

CASE NOS. 06-3335, 06-3483, 06-3621

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

AND

**JEANNE WHITE,
INTERVENOR-APPELLEE,**

vs.

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

FINAL MERITS BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants/Appellants submit that oral argument is necessary in this case because the Plaintiffs and Intervenor have alleged that the entire electoral process in the State of Ohio has been unconstitutional for the past thirty years. The Defendants request oral argument in order to clarify the written arguments and to address important questions concerning Ohio's election system.

ISSUES PRESENTED FOR REVIEW

This appeal presents the following four issues for review:

- 1) Whether the Plaintiffs have stated a claim that Ohio's elections system violates the Fourteenth Amendment;
- 2) Whether the Defendants have Eleventh Amendment immunity from the Plaintiffs' claims;
- 3) Whether the Intervenor has stated a claim that Ohio's use of electronic voting machines ("DREs") violates the Fourteenth Amendment;
- 4) Whether the Defendants have Eleventh Amendment immunity from that claim.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Plaintiffs' and Intervenor's claims pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. §§ 1291 and 1292.

INTRODUCTION

This country's entire elections system is premised upon the use of hardworking individuals who work very long days for very little money. These elections workers, embodied with a great sense of civic pride, work busy polling locations across the country. They view this avocation as a way to exhibit their patriotism and pride in democracy.

These workers are not elections professionals. They are not lawyers. As they will no doubt admit, they are not perfect. They are, however, the backbone of the American elections system.

During the 2004 election, neither political party made any secret that they had teams of lawyers circling battleground States, looking for any minor error made by these hardworking individuals so that they could immediately rush into court. The Plaintiffs in this case appear to be the beneficiaries of those efforts. They have maligned these hardworking individuals by claiming that isolated, unintentional, simply human mistakes made by these poll workers demonstrate that an unconstitutional elections system has existed in the State of Ohio for over 30 years.

They cannot point to any intentionally discriminatory actions by these local poll workers. They cannot point to any actions by the Governor or Secretary of State in order to take advantage of the State's elections system by violence or

corruption. They cannot show a system-wide breakdown. Rather, they have simply alleged that some of these hardworking elections workers are guilty of being human and making understandable errors. Those allegations are insufficient to show the State's elections system violates the constitution.

This Court should recognize that certain mistakes are inevitable whenever 5,722,443 people attempt to vote in a hotly contested election in a thirteen hour period. Those unavoidable human mistakes are a part of our elections system. They are not, and cannot be, grounds to find the system unconstitutional. Thus, this Court should reverse the District Court and dismiss the Plaintiffs' and Intervenor's complaints.

STATEMENT OF FACTS

The Plaintiffs have alleged that Ohio's local county boards of elections made various errors during the 2004 general election. These errors included mistakes in the processing of new voter registration forms, the compilation of eligible voter lists for the election itself, and the processing of absentee ballots. They also complained about errors in provisional ballots and voting machine allocation. Likewise, the Intervenor has filed her complaint because she simply does not like voting on an electronic voting machine.

This lawsuit is brought by both individual and institutional plaintiffs. Its apparent goal is the complete federal judicial takeover of the Ohio elections

system. (R. 1, Complaint at Prayer for Relief; R. 200, Amended Complaint at Prayer for Relief; Appx. at 061, 318). The only defendants in this case are Ohio Governor Bob Taft and Ohio Secretary of State J. Kenneth Blackwell. (R. 1, Complaint at ¶¶ 1, 27; R. 200, Amended Complaint at ¶¶ 1, 24; Appx. at 001, 261).

A. The Individual Plaintiffs

Darla Stenson's complaint is that she was a registered voter in Lucas County, Ohio for the 2004 general election. When she arrived at her multi-precinct polling location, an employee of the Lucas County Board of Elections informed her that she was not on the voter roll. According to her allegations, that local government employee failed to check and see if she was in the correct precinct. Rather, the board employee simply gave Stenson a provisional ballot and told her not to seal the envelope. Her provisional ballot was eventually rejected because she voted in the wrong precinct. (R. 1, Complaint at ¶ 12; R. 200, Amended Complaint at ¶ 12; Appx. at 001, 261).

Charlene Dyson alleges that she is a resident of Franklin County, Ohio and suffers from arthritis in both of her legs and generally uses a wheelchair. She has claimed that the building she votes in is not accessible so she called the Franklin County Board of Elections prior to the 2004 election and was informed that she could have a county employee bring a ballot to the car so that she could vote. She alleges that when her sister went into the polling place, her sister was informed that

they would not bring a ballot out to Dyson's car. Dyson testified, however, that immediately after she left her polling location she placed a call to an election group that then called the Franklin County Board of Elections. In the middle of the afternoon on Election Day, Dyson was told that if she went back to her polling location, a county employee would bring a ballot out to her car. She decided, however, not to return to her polling location because she was simply too mad to vote. She had also admitted that from 1971 through 2004 that was the only problem she ever encountered when she attempted to vote. (R. 1, Complaint at ¶ 14; R. 200, Amended Complaint at ¶ 13; Appx. at 001, 261).

Anthony White alleges that he is a registered voter in Cuyahoga County and was eligible to vote in the 2004 general election. White claimed that he received a card from the Cuyahoga County Board of Elections prior to the 2004 election informing him where his polling place was located. After waiting in the proper line, a board of elections employee informed him that he was not on the voting roster for that precinct or for any of the other precincts voting at that location. He claims that he was given a provisional ballot that was not counted and that the Cuyahoga County Board of Elections has no record of White attempting to vote in the 2004 election. (R. 1, Complaint at ¶ 15; R. 200, Amended Complaint at ¶ 14; Appx. at 001, 261).

Deborah Thomas alleged that she was a registered voter in Cuyahoga County and she alleged that she had voted in the same location for twenty years. She claimed that when she arrived to vote on Election Day, a Cuyahoga County Board of Elections employee told her that her name was not on the voting roll but did not attempt to call the Board of Elections or take any other steps to determine her registration status. Thomas alleges that she cast a provisional ballot but the Cuyahoga County Board of Elections failed to count her provisional ballot and does not have any record of her attempt to vote. (R. 1, Complaint at ¶ 17; R. 200, Amended Complaint at ¶ 15; Appx. at 001, 261).

Leonard Jackson also alleges that he was a registered voter in Cuyahoga County who was eligible to vote in the 2004 general election. He claims that he arrived at his regular polling place but was told that his name was not in the voter rolls. He alleges that the county employee failed to call the local board of elections or to take any other steps to investigate Jackson's status. Jackson was given a provisional ballot which he claims was not counted and he further alleges that the Cuyahoga County Board of Elections has no record of him attempting to vote in 2004. (R. 1, Complaint at ¶ 18; R. 200, Amended Complaint at ¶ 16; Appx. at 001, 261).

Deborah Barberio resides in Cuyahoga County and alleges that she was eligible to vote in the 2004 general election. She alleged that she appeared as a

registered voter in August 2004. Apparently, her husband received a voter information card from the Cuyahoga County Board of Elections for the November 2004 election but she did not. The Board informed her that she was registered to vote. When she went to vote on Election Day, she was apparently informed that she was not registered to vote. Her provisional ballot was rejected by the Cuyahoga County Board of Elections. (R. 1, Complaint at ¶ 19; R. 200, Amended Complaint at ¶ 17; Appx. at 001, 261).

Mildred Casas was a registered voter in Franklin County, Ohio. She alleges that she attempted to vote at the Ohio State Student Union on Election Day when an employee of the Franklin County Board of Elections informed her that she needed to vote at a different location. She went to that location and eventually was sent to a third voting location. At the third location she cast a provisional ballot. Since she cast the provisional ballot in the wrong precinct it was eventually rejected by the Franklin County Board of Elections. (R. 1, Complaint at ¶ 20; R. 200, Amended Complaint at ¶ 18; Appx. at 001, 261).

Sadie Rubin claims that she was a registered voter in Knox County attending Kenyon College. She complains that she needed to wait several hours in order to cast her ballot in the 2004 general election. (R. 1, Complaint at ¶ 21; R. 200, Amended Complaint at ¶ 19; Appx. at 001, 261).

Lena Boswell complains that she has been a registered voter in Cuyahoga County for several years. When she attempted to vote in 2004, she discovered that her name was not on the voter roll. The county Board of Elections informed her that she was either purged from the voting rolls in 1996 or her registration may have been inadvertently removed when the county changed computer systems in 2000. Her provisional ballot was later rejected by the Board of Elections. (R. 1, Complaint at ¶ 22; R. 200, Amended Complaint at ¶ 20; Appx. at 001, 261).

Chardell Russell complains that she resided in Lucas County and the voting machines at her precinct were not functioning so she was given a paper ballot. She deposited the paper ballot as instructed. The apparent basis of her complaint is that she was not told if there was a way to verify that her paper ballot was counted. (R. 1, Complaint at ¶ 23; R. 200, Amended Complaint at ¶ 21; Appx. at 001, 261).

Dorothy Cooley votes in Medina County. Her complaint is that an employee of the Medina County Board of Elections informed her that she was not allowed to wear a shirt with a candidate's logo into her polling location since Ohio law prohibits electioneering within 100 feet of the polling place. (R. 1, Complaint at ¶ 24; R. 200, Amended Complaint at ¶ 22; Appx. at 001, 261).

Finally,¹ Lula Johnson-Ham complains that when she arrived at her polling location in Lucas County, the machine was not functioning properly and she was

¹ Jimmie Booker, Dorothy Stewart, and Justine Watanabe were original plaintiffs in this case but dismissed their claims. (R. 75, Order at ¶ 2; Appx. at 214).

informed to place the ballot into a side slot on the machine and that her vote would be processed when the machine was working. The basis of her complaint is that she did not receive instructions on how to contact the Lucas County Board of Elections to make sure that her vote was actually counted. (R. 1, Complaint at ¶ 25; R. 200, Amended Complaint at ¶ 23; Appx. at 001, 261).

B. Organizational Plaintiffs

The League of Women Voters of Ohio and The League of Women Voters of Toledo-Lucas County are the two organizational plaintiffs in this litigation. (R. 1, Complaint at ¶¶ 9-10; R. 200, Amended Complaint at ¶¶ 9-10; Appx. at 001, 261). The organizational plaintiffs apparently claim that Ohio's entire elections system violates the Fourteenth Amendment. (R. 1, Complaint at ¶ 41; R. 200, Amended Complaint at ¶ 38; Appx. at 001, 261). The only specific allegation that the Plaintiffs have filed against the Governor is that he failed to provide the local county boards of elections with adequate funding and resources. (R. 1, Complaint at ¶ 45; R. 200, Amended Complaint at ¶ 42; Appx. at 001, 261).

The organizational plaintiffs have made general allegations in their complaint as follows:

- Some counties may have had problems registering voters and, as a result, were unable to vote in the 2004 general election. (R. 1, Complaint at ¶¶ 49-57; R. 200, Amended Complaint at ¶¶ 46-54; Appx. at 001, 261);

- Some people, pursuant to a statute this Court has already upheld as constitutional, had their voter registrations challenged²; (R. 1, Complaint at ¶¶ 58-60; R. 200, Amended Complaint at ¶¶ 55-57; Appx. at 001, 261);
- County boards of elections had problems processing absentee ballot applications and some people never received an absentee ballot or were incorrectly listed as having voted by absentee ballot when they did not; (R. 1, Complaint at ¶¶ 68-77; R. 200, Amended Complaint at ¶¶ 65-74; Appx. at 001, 261);
- County boards of elections failed to provide information about the correct location to cast their ballots. (R. 1, Complaint at ¶¶ 79-83; R. 200, Amended Complaint at ¶¶ 76-80; Appx. at 001, 261);
- Some isolated polling locations either opened late or closed early; (R. 1, Complaint at ¶¶ 84-86, 120; R. 200, Amended Complaint at ¶¶ 81-83, 117; Appx. at 001, 261);
- The county boards of elections failed to provide an adequate amount of voting machines at some precincts (R. 1, Complaint at ¶¶ 88-115; R. 200, Amended Complaint at ¶¶ 85-112; Appx. at 001, 261);
- The county boards did not properly train their poll workers. There were not enough county poll workers and the ones that were there gave erroneous advice (R. 1, Complaint at ¶¶ 124-133; R. 200, Amended Complaint at ¶¶ 121-130; Appx. at 001, 261);
- Some precincts ran out of envelopes for provisional ballots and county boards of elections disqualified a “high” amount of those ballots (R. 1, Complaint at ¶¶ 140-143; R. 200, Amended Complaint at ¶¶ 137-140; Appx. at 001, 261);
- In violation of Ohio law, some polling locations were not handicapped accessible and county poll workers ignored Ohio law by not providing curbside ballots for handicapped voters (R. 1, Complaint at ¶¶ 145-146; R. 200, Amended Complaint at ¶¶ 142-143; Appx. at 001, 261);

² *Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004).

- In 1998 and 2000, there were specific problems in some precincts in Franklin, Cuyahoga, and Hamilton Counties. (R. 1, Complaint at ¶ 148; R. 200, Amended Complaint at ¶ 145; Appx. at 001, 261).
- In 1971 and 1972, some problems occurred in three counties, while Franklin and Cuyahoga counties had duplicate or erroneous voter registrations in their poll books in 1996 and 1998. (R. 1, Complaint at ¶¶ 149-153; R. 200, Amended Complaint at ¶¶ 146-150; Appx. at 001, 261); and
- Finally, the Plaintiffs allege that counties have not had adequate funding to maintain voter registration records or properly train poll workers. (R. 1, Complaint at ¶¶ 160-179; R. 200, Amended Complaint at ¶¶ 157-176; Appx. at 001, 261).

C. The Intervenor

The Intervenor Jeanne White complains that an electronic voting machine cannot be trusted to properly count her vote. Thus, she believes that Ohio's use of Help America Voting Act ("HAVA") compliant voting machines violates her rights under the Fourteenth Amendment. (R. 46, Intervenor's Complaint at ¶ 26A; R. 217, Intervenor's Amended Complaint at ¶ 23A; Appx. at 137, 367).

D. The Defendants

Under Ohio law, the supreme executive power of the State rests with the Governor. Ohio Const. Art. III § 5. The Governor, however, has absolutely no power relating to the manner in which Ohio runs its elections. *See*, R.C. § 3501.04. Likewise, he also has absolutely no control over the Ohio Secretary of State, an independent and separately elected office holder. *Id.*

The Secretary of State is the State's chief election officer. R.C. § 3501.04.

Among his numerous duties, he has the power to:

- Appoint all members of the county boards of elections;
- Advise members of the boards as to the proper method for conducting elections;
- Prepare rules and instructions for conducting elections;
- Prescribe the form of registration cards, blanks, and records;
- Determine and prescribe the forms of ballots and forms of all blanks, cards of instruction, poll books, tally sheets, certificates of election, and all forms and blanks required by law for use by candidates, committees, and boards;
- Compel the observance by election officers in the several counties of the requirements of the election laws;
- Make an annual report to the Governor containing the results of elections, the cost of elections in the various counties, a tabulation of the votes in the several political subdivisions, and other information and recommendations relative to elections the Secretary of State considers desirable; and
- Prescribe a general program to remove ineligible voters from official registration lists by reason of a change of residence, which shall be uniform, nondiscriminatory, and in compliance with federal law.

R.C. § 3501.05.

The Secretary of State, however, does not have power over the actual day to day operations necessary to run an election. Those powers rest with each county board of elections. R.C. §§ 3501.05, 3501.09.

STATEMENT OF THE CASE

On July 28, 2005, the Plaintiffs filed this lawsuit alleging that the State of Ohio has failed to hold a constitutional election since 1971. Under the terms of the complaint itself, Plaintiffs sought permanent injunction relief prior to the next “Statewide general election.” (R. 1, Complaint at Prayer for Relief; R. 200, Amended Complaint at Prayer for Relief ¶ 5; Appx. at 061, 318). On August 29, 2005, the Defendants filed their motion to dismiss. (R. 25, Motion to Dismiss; Appx. at 067). Since the Plaintiffs had couched their prayer for relief purely in terms of the next Statewide general election and Ohio held such an election on November 7, 2005, the Defendants filed a motion for leave to file a supplemental motion to dismiss on November 14, 2005. (R. 186, Motion for Leave to File Supplemental Motion to Dismiss; Appx. at 219). In this supplemental motion to dismiss, the Defendants raised a Sovereign Immunity defense since the Plaintiffs were no longer seeking prospective injunctive relief and their complaint was now moot. (*Id.* at 4; Appx. at 219).

On November 30, 2005, the Plaintiffs filed an amended complaint which merely restated their incredibly vague factual allegations concerning Ohio’s election system that were contained in the original complaint (“amended complaint”). In this amended complaint, the Plaintiffs asked the district court to issue a declaratory judgment that Ohio’s entire voting system violated the

Plaintiffs' rights to equal protection and substantive and procedural due process (R. 200, Amended Complaint at Prayer for Relief; Appx. at 318). They also asked the district court to become the *de facto* Secretary of State by demanding that the court issue injunctive relief concerning the manner in which Ohio conducts voter registration, provides absentee ballots, deploys and calibrates voting machines, determines the exact manner in which voters are allowed to cast ballots in their precincts, determines the number of poll workers hired and how they are trained, determines the manner in which precincts are organized, and requires reports and audits to be done of every local county board of elections, among other far reaching relief. (R. 200, Amended Complaint at Prayer for Relief ¶ 5; Appx. at 318).

Several days after the Plaintiffs filed their amended complaint, the district court issued an order denying the Defendants' motion to dismiss the original complaint. (R. 202, Order; Appx. at 324). The district court issued this order despite the fact that by filing an amended complaint, the Plaintiffs' original complaint was rendered moot. Meanwhile, the Defendants timely filed a motion to dismiss the Plaintiffs' amended complaint and, at the direction of the district court, also filed a motion for leave to take an interlocutory appeal of the court's decision denying the motion to dismiss the original complaint. (R. 213, Motion to Dismiss; R. 216, Motion for Leave to File an Interlocutory Appeal; Appx. at 342, 363).

The centerpiece of both the motion to dismiss the amended complaint and the motion for leave to take an interlocutory appeal was that the Plaintiffs had failed to allege an ongoing violation of their federal constitutional rights. (R. 213, Motion to Dismiss at 5; R. 221, Memo In Support of Interlocutory Appeal; Appx. at 342, 430). The Defendants argued that since the Plaintiffs have not pled facts which would allow a court to determine the Defendants had violated their constitutional rights, the Defendants enjoyed sovereign immunity and the district court lacked subject matter jurisdiction to hear the case.

The district court granted the Defendants' motion for leave to take an interlocutory appeal in order to determine whether the Plaintiffs had pled facts sufficient to allege a violation of their federal constitutional rights. (R. 236, Order at 3; Appx. at 459). In that order, the district court specifically recognized that "there are substantial grounds for disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236, Order at 4; Appx. at 459). The district court also determined that "there is substantial disagreement as to how I have platted this as yet largely unexplored uncharted constitutional territory; certainly no precedent compels one outcome over the other. Consequently, there is substantial disagreement with regard to whether plaintiffs' constitutional claims are cognizable." (R. 236, Order at 4 n. 1; Appx. at 459).

However, within minutes of issuing that opinion, the District Court issued a second decision denying the Defendants' motion to dismiss the Plaintiffs' amended complaint. (R. 237, Order; Appx. at 465). In that order, the Court determined that *if* the Defendants decided to exercise their constitutional right to an interlocutory review, it would deem such an appeal frivolous and would attempt to maintain jurisdiction over the case. (*Id.* at 6; Appx. at 465).

The Defendants timely filed an appeal of right with this Court on February 28, 2006. (R. 239, Notice of Appeal; Appx. at 474). The Defendants also filed a petition for permission for interlocutory appeal with this Court on the same day. The Defendants requested that the District Court stay its decision during the pendency of the appeal of right. (R. 240, Motion to Stay; Appx. at 476). On March 15, 2006, the District Court denied the Defendants' request and once again attempted to assert jurisdiction over this case. (R. 252, Order; Appx. at 489). The Defendants filed an emergency stay request with this Court to stay all proceedings in the District Court during the pendency of the State's appeal of right and that motion was granted on May 9, 2006. (R. 301, Appeal Remark; Appx. at 508; R. 302, Appeal Remark; Appx. at 510; R. 303, Appeal Remark; Appx. at 512). In that same order, this Court granted the Defendants' petition for permission to file an interlocutory appeal.

The Intervenor Jeanne White first filed her motion to intervene and proposed complaint on October 4, 2005. (R. 43, Motion to Intervene; R. 46, Intervenor’s Complaint; Appx. at 136). The basis of White’s proposed complaint was that because she could not be certain that an electronic voting machine (“DRE”) properly counted her vote, she believed that her Fourteenth Amendment rights had been violated. (R. 46, Intervenor’s Complaint at ¶ 26A; Appx. at 137). The Defendants opposed her motion to intervene. (R. 67, Opposition to Motion to Intervene; Appx. at 207). On November 7, 2005, the District Court granted White’s motion to intervene. (R. 182, Order; Appx. at 216). The Defendants filed a motion to dismiss on November 22, 2005 arguing that the Intervenor has failed to state a cognizable constitutional claim. (R. 198, Motion to Dismiss Complaint of Intervenor at 5; Appx. at 255).

On December 8, 2005, the Intervenor filed a motion to amend her complaint because the 2005 Statewide general election had mooted out her claim for relief. (R. 217, Motion to Amend Complaint; Appx. at 365). The trial court never ruled on this motion. Instead, on March 23, 2006, the Court issued an order denying the Defendants’ motion to dismiss Intervenor’s original complaint. (R. 254, Order; Appx. at 495). On April 3, 2006, the Defendants timely filed an appeal of right of the District Court’s decision. (R. 259, Notice of Appeal; Appx. at 497).

SUMMARY OF THE ARGUMENT

In order to properly plead an equal protection violation, a plaintiff must allege that he was the victim of “intentional and purposeful discrimination.” *Gold v. Feinberg*, 101 F.3d 796, 800 (2nd Cir. 1996). In dealing with elections cases, federal courts have consistently recognized that “[u]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents ‘intentional or purposeful discrimination.’” *Powell v. Power*, 436 F.2d 84, 88 (2nd Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944)).

Neither the Plaintiffs nor the Intervenor have alleged that the Defendants have purposefully or intentionally discriminated against them or any group of individuals. Rather, the Plaintiffs and the Intervenor simply alleged that isolated events occurred at various places as a result of errors made by local county employees. Since there was no allegation of intentional or purposeful discrimination, the Plaintiffs and the Intervenor have failed to allege any equal protection violation and that claim should be dismissed.

The due process clause does not guarantee an error-free election. *Powell*, 436 F.2d at 88. Since most election workers are volunteers who work at polling locations purely out of a sense of patriotism, courts must expect that errors will occur whenever an election is held. *Hennings v. Grafton*, 523 F.2d 861, 865 (7th Cir. 1975). In order to state a due process claim, a plaintiff must allege that the “entire election process – including as part thereof the state’s administrative and

judicial corrective process – fails on its face to afford fundamental fairness.” *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978). Since the Plaintiffs and the Intervenor have failed to allege facts that would allow them to establish a completely failed elections system, they have failed to state any due process claim.

The Plaintiffs and Intervenor have also failed to plead a claim which would defeat Ohio’s right to sovereign immunity. The individual plaintiffs have failed to allege any ongoing *constitutional* violation. Many of the individual plaintiffs simply alleged a specific problem relative to the 2004 election. Others have, as their constitutional claim, alleged problems that were fixed on election day or behavior that has been upheld by this Court as being constitutionally sound.

Likewise, the complaints raised by the Plaintiffs and the Intervenor have become moot. The State of Ohio, in the aftermath of the 2004 general election, passed H.B. 3, a comprehensive election reform bill. As is demonstrated in this brief, the various provisions of H.B. 3 correct any issue raised in the Plaintiffs’ complaint. Thus, their claims are moot. Likewise, the Intervenor complains about an uncertainty of whether an electronic voting machine has properly recorded her vote. This claim, already rejected by the Ninth Circuit Court of Appeals, is moot in the State of Ohio because of the newly enacted requirement that all electronic voting machines have voter verified paper audit trails. *See, Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003); R.C. §§ 3506.10(P), 3506.05(H)(3).

Finally, the Plaintiffs have failed to properly articulate a claim against Governor Taft or Secretary of State Blackwell. The Governor, while being the chief executive officer of the State of Ohio, has absolutely no power over elections. Thus, he cannot grant them any relief and should not be a defendant in this case. While the Secretary of State is the State's chief elections officer, he does not control the day to day operations of running an election. The Plaintiffs complain about problems with polling locations, poll books, voter registration forms, and absentee ballots. Under Ohio law, the local county board of elections, not the Secretary of State, is responsible for all of those issues. Thus, the Plaintiffs have failed to articulate a claim against him. As a result, neither the Governor nor the Secretary of State are proper defendants in this litigation.

LAW AND ARGUMENT

STANDARD OF REVIEW

“We review *de novo* the legal question of whether [a Defendant] is entitled to sovereign immunity....” *S.J. v. Hamilton County*, 374 F.3d 416, 418 (6th Cir. 2004) citing *Timmer v. Mich. Dep’t of Commerce*, 104 F.3d 833, 836 (6th Cir. 1997). This Court also reviews *de novo* the decision of a District Court to deny a motion to dismiss. *Jackson, Tenn. Hosp. Co. v. W. Tenn. Healthcare, Inc.*, 414 F.3d 608, 611 (6th Cir. 2005). A complaint should only be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Despite this liberal pleading standard, a plaintiff must plead more than bare assertions of legal conclusions. *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005). Thus, in order to avoid dismissal, the complaint must contain “either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory.” *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997). It is well-settled law that courts need not accept legal conclusions couched as factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). In this case, the Plaintiffs and the Intervenor have merely pled legal conclusions and have failed to plead sufficient facts to show that the two

named defendants have engaged in an ongoing violation of their federal constitutional rights.

I. A Plaintiff must allege an ongoing violation of his federal constitutional rights in order to properly plead a claim under 42 U.S.C. § 1983.

In order to establish liability under 42 U.S.C. § 1983, a plaintiff must prove that an individual, acting under color of State law, deprived him “of rights, privileges, or immunities secured by the Constitution and laws of the United States.” *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). A State’s Sovereign Immunity prohibits a federal court from exercising any jurisdiction against a State except in the most limited of circumstances. *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (en banc). One of those exceptions grants federal courts jurisdiction to hear lawsuits against State officials “for purely injunctive relief enjoining the official from violating federal law.” *Id. citing Ex parte Young*, 209 U.S. 123, 155-56 (1908).

II. The Plaintiffs And Intervenor have failed to allege that the defendants have violated their federal constitutional rights.

The Plaintiffs and the Intervenor have failed to allege a most basic and essential requirement of any § 1983 equal protection claim – “intentional and purposeful discrimination.” *Gold v. Feinberg*, 101 F.3d 796, 800 (2nd Cir. 1996), *see also Purisch v. Tennessee Technological Univ.*, 76 F.3d 1414, 1424 (6th Cir. 1996). Although this Court has never specified the elements required to properly

plead an equal protection violation concerning the manner in which elections themselves are conducted, all of the other circuits that have addressed similar issues agree that an essential element of such a claim is intentional or purposeful discrimination. *See Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970); *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980); *Bodine v. Elkhart County Election Board*, 788 F.2d 1270, 1271 (7th Cir. 1986).

In one of the earliest § 1983 equal protection cases concerning the manner in which an election was held, the Second Circuit held “[u]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents ‘intentional or purposeful discrimination.’” *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). The allegations in *Powell* concerned a Democratic Party’s primary election for a seat in the United States House of Representatives. The New York State elections officials had erroneously failed to remove non-democratic registration cards from the binders used at the polling places. As a direct result of that error, 1,232 unqualified voters cast ballots. The victor, who had already been endorsed by the Republican Party, had prevailed by 150 votes. *Id.* at 86 n.2.

In addition to rejecting the plaintiffs’ equal protection claim because there was a lack of purposeful or intentional discrimination, the *Powell* court noted that “[w]ere we to embrace plaintiffs’ theory, this court would henceforth be thrust into

the details of virtually every election, tinkering with the state’s election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.” *Id.* at 86. Thus, the court simply concluded that “we cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error.” *Id.* at 88. As a result, the *Powell* court refused to grant the plaintiffs any relief whatsoever.

The Fifth Circuit has properly recognized that “the determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, whether it was inflicted intentionally or accidentally, whether it is part of [a] pattern that erodes the democratic process or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process and whether state officials have succumbed to ‘temptations to control ... elections by violence and by corruption.’” *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) quoting *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884). Thus, activity by state elections officials rise to the level of willful conduct when their actions undermine “the organic processes by which candidates are elected.” *Id.* at 452, quoting *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975)(quotations omitted).

The Supreme Court has recognized that the right to vote is not absolute and has correctly restricted it. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 124-29 (1970). Thus, the right to vote is understood as a narrow substantive right, conferred by the equal protection clause, “to participate in elections on an equal basis with other qualified voters.” *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980). Based upon this generally limited substantive right, the Fifth Circuit has properly recognized “a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual’s vote.” *Gamza*, 619 F.2d at 453. As a result, the *Gamza* court recognized that while systematically discriminating laws would violate the equal protection clause, “isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.” *Id. citing Powell*, 436 F.2d at 88. Absent intentional or purposeful discrimination, the unlawful administration of a non-discriminatory law by State officials does not violate the Fourteenth Amendment. *Id. citing Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

The rationale for such a holding should be obvious. “If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the

multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.” *Gamza*, 619 F.2d at 453.

The Seventh Circuit has also recognized that neither the constitution nor the Fourteenth Amendment are election fraud statutes. *Bodine v. Elkhart County Election Board*, 788 F.2d 1270, 1271 (7th Cir. 1986). The litigation in *Bodine* revolved around the electronic tabulators that counted punch card ballots. The board of elections had failed to verify the accuracy or test the tabulators it had received from a private vendor. *Id.* As errors appeared, the board adjusted the control cards in the system but failed to ever conduct an overall evaluation for accuracy. *Id.* Thus, the plaintiffs tried to bring a § 1983 claim against the board of elections.

In rejecting this claim, the *Bodine* court recognized that the plaintiffs confused fraud for at most willful neglect. *Id.* at 1272. “Appellants’ argument is that defendants’ undermined the election process by fraudulently and willfully refusing to test the system, count the votes, and certify the results. Significantly missing from the argument is any allegation that the computer control cards were somehow manipulated by the defendants to undermine the election.” *Id.* Only election fraud, not incompetence by government officials, is actionable. *Id.* at 1272-73.

Similarly, the Fifth Circuit has recognized that so long as residents of one locality are treated the same as other residents of that locality, there is simply no equal protection violation. *Angel v. City of Fairfield, Texas*, 793 F.2d 737, 740 (5th Cir. 1986). The complaint in *Angel* alleged that in a mayoral race some non-residents of the city were illegally allowed to vote while other residents of the city were improperly precluded from voting. *Id.* at 737-38. The Court recognized that “[w]hen nonresidents were allowed to vote in Fairfield elections, all of the qualified voters were treated alike, and their respective votes were diluted to the same extent.” *Id.* at 740. Since the equal protection clause only grants the right to participate in elections on an equal footing with other citizens of that jurisdiction and since he did not allege discrimination between citizens in the same jurisdiction, he failed to properly state any claim for denial of equal protection. Thus, the court noted “[t]his case, though promenading in disheveled constitutional dress, is nothing more than a ‘garden variety’ election challenge that should have ended in the state courts where it began.” *Id.*

When faced with an equal protection claim because the State of Illinois only allowed absentee voting for very limited reasons, the Seventh Circuit noted that the claim was not cognizable because, “it would amount to saying that any state election law that is enforced laxly, or perhaps is difficult to enforce at all, denies equal protection by hurting honest people.” *Griffin v. Roupas*, 385 F.3d 1128,

1132 (7th Cir. 2004). Thus, “unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection.” *Id. citing Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.*, 964 F.2d 1556, 1569 (5th Cir. 1992).

Finally, the Second Circuit in an elections case has recognized that the uneven or erroneous application of a valid statute violates the equal protection clause only if it represents intentional or purposeful discrimination. *Gelb v. Board of Elections of the City of New York*, 155 Fed Appx. 12, 14 (2d Cir. 2005), 2005 U.S. App. LEXIS 21150 at **3 (2d Cir. Sept. 29, 2005) *citing Powell*, 436 F.2d at 88 (attached hereto). In *Gelb*, the plaintiff alleged that the New York City Board of Elections erroneously and in violation of state law refused to provide lines for write-in candidates for every office. *Id.* The Second Circuit recognized that the question before it was whether the action of the board was intentional. *Id.* The Court determined that “while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation [of State law], plaintiff cannot establish that defendants intentionally choose this erroneous interpretation *for the purpose of discriminating against write-in voters.*” *Id.* (emphasis in original).

In order to state an equal protection claim in our case, the Plaintiffs or the Intervenor would need to allege that either Governor Bob Taft or Secretary of State Blackwell intentionally and purposefully chose to discriminate against them or a

specific group of people. Since the plaintiffs and the intervenor have failed to do this, they have failed to properly plead an equal protection violation in either their original complaints or in their amended complaints and their claims should be dismissed.

1. The individual plaintiffs have failed to allege intentional or purposeful discrimination with the intent to discriminate against them.

None of the individual plaintiffs have alleged that either Governor Taft or Secretary of State Blackwell have engaged in intentional or purposeful discrimination against them. (R. 1, Complaint at ¶¶ 11 through 26; R. 200, Amended Complaint at ¶¶ 11 through 23; Appx. at 001, 261). Rather, they have simply alleged that in 2004 something very specific and discrete happened to each of them individually. *Id.* These individual plaintiffs simply complained that that errors made by employees of the county boards of elections made it difficult or impossible for them to properly cast ballots during the 2004 general election. *Id.*

The fatal defect, then, in their allegations is simply the lack of any scienter or claim of intentional or purposeful discrimination by either Secretary of State Blackwell or Governor Taft. For example, the individual plaintiffs allege that Governor Taft has failed to provide proper funding to the local county boards of

elections for the maintenance of Ohio's elections system.³ Likewise, the individual plaintiffs' allegations against Secretary of State Blackwell that he had been aware of deficiencies in Ohio's elections system but had done nothing to correct it are insufficient as a matter of law to establish liability on his part.⁴ Likewise, the plaintiffs' allegations against Secretary of State Blackwell that he has been aware of alleged deficiencies in Ohio's elections system but has done nothing to correct them are insufficient, as a matter of law, to establish liability.

The individual plaintiffs have failed to allege, for example, that either Governor Taft or Secretary of State Blackwell acted in a certain way with respect to the problems they had in 2004 "for the purpose of discriminating" against them. *Gelb*, 2005 U.S. LEXIS App. 21150 at **3. Regardless of the other defects in the individual plaintiffs' claims, this failure to plead any intentional or purposeful discrimination means that they have failed to properly plead an equal protection claim. Thus, this Court should reverse the district court and dismiss the individual voters' equal protection claims.

³ As a matter of Ohio law, funding for the operation of a county board of elections rests with the county itself, not with Governor Taft. R.C. § 3501.17. Yet, even overlooking this obvious error committed by the Plaintiffs, such an allegation is insufficient to establish any legal liability.

⁴ As a matter of law, county boards of elections conduct the day to day operation of running an election. R.C. § 3501.11. The government officials who the Plaintiffs allege committed errors on election day are employees of the local county government, they are not state employees and as a matter of State law are not under the control of Secretary of State Blackwell.

2. The organizational plaintiffs have also failed to properly plead an equal protection violation by neither alleging intentional or purposeful activity by the two defendants nor by claiming that that defendants intended to discriminate against them.

Although the organizational plaintiffs have written a long complaint and even amended their complaint, they have failed to include any allegation that either of the defendants engaged in intentional or purposeful activity in order to discriminate against them or their members. Since at least the *Snowden* case, 321 U.S. 1 (1944), the United States Supreme Court has required intentional or purposeful action in order to state an equal protection violation. At best, the organizational plaintiffs have alleged there were some problems that concerned absentee balloting, voting machine placements, and voter registration in 2004.⁵ The organizational plaintiffs have also alleged that there were some isolated problems in a handful of Ohio counties in 1971-1973 and again in 1998, 2000, and 2002. As *Gelb* recognized, however, this is insufficient under the Equal Protection clause to show intentional or purposeful discrimination. At best, it shows that minor localized problems may not have been corrected. That, however, is not a violation of the equal protection clause and cannot be the basis of a § 1983 claim against these defendants.

⁵ As will be demonstrated later in this brief, all of these actions are legally entrusted to the local boards of elections not the Secretary of State or the Governor. Thus, any claim that may have been stated in the pleadings would be properly brought against the various county boards of elections, not the Secretary of State or the Governor.

3. The Intervenor has also failed to allege purposeful or intentional discrimination which would allow this Court to find she properly pled an equal protection violation.

The Intervenor has likewise failed to allege an intentional or purposeful action by either of the Defendants. (R. 43, Intervenor’s Complaint; R. 217, Intervenor’s Amended Complaint; Appx. at 136, 367). The electronic voting machine used by the intervenor, like every machine used in the State of Ohio is non-discriminatory.⁶

Likewise, neither the Intervenor nor any of the plaintiffs have alleged that the defendants have succumbed to the “temptations to control ... elections by violence and by corruption....” *Ex parte Yarbrough*, 110 U.S. at 666. Rather, the Intervenor has stated that the electronic voting machine upon which she voted jumped from the candidate she selected to a different candidate. (R. 43, Intervenor’s Complaint, ¶ 26A; R. 217, Intervenor’s Amended Complaint, ¶23A; Appx. at 136, 367). This is simply no different than the *Bodine* case. The Intervenor herself corrected any possible error on the electronic voting machine when she re-selected the person for whom she wanted to vote. This action recognizes her intention in voting far more precisely than anything that the Elkhart County Board of Elections did in the *Bodine* case.

⁶ As will be demonstrated later, since the 2004 election, the State of Ohio has mandated that all electronic voting machines also contain a Voter Verified Paper Audit Trail so that the voter can see exactly how the voting machine is recording his vote. R.C. §§ 3506.10(P), 3506.01(H), 3506.05(H)(3).

Thus, as has been shown, the Plaintiffs and the Intervenor have failed to allege intentional or purposeful discrimination against themselves or against any group whatsoever. Likewise, all have failed to plead that any of the defendants have attempted to control elections through corruption or violence. As a result, they have completely failed to properly plead an equal protection case.

Much as these Plaintiffs and the Intervenor have failed to allege any equal protection violation, they have also failed to bring a claim for a violation of their due process rights.

III. Neither the Plaintiffs nor the Intervenor have properly pled any violation of their due process rights because they have failed to allege Ohio's elections system is totally deficient from the ground up.

“[T]he due process clause and article I, section 2 offer no guarantee against errors in the administration of an election.” *Powell*, 436 F.2d at 88. Rather, “[i]t is not every election irregularity, however, which will give rise to a constitutional claim and an action under section 1983.” *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975).

In *Hennings*, the Seventh Circuit was faced with a claim that inaccurate vote tabulation and arbitrary action by various elections officials stemmed from new voting machinery. *Id.* at 863. Mechanical errors occurred on these new voting machines at many of the precincts voting in that particular election and a number

of machines failed to correctly determine vote totals. *Id.* Elections officials failed to provide paper ballots and lines became very long. *Id.*

In rejecting this claim, the Seventh Circuit recognized that “[v]oting device malfunction, the failure of elections officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that the devices might be tampered with, and the refusal of those officials after the election to conduct a retabulation, assuming these events to have occurred, fall far short of constitutional infractions, absent aggravating circumstances of fraud or other willful conduct....” *Id.* at 864. The Court of Appeals even found that allowing some voters to vote twice in precincts where machines broke down without establishing a method to first determine whether a previous vote had been counted “was of course not an adequate discharge by elections officials of their responsibilities, but it did not rise to the level of a constitutional violation.” *Id.* Thus, under the *Hennings* decision it is clear that errors by elections officials are not grounds for bringing a due process claim.

The rationale of the *Hennings* decision recognized a fundamental truth about the American elections system. “Except for the overall supervision of the county clerk, or his counterpart, and appointed subordinates, the work of conducting elections in our society is typically carried on by volunteers and recruits for whom it is at most an avocation and whose experience and intelligence vary widely.

Given these conditions, errors and irregularities, including the kind of conduct proved here, are inevitable, and no constitutional guarantee exists to remedy them.” *Id. citing Pettengill v. Putnam County R-1 School Dist.*, 472 F.2d 121 (8th Cir. 1973); *Powell*, 436 F.2d at 84.

The organizational plaintiffs’ allegations in this case are similar to the problems at issue in *Hennings*. They allege that the County Boards of Elections made errors when they compiled voter registration rolls for the 2004 general election, (R. 1, Complaint at ¶ 57; R. 200, Amended Complaint at ¶ 54; Appx. at 001, 261); absentee ballots were not received by people who requested them (R. 1, Complaint at ¶ 68; R. 200, Amended Complaint at ¶ 65; Appx. at 001, 261; ¶ 68); county employees provided incorrect information concerning the precinct in which people should have voted (R. 1, Complaint at ¶¶80-82; R. 200, Amended Complaint at ¶¶ 77-70; Appx. at 001, 261; ¶ 80-82); some isolated polling locations opened late or closed early (R. 1, Complaint at ¶¶84-88; R. 200, Amended Complaint at ¶¶81-85; Appx. at 001, 261; ¶ 84-88), some isolated precincts had a problem with the number of voting machines because of mechanical or other errors (R. 1, Complaint at ¶¶90-96; R. 200, Amended Complaint at ¶¶ 87-93; Appx. at 001, 261; ¶ 90-96), people had to wait in lines to vote (R. 1, Complaint at ¶¶103-104; R. 200, Amended Complaint at ¶¶100-101; Appx. at 001, 261; ¶¶ 103-104); some counties did not hire enough poll workers

and they failed to properly train the workers they managed to hire (R. 1, Complaint at ¶¶120, 124-126; R. 200, Amended Complaint at ¶¶117, 121-123; Appx. at 001, 261; ¶¶ 120, 124-26), and provisional ballots were not counted because those provisional ballots were cast in an incorrect precinct. (R. 1, Complaint at ¶¶133-143; R. 200, Amended Complaint at ¶¶130-140; Appx. at 001, 261; ¶¶ 133-143).

All of these errors are individualized mistakes made by discrete county employees, for almost all of whom election administration is simply an avocation. Likewise, as will be demonstrated later in this brief, Ohio law is clear and direct on this point about exactly how each of these processes should work. An individual county employee's mistake relative to a voter in 2004 is an insufficient basis for which to find liability against Secretary of State Blackwell or Governor Taft.

Other appellate courts that have addressed this issue have reached the same conclusion as the *Hennings* court. The First Circuit, for example, has determined that “due process is implicated where the entire election process – including as part thereof the state’s administrative and judicial corrective process – fails on its face to afford fundamental fairness.” *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978). In *Griffin*, the State of Rhode Island had a law that specifically allowed for absentee balloting during general elections, however, the law itself did not specify whether absentee ballots could be provided during a party’s primary. *Id.* at 1067. During a primary election, the Rhode Island Secretary of State provided absentee

ballots to several voters as had been his long standing tradition. *Id.* at 1066. In one election, 131 absentee ballots were voted and the top two vote getters were separated by only 13 votes. *Id.* The losing candidate had challenged the decision of the Secretary in state court after the election. *Id.* at 1067. The Rhode Island Supreme Court had retroactively determined that absentee ballots should not have been provided and reserved the outcome of that election. *Id.* at 1068.

The *Griffin* court recognized that normal garden variety elections issues are not appropriate to allow a § 1983 claim. *Id.* at 1076. The Court did determine, however, that if the elections process reaches a point of “patent and fundamental unfairness, a violation of the due process clause may be indicated,” and the plaintiff may have stated a § 1983 violation. *Id.* The Court cautioned, however, that “[s]uch a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane.” *Id.* As a result, a plaintiff states a due process claim only “where the entire election process – including as part thereof the state’s administrative and judicial corrective process – fails on its face to afford fundamental fairness.” *Id.* at 1078.

In this case, the Plaintiffs have failed to allege that Ohio’s elections system, including both the administrative and judicial system, have failed to afford fundamental fairness. Rather, they have simply alleged that they heard that

specific things happened to unidentified individuals. As a result, they have failed to properly plead a due process claim for fundamental unfairness.

Likewise, the Intervenor has also failed to allege any due process violation. As the *Bodine* court has recognized, errors with voting tabulation are not cognizable under the due process clause. Similarly, the Ninth Circuit Court of Appeals has rejected the very claim that Jeanne White has attempted to bring in this case. In *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003), the Court of Appeals rejected an equal protection and due process claim concerning the use of an electronic voting machine without a voter verified paper audit trail.

While recognizing that no balloting system is perfect, the court recognized that they could not find that the “use of paperless, touch screen voting systems severely restricts the right to vote.” *Id.* at 1106. The *Weber* court recognized that each balloting system has its own merits and detractions. After recognizing that the electronic machines would not lose any of their benefits if they were fitted with voter verified paper audit trails, the Court went on to state that “it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing.” *Id.* at 1107. Electronic systems without voter verified paper audit trails are reasonable selections for voting machines and the Court determined that “[n]othing in the Constitution forbids this choice.” *Id.*

The Intervenor has been unable to plead any cause of action that the use of electronic voting machines without paper audit trails violates her constitutional rights.⁷ Thus, this Court should reverse the district court and dismiss her claim.

Even if the Plaintiffs had properly pled a claim of equal protection or due process violations, this Court should dismiss their amended complaint, because they have failed to allege an ongoing constitutional violation that would defeat the State's sovereign immunity. Thus, the Plaintiffs have failed to properly plead a case over which the district court even had jurisdiction.

IV. Since the Defendants Are Entitled To Sovereign Immunity from the Plaintiffs' claims, the District Court erred in failing to dismiss this case.

Both the Plaintiffs' and Intervenor's original complaints shared the same fatal flaw; they were couched in terms of the next statewide general election. Since the complaints were filed before the November, 2005 statewide general election, those claims for relief were mooted out as soon as that election passed and the Plaintiffs had obtained their relief. The Plaintiffs and the Intervenor filed amended complaints in which they specified that they were seeking relief for the

⁷ Even if she managed to properly plead such a claim, her claim is moot since the State of Ohio has mandated paper audit trails as part of those voting machines since the 2006 primary election. R.C. § 3506.10(P). As will be demonstrated in another section of this brief, her claim is moot.

Just as important, however, is that these electronic voting machines are the only HAVA compliant certified machines in the State of Ohio that can be used independently by blind voters. 42 U.S.C. § 15481.

November, 2006 and other future statewide general elections.⁸ The Plaintiffs, however, have failed to allege ongoing constitutional violations that would give this Court jurisdiction.

The Eleventh Amendment provides that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. Amend. XI. The Supreme Court has long recognized that this Amendment bars the federal courts from hearing suits against a State by residents of that State. *Hans v. Louisiana*, 134 U.S. 1 (1890).

In its most recent announcement on Eleventh Amendment immunity, this Court recognized the well-known exceptions to Eleventh Amendment immunity including lawsuits filed against state officials “for purely injunctive relief enjoining the official from violating federal law.” *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (en banc). It found that a federal court’s jurisdiction is limited only to prospective injunctive relief and cannot include any retroactive awards. *Id.* at 367 citing *Edelman v Jordan*, 415 U.S. 651, 677 (1974). Eleventh Amendment

⁸ In their pleadings, the Plaintiffs and the Intervenor have failed to allege how the State of Ohio apparently has managed to run perfectly acceptable and constitutional elections in odd numbered years, and for the primary elections in even numbered years. Naturally, if the Plaintiffs or the Intervenor had any allegations of minor problems in any of those elections, they should have included them in the amended complaint.

defenses, as well as any exception to the defense, must be considered on a case-by-case basis. *Id.* at 368; *see Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

By the terms of the complaint itself, none of the individual plaintiffs, for example, alleged ongoing constitutional violations. All of the Plaintiffs had the opportunity to vote in the 2005 general election. Yet, their amended complaint is completely void of any allegations whatsoever that they suffered any problems when they attempted to exercise their right to vote. Most strangely, perhaps, is the complete lack of any allegations that any of the plaintiffs even voted in the 2005 Statewide general election. Similarly, the amended complaint is completely void of any “belief” that any person in the State of Ohio had a problem when he attempted to cast his ballot in the 2005 statewide general election. If the plaintiffs were aware of any such problems, they should have pled them.

Sadie Rubin’s complaint was that she needed to wait in line in order to vote during the 2004 general election. (R 1, Complaint at ¶ 21; R. 200, Amended Complaint at ¶ 19; Appx. at 001, 261). During her deposition,⁹ Sadie Rubin has testified that she had not voted in the 2005 primary election and did not know

⁹ Since this is an Eleventh Amendment challenge to the district court’s jurisdiction, it was properly brought under Fed. R. Civ. P. 12(b)(1). As a result, the deposition testimony of the four plaintiffs who had been deposed can be used to support the argument that they cannot show any ongoing constitutional violation. *Ernst v. Rising*, 427 F.3d 351, 372 (6th Cir. 2005).

whether she would vote in the 2005 general election. (R. 192 Rubin Depo. At 21-22; Appx. at 530).¹⁰ Furthermore, she had no basis to believe that when Knox County increased its supply of voting machines for the 2006 election by 43% that such an increase will be insufficient to handle the influx of voters from out of State college students who attend Kenyon College and decide to register to vote in Ohio. (*Id.* at 50-51; Appx. at 530). Based upon these additional voting machines, it is clear that Rubin cannot maintain that she has suffered any ongoing constitutional violation. Thus, the State of Ohio enjoys Eleventh Amendment immunity as to her claim.

Mildred Casas presents an even clearer case of Eleventh Amendment immunity for failing to plead an ongoing constitutional violation. In her complaint, she alleged that some Franklin County poll workers gave her the incorrect information about where she was supposed to vote. (R. 1, Complaint at ¶20; R. 200, Amended Complaint at ¶18; Appx at 001, 261). Since the 2004 election she has moved but she has failed to update her voter registration with the Franklin County Board of Elections. (R. 190 Casas Depo. At 11, 17; Appx. at 523). As a result, she is not currently a legally registered elector entitled to vote in

¹⁰ The mootness and Eleventh Amendment immunity arguments are brought specifically under Fed. R. Civ. P. 12(b)(1). The Sixth Circuit has recognized that a defendant can attach information outside of the complaint itself and that the presence of such material does not convert the 12(b)(1) motion to a motion for summary judgment. *Ernst v. Rising*, 427 F.3d 351, 372 (6th Cir. 2005) (en banc).

the precinct in which she had an alleged problem in 2004. R.C. § 3503.01. Furthermore, she did not plan on voting in 2005 and does not have any facts to suggest that when she presents herself to vote in 2006 she will be faced with an identical problem. (R. 190, Casas Deposition at 62; Appx. at 523). Thus, Casas' claim, by her own admission, is moot and she has failed to allege an ongoing constitutional violation.

Likewise, Dorothy Cooley's allegations in the complaint and amended complaint do not show any ongoing constitutional violation. She complained that she was correctly told by a poll worker she could not be in the polling place with a Bush-Cheney t-shirt since that was a violation of Ohio law. (R. 1, Complaint at ¶ 24; R. 200, Amended Complaint at ¶ 22; Appx. at 001, 261). She has not alleged and simply cannot allege that in future elections she will wear a t-shirt of another candidate for office and that a county polling official will ask her to cover the candidate logo. (R. 191, Cooley Depo. At 50-51; Appx. at 527).

Most interesting, perhaps, is the simple fact that Cooley has failed to allege any constitutional violation whatsoever. This Court has already determined that Ohio's statute prohibiting campaigning within 100 feet of a polling location is constitutional. *See United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004) ("A long history, a substantial consensus, and simple common sense show that some restricted zone around a

polling place is necessary to protect [the fundamental right to vote],” (quoting *Burson v. Freeman*, 504 U.S. 191, 196-97 (1992)). Thus, she apparently is suing because an employee of the Medina County Board of Elections required her to comply with State law. She has not, and cannot as a matter of law, state an ongoing constitutional violation.

Finally, Charlene Dyson’s claim is also barred by the Eleventh Amendment because she cannot show an ongoing constitutional violation. She complained that when she appeared at her polling place in November 2004, her sister informed her that somebody had claimed she would not be allowed to do curbside voting. (R. 1, Compliant at ¶ 14; R. 200, Amended Complaint at ¶ 13; Appx. at 001; 261). However, well before the polls closed on November 2, 2004, Dyson was informed that if she returned to her polling location, the election officials would bring a ballot out to her.¹¹ (R. 188, Dyson Depo. at 25-26; Appx. at 513). However, she refused to return to the polling place because she was simply too mad to vote. (*Id.* at 26; Appx. at 513). Furthermore, Dyson has admitted that she had never had a problem voting in any election from 1977-2003. (*Id.* At 28-34; Appx. at 513). It becomes clear from Dyson’s own testimony, not only has she failed to allege an

¹¹ Dyson is in a wheelchair due to arthritis. Since the November 2004 election, the school where Dyson votes has added a wheelchair ramp, thereby completely eliminating the need for Dyson to engage in curbside voting.

ongoing constitutional injury for future Ohio elections, she failed to allege a constitutional violation for the 2004 general election.

Likewise, as much of the Plaintiffs' complaints are covered by specific statutory provisions of the Ohio Revised Code, or amendments to the Ohio Revised Code enacted after the 2004 general election, they have failed to allege an ongoing constitutional violation and their claims are moot.

A. The Plaintiffs And The Intervenor Have Failed To Allege Any Ongoing Unconstitutional Conduct By The Defendants And Their Claims Are Moot.

In addition to the specific problems noted above, the Plaintiffs and the Intervenor have failed to allege any ongoing constitutional violations by any of the Defendants. Federal courts are courts of limited jurisdiction and are restricted to hearing "cases" or "controversies." U.S. Const. Art. III § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). The mootness doctrine, which is a subset of the justiciability requirement, demands that a case present a live case or controversy at all times during its pendency. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). This Court has recognized that the test for mootness is "whether the relief sought would, if granted, make a difference to the legal interest of the parties." *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (quoting *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1318 (7th Cir. 1992)). And, where plaintiffs seek to enjoin state action that has since been prohibited by

state statute – even if the statutory change occurred during an appeal of the federal action – an injunction would not “make a difference” to their legal interests.” *Kentucky Right to Life v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997).

The gravamen of the Plaintiffs’ complaint is that Ohio needs to institute a uniform manner of voter registration, insure that all legally cast ballots are properly counted, and ensure that voters receive accurate information as to the location of their polling places, that those polling places are adequately staffed with trained poll workers, and adequately supplied with functioning voting machines, that provisional ballots are properly counted, and that disabled voters be adequately accommodated. (R. 200, Amended Complaint at ¶¶ 46-143; Appx. at 261).

H.B. 3, which became effective on May 2, 2006, addresses all of these concerns. (R. 277, Motion To Dismiss at Exh. 1; Appx. at 499). Under H.B. 3, the State of Ohio maintains a statewide registration system under which:

- Voter identification is required with applications for registration and notices of registration specifically inform voters of that requirement, R.C. §§ 3503.11, 3503.14(A), 3503.19(C)(1);
- Applicants are permitted to register through any board of elections or through the Secretary of State’s office, R.C. § 3503.19(B)(2)(a) and (b);
- Voters whose applications are received more than 30 days before an election are assured that they will be registered to vote in that election, R.C. § 3503.19(B)(2)(d);
- Voter registration lists must be prepared 14 days before each election and are available for public inspection, R.C. § 3503.23(A);

- Voter registration lists are to be periodically purged of ineligible voters, R.C. § 3501.05(Q);
- A statewide voter registration database must be maintained and the local county boards of elections are authorized to modify it, R.C. §§ 3501.05(V), 3503.13(A), 3503.15(C), 3503.15(D), 3503.15(F);
- Voters may search the statewide database in order to make sure their registration status and information are correct, R.C. § 3503.15(G);
- Voters who have requested or who have voted by absentee ballot may also cast provisional ballots, R.C. § 3505.181(A)(5);
- Provides for fourteen separate categories of voters who are eligible to vote by provisional ballot to make sure that all voters who are legally allowed to vote will be able to vote, R.C. §§ 3501.05(C), 3501.19(C), 3503.16(B), 3503.19(C), 3503.24(D), 3505.18(A), and 3505.181(A); and
- Every board of elections is subject to strict guidelines concerning voting machines and the minimum number of machines in a county is further refined. R.C. §§ 3501.10, 3506.01, 3506.05, and 3506.22.

The incredibly comprehensive H.B. 3, therefore, addresses each and every concern raised by the Plaintiffs. Thus, their claims have been mooted once this bill became effective.

Similarly, any complaint that the intervenor has been mooted by the passage of H.B. 262 and 434. Under Ohio law, electronic voting machines must have voter verified paper audit trails. R.C. §§ 3506.10(P), 3506.05(H)(3). If there ever is to be a recount of an electronic voting machine, this paper audit trail will be used

as the official tabulation for purposes of the recount. R.C. § 3506.18(A). Thus, the Intervenor's complaint has been mooted by the requirements of a paper audit trail.

IV. The Plaintiffs Have Failed To State Any Actionable Claim Against Either Governor Taft Or Secretary Blackwell As Any Errors In The State's Elections System Are The Result Of County Boards Of Elections And Their Employees.

The Plaintiffs, by filing suit against Governor Taft and Secretary of State Blackwell, but failing to sue the local county boards of elections, have shown they do not comprehend how elections in the State of Ohio actually operate. The Plaintiffs have sued the Governor and Secretary of State over several issues over which they have no control. Thus, before either the Governor or Secretary address the specific issues of this claim, it is necessary for this Court to understand the various roles the Governor, Secretary of State, and local county Boards of Elections play in Ohio's election system.

The supreme executive power of the State of Ohio rests with the Governor. Ohio Const. Art. III § 5. The Secretary of State is the State's chief election officer. R.C. § 3501.04. He has, among his duties, the power to:

- Appoint all members of county boards of elections;
- Advise members of the boards as to the proper method for conducting elections;
- Prepare rules and instructions for conducting elections;
- Prescribe the form of registration cards, blanks, and records;

- Determine and prescribe the forms of ballots and forms of all blanks, cards of instruction, poll books, tally sheets, certificates of election, and all forms and blanks required by law for use by candidates, committees, and boards;
- Compel the observance by election officers in the several counties of the requirements of the election laws;
- Make an annual report to the Governor containing the results of elections, the cost of elections in the various counties, a tabulation of the votes in the several political subdivisions, and other information and recommendations relative to elections the Secretary of State considers desirable; and
- Prescribe a general program to remove ineligible voters from official registration lists by reason of a change of residence, which shall be uniform, nondiscriminatory, and in compliance with federal law.

R.C. § 3501.05.

Each Board of Elections has among its responsibilities, the following:

- Establish, define, provide, rearrange, and combine election precincts;
- Fix and provide the places for registration and for holding primaries and elections;
- Provide for the purchase, preservation, and maintenance of booths, ballot boxes, books, maps, flags, blanks, cards of instructions, and other forms, papers, and equipment used in registration, nominations, and elections;
- Appoint and remove its director, deputy director, and employees and all registrars, judges, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve;
- Advertise and contract for the printing of all ballots and other supplies used in registrations and elections;

- Provide for the delivery of ballots, poll books, and other required papers and material to the polling places;
- Cause the polling places to be suitably provided with stalls and other requires supplies;
- Receive the returns of elections, canvass the returns, make abstracts of them, and transmit those abstracts to the proper authorities;
- Make an annual report to the Secretary of State, on the form prescribed by the Secretary of State, containing a statement of the number of voters registered, elections held, votes cast, appropriations received, expenditures made, and other data required by the Secretary of State;
- Prepare and submit to the proper appropriating officer a budget estimating the cost of elections for the ensuing fiscal year;
- Investigate and determine the residence qualifications of electors;
- Establish and maintain a voter registration of all qualified electors in the county who offer to register;
- 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;
- At least annually, on a schedule and in a format prescribed by the Secretary of State, submit to the Secretary of State an accurate and current list of all registered voters in the county for the purpose of assisting the Secretary of State to maintain a master list of registered voters pursuant to Ohio law.

O.R.C. § 3501.11.

An even cursory review of Ohio law, therefore, shows that the Plaintiffs fail to comprehend the respective roles of the Governor, Secretary of State, and county

Boards of Elections. A proper understanding of those roles, however, leads to the inescapable conclusion that the Plaintiffs' claims must be dismissed.

A. The Plaintiffs And Intervenor Have Failed To Allege Any Claim Against Governor Taft.

The Plaintiffs repeat a simple claim against Governor Bob Taft. He is the State's "principal executive officer." (R. 1, Complaint at ¶ 36; R. 200, Amended Complaint at ¶ 33; Appx. at 001, 261). He, as Governor, has not provided "adequate, equitable funding and resources to the county boards of elections to ensure that the boards timely and responsibly carry out their duties...." (R. 1, Complaint at ¶ 45; R. 200, Amended Complaint at ¶ 42; Appx. at 001, 261). At other points of the Complaint, the Plaintiffs also simply allege that Governor Taft, as one of the "Defendants" was responsible for oversight and funding Ohio's elections system, that he failed to provide adequate oversight and funding for voter registration, that he failed to provide adequate resources to local elections officials, that he maintains an unequal voting system that lacks uniform standards, that he deprived the Plaintiffs of their right to vote, that he maintains a system that denies or severely burdens the right to vote, and that he has implemented a computerized voting registration list in violation of the Help America Vote Act. (R. 1, Complaint at ¶¶ 169, 172, 179, 203, 205, 208, 210, and 212; R. 200, Amended Complaint at ¶¶ 166, 169, 176, 200, 202, 205, 207, and 209; Appx. at 001, 261).

Although the Plaintiffs may have alleged a litany of isolated elections problems, they have not stated a cognizable claim against Governor Taft. As noted above, he is merely the supreme executive power of the State of Ohio. He does not fund election systems. That is the legal responsibility of the local county government. R.C. § 3501.17. He does not provide workers, train workers, maintain voter registrations, process ballots, or any of the myriad of baseless allegations spouted by the Plaintiffs. That is also the legal responsibility of the local county board of elections. R.C. § 3501.11. As a matter of law, therefore, he cannot be liable under a § 1983 theory.

By now, it should be undisputed that § 1983 liability cannot be imposed under a theory of *respondeat superior*. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.) *cert. denied* 469 U.S. 845 (1984). Instead, “a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.” *Id.*

In this case, the Plaintiffs have completely failed to allege that Governor Taft personally denied them their constitutional rights or that he implicitly authorized, approved, or knowingly acquiesced to such a denial. Based upon the Governor’s responsibilities under Ohio law, such a claim would be impossible.

As demonstrated above, the Governor has no direct role in Ohio’s elections. Instead, the Secretary of State is the Chief Elections Officer while the county

Boards of Elections have specific responsibilities as determined in their statutes. Since the Governor is not given any direct responsibility for Ohio's elections system under the law, he should be dismissed for failure to state a claim upon which relief can be granted.

B. Likewise, the Plaintiffs Have Failed To Allege Any Action By Secretary of State Blackwell That Could Lead To the Imposition Of Legal Liability.

The Plaintiffs complaints against the Secretary of State revolve around problems they allege concerning provisional ballots cast in the wrong precincts, errors committed by the boards of elections in finalizing their poll books, mistakes made by county boards of elections in the mailing of absentee ballots, errors in determining in which precinct a voter was obligated to cast their ballots, and machines having broken down.

Ohio law mandates that county boards of elections have the legal power to “establish, define, provide, rearrange, and combine election precincts.” R.C. § 3501.11(A). The maintenance of voter registration rolls rests with the county boards of elections. R.C. § 3501.11(T). The counting of all ballots, including provisional ballots, is something that is done by the county board of elections. R.C. § 3501.11(L). The people who work for the county board of elections are county employees. R.C. § 3501.11(D). Ohio law mandates that in order to be a qualified elector, one must vote in the precinct in which one legally resides. *In re*

Protest Filed with Franklin County Bd. of Elections, 49 Ohio St. 3d 102 (1990).

This Court found that such a requirement does not violate federal law. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 577 (6th Cir. 2004) *citing* R.C. § 3503.01.

The county boards of elections bare sole legal responsibility for the delivery of ballots to the polling places they have established. R.C. § 3501.11(H). They also are legally obligated to cause those polling places to be provided with stalls and other required supplies. R.C. § 3501.11(G). The boards of elections have the responsibility for maintaining, purchasing, and preserving equipment used in the registration, nominations, and in elections. R.C. § 3501.11(C).

The local boards of elections have the legal responsibility to maintain voter registration records. R.C. § 3501.11(U). The boards of elections, not the Governor nor the Secretary, have the legal obligation to provide absentee ballots. R.C. § 3509.04. If a person asks for an absentee ballot and that person presents himself at a polling location on election day, he still has the legal right to cast a provisional ballot. R.C. § 3505.181(A) (5).

Apparently much to Dorothy Cooley's disappointment, Ohio law clearly prohibits any type of electioneering within 100 feet of a polling location. R.C. § 3501.30, 3501.35. This Court has found such prohibition to be perfectly

constitutional. *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004).

County boards of elections are obligated to provide adequate facilities for each polling location. R.C. § 3501.29(A). They have the affirmative obligation to secure enough voting machines. *Id.* They have the affirmative obligation to assure that the polling locations are handicap accessible. R.C. § 3501.29(B). They must secure sufficient number of ballots for each election. R.C. § 3501.30(A).

The poll workers, who are county employees, are obligated to open polls at 6:30 a.m. and close them at 7:30 p.m. R.C. § 3501.32. If they cannot serve for a particular election, they are legally obligated to inform the county board of that fact. R.C. § 3501.31.

Ohio law is very clear. Its application is uniform across the State. The legal responsibility for complying with these provisions rests not with the Secretary of State, but rather with the various county boards. Thus, any claim that the Plaintiffs or the Intervenor was denied their constitutional rights during the 2004 election or at any other point in time need to be addressed with the proper county board of elections, not with the Secretary of State.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and find that the plaintiffs and intervenor have failed to state a constitutional claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and 6 Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word count provided by Microsoft Word 2003, and in accordance with the provisions of Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 13,323 words.

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon the following by
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DESIGNATION OF APPENDIX CONTENTS

Appellants, pursuant to Sixth Circuit rule 28(d) and 30(b), hereby designate the following filings, in addition to those designated by Appellees in the District Court's record as items to be included in the Joint Appendix:

Description of Entry	Date Filed in District Court	Record Entry Number
Complaint	07/28/05	1
Motion to Dismiss Plaintiff's Complaint	08/29/05	25
Motion to intervene as a party	10/04/05	43
Intervenor's Complaint	10/04/05	46
Opposition to Motion to Intervene	10/18/05	67
Order Granting Leave to Withdraw	10/21/05	75
Order on Motion to intervene as a party	11/07/05	182
Motion for leave to file Supplemental Motion to Dismiss	11/14/05	186
Motion to Dismiss Intervenor's Complaint	11/22/05	198
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Order denying Defendant's Motion to Dismiss Plaintiffs' Complaint	12/02/05	202
Motion to dismiss for lack of jurisdiction	12/07/05	213
Motion to leave to file interlocutory appeal	12/08/05	216
Intervenor's Motion to amend complaint	12/08/05	217
Memorandum In Support of Interlocutory Appeal	12/15/05	221
Order Granting Motion for leave to file Interlocutory Appeal	02/10/06	236
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Description of Proceedings or Testimony	Reference Numbers	Transcript Page Numbers
Sadie Rubin Deposition	R. 192	21-22, 50-51
Mildred Casas Deposition	R. 190	11, 17, 62
Dorothy Cooley Deposition	R. 191	50-51
Charlene Dyson Deposition	R. 188	25-26, 28-34

Description of Legislation	Reference Numbers	Transcript Page Numbers
Ohio House Bill 3 – Election Reform Bill	R 277	Exhibit