So between the statutory analysis, the rules
12 analysis on Rule 24, again the rule says where the interest
13 isn't adequately being represented, the interest is being
14 adequately represented and the practical implications, the
15 reason this is being sought, let's just talk about it, is
16 so we can have an appellate process with more chaos and an
17 appellate process that this Court has already ruled would
18 be inappropriate.

19 And so for all of those reasons, we respectfully
20 request that the motion be denied, or at a minimum we set
21 out a generous briefing schedule where we can all brief it,
22 carefully consider it, and at this point there may be no
23 reason to disqualify the Attorney General. But since we're
24 seeing all kinds of inconsistent actions and we can't figure
25 out who the client is, maybe we need to have the General

1 Assembly in here to figure out whether they really want this
2 and have a separate interest.

3 THE COURT: I'm going to make a decision today on
4 this issue because time is of the essence.

5 Thank you, Mr. Chandra.

6 MR. CHANDRA: Thank you, your Honor.

7 THE COURT: Ms. Jennings.

8 MS. JENNINGS: Thank you, your Honor.

9 I would point out again that, contrary to
10 Mr. Chandra's comments that this is somehow all a result
11 of the fact that the notice of appeal was not filed, that
12 our efforts to intervene in both of these cases predate
13 yesterday's hearing.

14 In King Lincoln Bronzeville we filed a motion to
15 intervene on Monday, I thought that that would likewise
16 apply to this case and that they were consolidated.
17 Yesterday morning I began the process of seeking consent to
18 intervene from counsel in this case. We have consistently
19 acted to intervene on behalf of the General Assembly.

20 THE COURT: For the record, the Secretary of State
21 in this case has been represented by the Attorney General's
22 Office; is that right?

23 MS. JENNINGS: Yes.

24 THE COURT: So what we have here is the Secretary
25 of State being represented by the Attorney General's Office

1 and then the "State of Ohio" is being represented by the
2 same office, the Attorney General's Office.

3 MS. JENNINGS: That's correct, your Honor, and
4 that is not --

5 THE COURT: But they are different clients.

6 MS. JENNINGS: They are different clients.

7 THE COURT: One client is the General Assembly and
8 one client is the Secretary of State.

9 MS. JENNINGS: Correct.

10 THE COURT: Do you see them as having divergent
11 interests?

12 MS. JENNINGS: I think, as of this morning, the
13 interests may be divergent.

14 THE COURT: Tell me how the interests may be
15 divergent, what facts you rely on to conclude that their
16 interests may be divergent?

17 MS. JENNINGS: I think that the interests may be
18 divergent -- I can give you two examples.

19 THE COURT: All right.

20 MS. JENNINGS: One is their stated desire not to
21 file an appeal from yesterday's decision.

22 THE COURT: That's the Secretary of State?

23 MS. JENNINGS: Right, Secretary of State.

24 And as of right now, it's really impossible for anyone to
25 know what that may mean for their plans to defend the action

1 next Wednesday.

2 THE COURT: Have you built Chinese walls between
3 the lawyers from your office who represent the Secretary of
4 State and the lawyers from your office who represent the
5 General Assembly?

6 MS. JENNINGS: Where there is a conflict, we build
7 appropriate Chinese -- yes. In this matter I am no longer
8 supervising the work of Mr. Sikora and Mr. Coglianese,
9 although that is normally my job as a senior deputy
10 Attorney General.

11 THE COURT: So you don't know whether the lawyers
12 in your office are planning to defend this case through the
13 PI hearing.

14 MS. JENNINGS: I am no longer privy to discussions
15 between the Secretary of State and the lawyers in my office
16 regarding this case.

17 THE COURT: Mr. Coglianese, would you please stand
18 for a moment. I may have asked you this before but I just
19 want to close this loop: Are you, on behalf of the
20 Secretary of State, intending to defend this case at the
21 preliminary injunction hearing on Wednesday?

22 MR. COGLIANESE: Your Honor, although we have not
23 yet seen the preliminary injunction motion, standing in
24 front of you right now this second, yes, that is my
25 intention.

1 THE COURT: Have you had any indication from your
2 client that you were not going to defend in the event that
3 you lost the TRO yesterday?

4 MR. COGLIANESE: That we would not defend the PI?

5 THE COURT: That's right.

6 MR. COGLIANESE: No, your Honor.

7 THE COURT: In fact, am I correct that the
8 Secretary of State's position is that even if you lost the
9 TRO yesterday, you were still going to defend the
10 preliminary injunction hearing whenever it was set? Was
11 that your position?

12 MR. COGLIANESE: That is my understanding, your
13 Honor.

14 THE COURT: Thank you. At least that clarifies
15 that.

16 Go ahead, Ms. Jennings.

17 MS. JENNINGS: I guess, your Honor, that clarifies
18 that at this particular moment and time. Obviously, we
19 can't say with certainty what will happen between now and
20 next Wednesday, thus the cause for my concern.

21 THE COURT: If on Monday Mr. Coglianesse calls and
22 says that the Secretary has decided not to go through with
23 the defense of the preliminary injunction hearing, if I
24 don't grant your motion, then you should renew your motion.
25 Because I think that 2403(b) may then be directly applicable

1 and you certainly would be granted the right to intervene.

2 MS. JENNINGS: And then my client's rights have
3 been prejudiced by losing three days on what is a very tight
4 time frame to prepare for the hearing on the motion for
5 preliminary injunction. That's why we believe the better
6 course is to let us in and let the chips fall where they
7 may. We do not intend to duplicate efforts or create
8 prejudice to any other party or seek delay.

9 If I may, your Honor, too, I was going to give you
10 another example. You asked for evidence of differences.
11 Another one is had we intervened before yesterday's hearing,
12 there are at least some areas where we may have expressed a
13 different opinion than was given.

14 The Attorney General shares this Court's concern
15 about the driver's license number and the confusion that
16 that has caused and agrees that voters should not be
17 disenfranchised by that particular problem. That is not a
18 concession that the statute is unconstitutional.

19 THE COURT: No, but --

20 MS. JENNINGS: That is that there is a practical
21 problem that has occurred that needs to be corrected.

22 THE COURT: But you would agree that voters should
23 not be disenfranchised under any set of circumstances, so
24 you are not just limiting it to that.

25 MS. JENNINGS: Pardon me?

1 THE COURT: I said you would agree that voters
2 should not be disenfranchised under any set of
3 circumstances.

4 MS. JENNINGS: Absolutely, your Honor. I just say
5 that that's another example where, had we been at the table
6 yesterday evening, you know, we would have had the
7 opportunity to perhaps talk about the shaping of the
8 relief. I'm not seeking to go back at this point in time to
9 do that.

10 THE COURT: At least until this morning when your
11 motion to intervene was filed, the Attorney General's Office
12 didn't have that duality of representation. The Attorney
13 General's Office -- you were still supervising
14 Mr. Coglianesse; the Attorney General's Office was still
15 supervising the representation of the Secretary of State.
16 And so the arguments that Mr. Coglianesse made represented
17 the considered judgments not only of Mr. Todd, Mr. James,
18 Mr. Coglianesse and Mr. Sikora, but also the rest of the
19 Attorney General's Office. It was your strategy that was
20 unfolded here in this courtroom, wasn't it?

21 Yes, it was.

22 MS. JENNINGS: At that point in time --

23 THE COURT: At the point in time of the arguments
24 yesterday, what Mr. Coglianesse did was argued for the
25 Secretary of State on behalf of the Attorney General's

1 Office, representing the views of the Attorney General's
2 Office; isn't that true?

3 MS. JENNINGS: That is true. Still, though, I
4 guess my point being the different interests, they already
5 existed at that point. There was just no conflict. Where
6 everyone is moving ahead and fully defending the statute,
7 there is absolutely no problem with the dual representation
8 and taking the position in litigation that represents all
9 interests.

10 THE COURT: I understand.

11 MS. JENNINGS: That's just another example,
12 though, you know, does it matter? It does matter.

13 Specifically, the standard for intervention as of
14 right is to be broadly construed. We believe that the facts
15 at this time are sufficient for us to intervene as of right
16 because there is the possibility that the Secretary may not
17 adequately represent the interests of the General Assembly
18 in fully and forcefully defending the constitutionality of
19 our statutes.

20 THE COURT: Thank you, Ms. Jennings.

21 I am going to take this matter under advisement.
22 I don't intend to keep you all here today like I did last
23 night, but I do intend to make a ruling this afternoon.
24 But I think that we all have earned the right to have
25 lunch.

FRIDAY AFTERNOON SESSION

OCTOBER 27, 2006

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4 THE COURT: Good afternoon and once again, thank
5 you for your patience.

6 Pending before the Court is the motion of the
7 Attorney General to move to intervene. The motion is styled
8 "Motion to Intervene by the State of Ohio."

9 The State of Ohio has moved to intervene as of
10 right pursuant to Civil Rule 24(a)(2), also pursuant to 28
11 U.S.C. 2403, and they have moved for permissive
12 intervention. The Court will consider each of these
13 arguments seriatim.

14 As a threshold matter, however, I want to consider
15 the issue that none of us has really considered. I think
16 it's just been presumed that if I were to permit the General
17 Assembly, shall we say, to appeal or to intervene, then it
18 would be able to prosecute an appeal. And I am not certain
19 that that is the case.

20 In a civil action an order granting, denying or
21 dissolving a restraining order, qua restraining order, is
22 non appealable. Sometimes, however, although the
23 distinction may be subtle and difficult to draw, an order
24 denying a temporary restraining order after full
25 presentation by the parties has the effect of the refusal of

1 an injunction within the meaning of 28 U.S.C. 1292(a)(1).

2 Such a situation may exist if the refusal of even
3 temporary relief cuts off the possibility of meaningful
4 interlocutory relief.

5 The courts look to the subject matter of the
6 order, its duration, and whether or not notice and hearing
7 of both parties were had. And the courts also look to
8 whether a district court, in determining the TRO motion,
9 used the four-prong test that this Court used yesterday, or
10 whether it used the two-prong test of considering only
11 immediacy and irreparability of injury as Rule 65 sets out,
12 Rule 65(b) sets out to be precise.

13 In this case, it is a close call. First of all,
14 it came to the Court as a TRO and the Court treated it as a
15 TRO, with the exception of the fact that it was not ex parte.
16 Both parties, as is often the case when you have a prelim-
17 inary injunction hearing, had an opportunity to be heard.

18 However, as distinct from a preliminary injunction
19 hearing, neither party adduced evidence. And at the
20 preliminary injunction hearing that I envision next week,
21 witnesses will be called, evidence will be adduced by both
22 parties, it will be indeed an adversarial proceeding. The
23 pleading yesterday was adversarial but it was simply
24 argument on the papers.

25 Similarly, the Court in Spencer v. Armonk

1 Industries, 489 F.2d 704, 1973, considered the fact that
2 -- I'm sorry. That was the case from which I read about
3 the general rules regarding the issuance of a temporary
4 restraining order and whether it can be considered as
5 something giving preliminary injunctive relief.

6 But in Austin v. Altman, 332 F.2d 273, 1964, one
7 of the things that the court looked at was the duration of
8 the TRO. In that case the duration of the TRO was 11 days.
9 And in looking at the fact that the TRO was longer than that
10 contemplated under Rule 65(b), the Court was of the mind
11 that perhaps this was more in the nature of a preliminary
12 injunction than a temporary restraining order. Here, the
13 temporary restraining order will last less than a week, less
14 than the ten-day period contemplated under Civil Rule 65(b).

15 In addition, the parties in this case are not
16 precluded from interlocutory relief as contemplated by 28
17 U.S.C. 1292(a)(1) because of the fact that you are going to
18 have a preliminary injunction hearing within approximately
19 five days of the TRO and either party may pursue an
20 interlocutory appeal after that preliminary injunction
21 hearing.

22 So even if this Court were to allow the General
23 Assembly, as the party that the Attorney General is seeking
24 to represent this time, even if I allow the General Assembly
25 to intervene, it is not clear that the General Assembly

1 would be able to appeal my TRO to the Sixth Circuit because
2 I am of the mind that it was a temporary restraining order,
3 qua temporary restraining order, which is nonappealable.

4 That being said, let me move on to the substance
5 of the General Assembly's motion. The General Assembly
6 first posits that it should be allowed to intervene as a
7 matter of right pursuant to Civil Rule 24(a) which provides:

8 "Upon timely application, anyone shall be
9 permitted to intervene in an action: (1) when a statute of
10 the United States confers an unconditional right to
11 intervene; or (2) when the person seeking to intervene
12 claims an interest relating to the action and is so situated
13 that the disposition of the action may impair that person's
14 ability to protect that interest unless existing parties
15 adequately represent the applicant's interest."

16 Let's take them one at a time.

17 First, under the first prong, when a statute of
18 the United States confers an unconditional right to
19 intervene:

20 The General Assembly relies on 28 U.S.C. 2403 as
21 such statute. That section provides:

22 "In any action, suit or proceeding in a court of
23 the United States to which a State or any agency,
24 officer or employee thereof is not a party, wherein the
25 constitutionality of any statute of that State affecting

1 the public interest is drawn into question, the Court
2 shall certify such fact to the Attorney General of the
3 State and shall permit the State to intervene for
4 presentation of evidence, if evidence is otherwise
5 admissible in the case and for argument on the question
6 of constitutionality."

7 First, this Court did not certify such fact to the
8 Attorney General of the State of Ohio because the General
9 Assembly cannot meet the predicate condition under this
10 section; that is, where the State and agency, officer or
11 employee is not a party.

12 In this case, the Secretary of State is a party.
13 This is, the Secretary of State has not been dismissed and
14 the Secretary of State, through counsel -- and I will note
15 parenthetically that the Secretary of State's office is
16 represented in this case by the Attorney General's Office.
17 An officer of the state, the chief elections officer of the
18 State, is a party to this case, and so 2403(b) does not
19 apply in this case.

20 Let's look at the second element in determining
21 whether that person can intervene as of right. The
22 applicant must claim an interest relating to the property or
23 transaction that is the subject of the action;

24 Secondly, where the applicant is so situated that
25 disposition of the suit may, as a practical matter, impair

1 or impede his ability to protect that interest; and

2 Third, that applicant's interest is adequately
3 represented by existing parties. Those are the three keys
4 to intervention as of right under 24(a)(2).

5 First, the applicant claims an interest. Clearly
6 the General Assembly meets that prong of the test. The
7 General Assembly claims an interest in the outcome of this
8 litigation; and, as Ms. Jennings properly noted, the General
9 Assembly has an interest in upholding the constitutionality
10 of its enactments.

11 Second, whether the applicant is so situated that
12 disposition of the suit may, as a practical matter, impair
13 or impede his ability to protect that interest.

14 In this case, the General Assembly does not
15 satisfy that prong of the test. The State of Ohio's
16 interest in this case, the people of the State of Ohio's
17 interest in this case are being protected by the Secretary
18 of State, the chief elections officer who, in his capacity
19 as chief elections officer, would have an interest in
20 upholding the constitutionality of the election laws.

21 What is even more compelling, and what undergirds
22 much of my ultimate decision in this case, is the fact that
23 the strategy that the chief elections officer brought to
24 this Court to uphold the constitutionality of H.B.3 was
25 formulated by the Attorney General's Office, the same

1 Attorney General's Office which is asking to represent the
2 General Assembly as an intervenor.

3 In her argument, Ms. Jennings did not offer any
4 substantial or substantive arguments that differ in any
5 respect from the arguments that Mr. Coglianese offered to
6 support the constitutionality of the H.B.3 sections that
7 this Court found constitutionally infirmed.

8 So the state's interest is being more than
9 adequately represented because it is propagating the same,
10 or it is certainly proposing the same arguments. It is
11 proffering the same arguments in support of the Secretary of
12 State that were offered in support of the General Assembly.
13 So that prong is not satisfied.

14 The third prong is whether the applicant's
15 interest is adequately represented by existing parties.

16 For the same reason, obviously, the General
17 Assembly's interest is adequately represented by the
18 existing parties because the General Assembly is being
19 represented by the same party who is representing the
20 Secretary of State, advancing the same arguments.

21 So there is no basis for intervention as of right
22 in this case.

23 The next question becomes whether the General
24 Assembly can intervene in this case under 24(b)(2) by way of
25 permissive intervention.

1 In order for a party to intervene by way of
2 permissive intervention, the request or the motion to
3 intervene must be timely; there must be common questions of
4 law or fact, and what the Court must also look at is whether
5 the intervention will result in undue delay or prejudice in
6 the adjudication of the rights of the original parties.

7 Well, the first question is whether it was
8 timely. On its face, it appears timely because the suit in
9 this case was filed I believe on Wednesday; is that correct?

10 MS. JENNINGS: Tuesday, the General Assembly.

11 THE COURT: The General Assembly moved to
12 intervene on Friday, although Ms. Jennings has argued that
13 her motion to intervene should be considered for either
14 Thursday or Wednesday, I am unclear whether it was Thursday
15 or Wednesday, because the case was formally transferred to
16 me on Wednesday.

17 Ms. Jennings' contention is that once it was
18 transferred to me, she thought it was consolidated with me,
19 and that a similar motion to intervene which had been filed
20 in the case into which she thought this case would be
21 consolidated had been filed.

22 The Court accepts Ms. Jennings' argument. As she
23 is an officer of this Court, I have no reason to believe
24 that she would misrepresent her intentions. However, a
25 motion was not filed in this case, styled in this case,

1 until today.

2 The motion was not formally raised with this Court
3 until last night when Mr. Coglianesse, who was representing
4 the Secretary of State, indicated that the General Assembly,
5 I think he couched it in terms of the Secretary of State,
6 would want to intervene in light of the fact that -- I think
7 I may have misspoke.

8 Mr. Coglianesse said the Attorney General wanted to
9 intervene in light of the fact that the Secretary of State
10 did not want to appeal.

11 That raises some question and/or concern, if not
12 suspicion, on this Court's part that the basis for the
13 motion for intervention may be a disagreement over
14 litigation strategy, to-wit: whether to appeal this Court's
15 temporary restraining order decision, which the Secretary of
16 State said it chose not to do, or to prosecute that appeal,
17 which the Attorney General said on behalf of the General
18 Assembly it wanted to do.

19 If that is the case, if I factor that in, then
20 this Court could very well find that the motion to intervene
21 was not timely. Because if the only reason that the General
22 Assembly wanted to intervene through the Attorney General is
23 to protect the constitutionality of the statute, then the
24 Court's view is that since the Attorney General was already
25 in the suit representing the Secretary of State, the

1 Attorney General could have moved to intervene on Tuesday,
2 before this whole issue to appeal or not to appeal arose.

3 Let's just say that that factor right now is at
4 equipoise. I'm not going one way or the other on it.

5 Are there common questions of law and fact?

6 Yes, there are. There are common questions of law because
7 the Attorney General has plotted the strategy to uphold the
8 constitutionality of the statute. So, yes, there are common
9 questions of law and fact.

10 Third, would there be undue delay or prejudice in
11 the adjudication of the rights of original parties?

12 Absolutely. There would be undue delay because we now have
13 another party coming in who is essentially brought in as a
14 redundancy.

15 If I take Ms. Jennings' argument for face value,
16 that is, we want to come in and protect the constitutionality
17 of the statute. Ms. Jennings, I will note for the record,
18 is Mr. Coglianesse's supervisor, although for the purposes of
19 this hearing she has constructed a Chinese wall because
20 ostensibly they are representing different clients with
21 divergent interests.

22 However, Ms. Jennings, by concession, is of the
23 same Attorney General's Office and section which helped
24 formulate the strategy and arguments set forth by
25 Mr. Coglianesse yesterday. That strategy and those arguments

1 went to upholding the constitutionality of House Bill 3.

2 The only thing that could come out of having two
3 parties from the same office, with the same position and the
4 and the same strategy, is an overlay upon an overlay. It is
5 going to be redundant, cumulative; and, given the fact that
6 we're operating on an expedited track, a waste of judicial
7 resources, not to mention the resources of the Attorney
8 General's Office.

9 Because I can't imagine how it would be efficient
10 in an expedited litigation situation to have offices with
11 Chinese walls articulating the same arguments and the same
12 strategy, but at the same time fighting about whether to
13 appeal or not to appeal. It seems that question is really
14 the engine driving this train. As it turns out, I think
15 it is the action that has actually derailed this
16 particular train.

17 There is no reason, colorable or otherwise, to
18 bring in a party to assert arguments that already have been
19 made. Ms. Jennings on behalf of the General Assembly did
20 not bring to this Court's attention any new arguments.
21 Essentially what she was saying was, Judge, if you'd just
22 let me take these same arguments that Mr. Coglianese made to
23 the Sixth Circuit, I know we'll get relief. And that may
24 well be the case, but the appropriate time for you to take
25 those arguments to the Sixth Circuit, if at all, or if

1 necessary, would be at the conclusion of the preliminary
2 injunction hearing and my adverse ruling thereon, should an
3 adverse ruling on your arguments follow.

4 Finally, the Court doesn't find that a
5 disagreement on litigation strategy should form the basis
6 for intervention, be it under 24(a), 24(b) or 28 U.S.C.
7 2403(b). These parties are represented by the same entity,
8 they have the strategy, and they have the same theory of the
9 case as to why H.B.3 is constitutional.

10 Moreover, there is no evidence at all, in fact the
11 evidence is to the contrary, as Mr. Coglianese has
12 established, and I think also Mr. Todd, that the Secretary
13 of State has relinquished his obligation and duty to defend
14 this case. It's not a situation that we found in Yniguez,
15 where the State was not being represented. The State is
16 being represented and they are being represented zealously
17 and expertly by Mr. Coglianese and the other people in the
18 Attorney General's Office who are supporting the
19 constitutionality of this statute.

20 Therefore, nothing has changed in this litigation
21 and the only thing that arose in this litigation that seems
22 to have precipitated it is a disagreement, perhaps within
23 the Attorney General's Office, between those representing
24 the Secretary of State and those who are purportedly
25 representing the General Assembly, or between the Secretary

1 of State and the Attorney General.

2 In either event, neither of those disagreements is
3 sufficient as a matter of law to permit intervention.
4 Therefore, the motion to intervene by the State of Ohio is
5 denied as the State of Ohio is already a party to this
6 litigation.

7 Now, that being said, we need to address another
8 issue relating to this case and that is -- I raised it with
9 Mr. Coglianesse over the lunch hour. Mr. Chandra, you had
10 not returned yet -- and that is the issue of the Web page.

11 I am not for the moment suggesting that the
12 Secretary of State did anything appropriate. None of us, as
13 we were working through this late into the evening,
14 considered the Web page. The Secretary of State has
15 followed this Court's order and had those directives sent to
16 all of the county boards of elections.

17 However, I am told, unless it has changed in the
18 last half hour or so, that the Web page remains the same as
19 it did before the Court's order.

20 MS. CORL: Your Honor, if I may, Christina Corl, I
21 am one of the attorneys for Secretary Blackwell. My
22 information is it's either being updated as we speak; or, if
23 we check right now, it might already be done.

24 THE COURT: I may just take a recess, check, and
25 if not, we need to just bring it up to speed. But it was

1 something that --

2 MS. CORL: The wheels are already in motion, your
3 Honor. They have been. We spoke to the office at
4 approximately 2:00. It's not something that fingers can be
5 snapped, but they immediately began working on it.

6 THE COURT: All right.

7 MS. CORL: And if it is not already done, it will
8 be before we leave today.

9 THE COURT: One other thing that we also need to
10 address, and I didn't address because we were operating on
11 an expedited schedule, is the date by which the preliminary
12 injunction motion and its supporting memoranda will be filed
13 and date for your reply. I am thinking I would like to have
14 simultaneous briefing, but you certainly could make a claim,
15 Mr. Coglianesse, that you don't know what their arguments
16 will be.

17 MR. CHANDRA: We will file it today, your Honor,
18 and we've had a conversation with counsel.

19 THE COURT: So you will file it by 5:00 today?

20 MR. CHANDRA: Maybe not quite that soon. It might
21 be a little bit after hours. We've got some typos to
22 correct. It is drafted and we will file it.

23 THE COURT: I am going to give you until 6:00
24 today to file it.

25 MR. CHANDRA: We will get it done.

1 THE COURT: Mr. Coglianese, how much time will you
2 need? Will noon on Tuesday be sufficient for you?

3 MR. COGLIANESE: We will do our best, your Honor,
4 to get it filed by noon on Tuesday.

5 THE COURT: Ms. Jennings.

6 THE COURT: Your Honor, sorry to take us back to
7 the subject.

8 THE COURT: Proceed.

9 MS. JENNINGS: Just quickly, related to your
10 ruling on the motion to intervene, I would move for leave to
11 file an interlocutory appeal on that order.

12 THE COURT: Denied.

13 Is there anything else from the plaintiff,
14 Mr. Chandra?

15 MR. CHANDRA: Yes, your Honor. Just perhaps after
16 this proceeding ends, if we could just spend a few minutes
17 talking about discovery in chambers. We wanted to make sure
18 that we can be in touch with the Court and resolve any
19 issues that have already started to arise.

20 THE COURT: I can tell you the answer is yes.
21 Both sides can be in touch with me so that we can move this
22 along. However, I will refer everyone to our rules on
23 civility in the Southern District. The preamble to our
24 rules is the statement on civility. That is the starting
25 point. Because I don't expect either side to fail to

1 cooperate with the other side. One of the things that has
2 been the hallmark of this litigation that I have seen so far
3 is the cooperation among and between counsel. Unless it's
4 privileged, give it up.

5 MR. CHANDRA: The issue isn't among us, isn't
6 between us. It's the other people that we have to reach out
7 to now to try to get their cooperation. And so as those
8 people object and create issues, we want to be able to have
9 a process.

10 THE COURT: Mr. Coglianese.

11 MR. COGLIANESE: Your Honor if I may, just for the
12 Court's edification, boards of elections are represented by
13 county prosecutors, they are not represented by the Attorney
14 General's Office. We have seen some objections and things
15 coming in, so we just thought if both sides sat down with
16 the Court, we might be able to establish a procedure quickly
17 for that. Thank you.

18 THE COURT: That's fine. I will be here. If
19 you're ready, give me about five minutes to move all of the
20 food off my conference room table and then we can discuss
21 it. It's 3:30 now. Let's convene at 3:45. That will give
22 you a chance to collect your thoughts and we can work
23 through it then.

24 MR. CHANDRA: Thank you, your Honor.

25 (Recess taken at 3:35.)

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CERTIFICATE

I certify that the foregoing is a true and correct record of proceedings in the above-entitled matter, heard before the Honorable Algenon L. Marbley, United States District Judge, sitting at Columbus, Ohio, on October 27, 2006, reported by me in stenotypy and transcribed by me or under my supervision.

<u>Joan E. Koenig</u>	<u>10-30-06</u>
Joan E. Koenig	Date
Official Federal Court Reporter	

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