

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 REPLY BRIEF OF DEFENDANTS-APPELLANTS

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I. INTRODUCTION

This case is about election administration. In a 63-page, 209-paragraph Amended Complaint, the Plaintiffs-Appellees allege that a series of individual and unconnected mistakes by poll workers, local boards of elections, and state officials occurring between 1971 and 2005 state a claim that Ohio’s entire *voting system* is “constitutionally and statutorily infirm, defective, and inequitable.” (R. 200, Amended Complaint, ¶ 3; Appx. at 261). They ask the District Court to use its equitable powers to supervise the operations of the State’s Chief Elections Officer and local boards of elections, and to force “massive systemic reform” of Ohio’s voting system by judicial decree. (Appellants’ Proof Brief at 48; R. 200, Amended Complaint ¶¶ X-5(a) through X-5(l), pp. 59-60; Appx. at 261). At no point in their Amended Complaint, however, do they allege any *present* or *specific* violation of federal law by the Defendants-Appellants that would support a claim that the State of Ohio is *currently* maintaining a *voting system* that violates the statutory or constitutional rights to Due Process or Equal Protection of the individual Appellees or of the members of the organizations who have joined in the Amended Complaint.

The District Court misapplied *Bush v. Gore*, 531 U.S. 98, 109 (2000) and *City of Canton v. Harris*, 489 U.S. 378, 387 (1989), to conclude that the Amended Complaint was sufficient to state a claim for systemic relief. (R. 202, Order

Denying Motion to Dismiss, 12/2/2005 at 1; Appx. at 324). Even as it announced this conclusion, the District Court had to concede that the relief requested here – massive structural reform of Ohio’s “two-tiered system to administer its elections” – would require it (and this Court) to “platt[] ... as yet unexplored uncharted constitutional territory, ...” (R. 236, Order of February 10, 2006; Appx. at 459).

The motion to dismiss should have been granted, first because almost *all* of the violations alleged in the Amended Complaint pre-date the massive structural reform efforts jointly undertaken in 2005 by the State of Ohio and the United States pursuant to the Help America Vote Act (“HAVA”). Pub. L. 107-252, 116 Stat. 1666, codified at 42 U.S.C. §§15301 to 15545 (2005). (*See* R. 200, Amended Complaint ¶ 157; Appx. at 261). And second, the few remaining allegations of post-2005 violations demonstrate that the State is taking steps to comply with the HAVA reforms. (*See* R. 200, Amended Complaint ¶ 164; Appx. at 261)¹.

¹ In response to HAVA, the Ohio General Assembly undertook at least two massive structural reforms of the Ohio elections code and several minor ones. All became fully effective in or before 2006, and most became effective *after* many, if not all, of the occurrences recounted in the Amended Complaint. *See* Substitute House Bill 262, 125th Ohio General Assembly (effective May 7, 2004); Ohio House Bill 3, 126th Ohio General Assembly (effective May 2, 2006). Appellant Secretary of State has also taken active steps to implement these reforms, sometimes over the vociferous opposition of local boards of elections and voting machine vendors. For example, *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 448-451, 835 N.E.2d 1232, 1232-1236, 2005-Ohio-5124 (2005), recounts the history of the dispute over the Secretary’s 2005 Directive 2005-01 mandating the use of precinct-count, optical-scan equipment in all Ohio counties

Thus, the primary reason the Amended Complaint fails to state a claim on which *any* relief can be granted is that Appellees have not stated a claim that Ohio's *present* policies violate HAVA. That is, Appellees do not allege that the Appellants themselves or local boards of elections are currently taking, or are threatening to take, action that mandates, ratifies, or actively ignores illegal or unconstitutional acts. In sum, the Amended Complaint fails to allege that the State will prospectively take any actions that will violate Plaintiffs' rights.

Nor do Appellees allege facts that support a finding that the State has violated Plaintiffs' rights in the past. Appellees do not state a claim for "massive systemic reform" by judicial decree. Appellees at best cite isolated, unconnected incidents that are not attributable to the State. These allegations do not state a claim, let alone justify the wide-ranging injunctive relief that Appellees seek, which would include a federal court undertaking a massive systemic reform of the State's election system.

rather than the punch-card and touch-screen voting machines then in use in some Ohio counties, including some of those mentioned in the Amended Complaint. The General Assembly has even set minimum standards for the ratio of voting machines to voters: 1 DRE machine for every 175 voters. O.R.C. §3506.22 (2006).

II. CONGRESS AND THE STATE OF OHIO HAVE BY MUTUAL AGREEMENT, WITHIN THE FRAMEWORK OF HAVA, SET THE CONTROLLING STANDARD FOR REFORM OF OHIO'S ELECTIONS SYSTEM.

Congress designed HAVA to create a joint federal-state framework customized by and for each State. *See* 42 U.S.C. §15403 (2006) (giving the State HAVA plan the force of federal law) and Substitute House Bill 262, 125th Ohio General Assembly, effective May 7, 2004) §4 (incorporating the state plan into Ohio law). The District Court itself has described HAVA as “remarkably clear, cogent, and succinct.” *Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815, 816, (N.D. Ohio 2004), *aff'd in part and rev'd in part*, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004). The District Court has also observed that the obligations HAVA imposes “can readily and easily be explained to Ohio's election officials by reciting the statute's essentials, and by doing so largely, if not entirely, in the language used by Congress.” *Id.* at 822. HAVA is certainly relevant to a determination regarding the need for prospective injunctive relief.

A. The Facts Alleged in the Amended Complaint Do Not State A Claim Under the Constitution, HAVA, or Any Other Federal Statute Protecting the Voting Rights of American Citizens.

Appellees' Prayer for Relief seeks to force the Secretary of State to “promulgate, adopt, and enforce uniform standards and processes” governing everything from “the accurate and timely processing by the counties of all voter

registration and absentee ballot requests in Ohio[]” to ensuring that “Ohio’s statewide voter registration list is administered in accordance with the Help America Vote Act.” (R. 200, Amended Complaint, ¶¶ 5(a) through 5(l); R. 200, Amended Complaint, Appx. at 261). Notably absent from the Amended Complaint, however, are allegations *under the law currently applicable to Appellants* of specific present or threatened acts or omissions that can, or should, be enjoined.

To the contrary, the Appellees admit in the Amended Complaint that the Secretary *has* taken action to remove, replace, and discipline boards of elections and elections administrators whose actions are alleged to violate the rights of Ohio voters and the integrity of Ohio’s elections (*e.g.*, R. 200, Amended Complaint, ¶ 164; Appx. at 261). The Amended Complaint confirms that the Secretary’s office *does* alert the Boards of Elections when it identifies a problem with a potential voter’s registration (*e.g.*, R. 200, Amended Complaint, ¶ 194; Appx. at 261), and thereby concedes, as it must after the adoption of HAVA and the massive revisions of the Ohio elections code since 2004, that there *are* standards applicable across the State of Ohio.

Even the most cursory examination of the administrative actions the Secretary has taken to implement HAVA, and of Ohio’s multiple revisions of its election code since 2004 demonstrates the existence of current statewide standards

that are both constitutional and HAVA-compliant. *See, also, e.g.*, Directive 2005-01 (“Deployment of Voting Systems” – mandating the use of PCOS voting systems in all counties); 2005-07 (“HAVA Selection of Voting Systems”); 2005-15 (“August 2, 2005 Special Congressional Election in Adams, Brown, Clermont, Hamilton, Pike, Scioto, Warren Counties ONLY”); 2006-02 (“County Board Reorganization”); 2006-36 (“Direct Recording Electronic (DRE) Voting Machine Key Card Management”); 2006-43 (“Registered Voters Report and Director’s Estimate: May 2006 Primary Election”).²

Furthermore, the District Court applied the wrong legal standard when it presumed the truth of far more than the facts alleged in the Amended Complaint. Notwithstanding changes in the law *after* the occurrence of the events the Appellees alleged, the court below also mistakenly presumed the truth of Appellees’ conclusory statements concerning the existence of “burdens,” “lack of uniformity,” and systemic failure. This is not the law, as the Rule 12(b)(6) requirement that a trial court assume the truth of the allegations and view them in a light favorable to the plaintiffs, applies only to allegations of *fact*, not to the legal conclusions that may be alleged or inferences that may be drawn from the pleaded

² These Directives are all available online at the Ohio Secretary of State’s website: <http://www.sos.state.oh.us/sos/ElectionsVoter/OhioElections.aspx?Section=1234>

facts. *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968). *Accord*, *Smith v. Rose*, 760 F.2d 102, 106 (6th Cir. 1985).

Applying this general principle to constitutional claims, this Court held in *Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir. 1986), that “[i]t is not enough for a complaint under § 1983 to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law.” Quoting *Blackburn v. Fisk University*, 443 F.2d 121 (6th Cir.1971), the Court in *Chapman* observed:

There is a sound reason for requiring that a civil rights action against a government official or employee state a claim in terms of facts rather than conclusions. When a government employee is sued, if no factual allegations are made, discovery and perhaps even trial may be required to demonstrate that the claim has no merit. Such activities require the government defendant and others such as government attorneys involved in defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties.

808 F.2d at 465.

In this case, the Amended Complaint pleads – or, more accurately “argues” – that events occurring at various times and locations over a period of 35 years, from 1971 through 2005, can be aggregated to support a claim of *systemic* failure and the existence of statewide “burdens” and “lack of uniformity.” But the District Court accepts Appellees’ legal conclusions without reference to HAVA, which creates an entirely new statutory framework in which to conduct state and federal

elections. It likewise ignores significant changes in Ohio election laws that moot the specific claims made in the Amended Complaint.

Until this case is dismissed, the result will be precisely as this Court predicted in *Chapman*. Massive discovery of irrelevant, but politically and historically interesting detail, will “require the government defendant and others such as government attorneys involved in defense of the claim to divert their attention from” the important task of administering Ohio’s election system. If it is permitted to resume, the Secretary and his staff will be forced to remain “involved in the litigation to the neglect of their assigned duties.” 808 F.2d at 465.

B. HAVA, the Voting Rights Act, and Other Federal Statutes Protecting the Right to Vote and the Equal Dignity of the Voter Do Not Authorize the Judiciary to Engage in “Massive Structural Reform” of State Election Administration Procedures.

By adopting HAVA, Congress sought to *avoid* the “uncharted constitutional territory” that prompted the District Court to certify this case for interlocutory appeal. When the District Court found that “there is substantial ground for disagreement with regard to whether plaintiffs’ claims are constitutionally cognizable” (R. 236, Order dated 2/10/2006 at 4; Appx. at 459), its reference to the “unexplored uncharted constitutional territory” into which Appellees’ Due Process and Equal Protection claims would thrust the courts tacitly recognized the breadth,

and inherently standard-*less* nature, of the equitable relief Appellees seek. By their own admission:

Plaintiffs [Appellees] do not challenge the general statutory basis for elections in Ohio – or, indeed, any specific statutory provisions. Rather, Plaintiffs’ claims arise from the failure to apply those laws uniformly and other systemic failures in the administration in the administration of the Ohio elections system.

Appellants’ Proof Brief at 60, n.11. Their goal is nothing short of “massive systemic reform” of Ohio’s voting system by judicial decree. (Appellants’ Proof Brief at 48; R. 200, Amended Complaint ¶¶ X-5(a) through X-5(l), pp. 59-60; Appx. at 261).

HAVA, by contrast, is a joint, federal-state framework for the reform of state election administration that is customized by and for each State and financed by state and federal funds. Its goal, broadly stated, is as follows:

to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, *to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections*, and for other purposes.

(Emphasis added.) Preamble to H.R. 3295, enrolled as agreed to by the House and the Senate as the Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat.

1666.³ By its own terms, then, HAVA expressly preserves an *existing* corpus of federal law that includes the Voting Rights Act, the Americans with Disabilities Act, and the National Voter Registration Act. 42 U.S.C. §15545 (2006). 42 U.S.C. §§15301(b)(1)(B), (D), (F), and (G). It requires election administration improvements, poll worker training, voting technology improvements, and improving access by persons with disabilities. It contains both administrative complaint and alternative dispute resolution procedures, 42 U.S.C. §15512 (2006), and 42 U.S.C. §15511. And it permits the Attorney General of the United States to seek

such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 15481 [voting systems standards], 15482 [provisional voting], and 15483 [voter registration] of this title.

The pattern is clear. Congress left “the specific choices on the methods of complying with the requirements of this subchapter ... to the discretion of the State,” 42 U.S.C. §15485 (2006). HAVA thus adopts as federal law the State *legislatures’* determinations regarding the individual in their respective states who will be ultimately responsible for ensuring compliance with HAVA. 42 U.S.C.

³ The enrolled version of H.R. 3285 is available online at: http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.31&filename=h3295enr.pdf&directory=/disk2/wais/data/107_cong_bills

§15403(e) (2006). It also incorporates by reference the relevant provisions of State law adopted to comply with HAVA. *See* 42 U.S.C. §15403 (2006) (giving the State HAVA plan the force of federal law).

Even if one were to presume the truth of Appellees' claim that Ohio had no statewide standards in 2004 – a claim that is refuted by Ohio law then in effect – Ohio's response to HAVA moots all claims relating to alleged lack of standards adopted after 2004. Ohio law specifically designates the Secretary of State as Ohio's "chief State election official," O.R.C. §3501.04 (2006), thus eliminating any allegation that the Ohio legislature failed to designate the one State official who has been given the authority to control the discretion of local officials. *See Bush v. Gore*, 531 U.S. at 116. The State HAVA plan has the force of law, pursuant to 42 U.S.C. §15403 (2006), and 42 U.S.C. §15484 (2006) specifically permits the states to exceed federal requirements, which is precisely what Ohio did when it required the Voter Verifiable Paper Audit Trails ("VVPAT") for all Direct Recording Electronic ("DRE") voting equipment⁴. *See* Substitute House Bill 262,

⁴ Section 3 E(1)(b) of Substitute House Bill 262, *supra*, provides in relevant part:

Before certifying any direct recording electronic voting machines with a voter verified paper audit trail, the Secretary of State shall establish standards for the certification of those machines as required by division (H)(3) of section 3506.05 of the Revised Code. In addition to the requirements of that section, the standards for certification shall require a direct recording electronic voting machine with a voter

125th Ohio General Assembly, effective May 7, 2004) §3(e)(1)(a) [HB 262].

Section 4 of HB 262 incorporates the State Plan and any amendments needed to conform to HAVA requirements into Ohio law:

verified paper audit trail to meet the requirements of the Help America Vote Act of 2002, Chapter 3506 of the Revised Code, this act, and any other applicable laws and standards.

The Secretary of State shall amend the state plan prepared by the Secretary of State and the state plan committee pursuant to the Help America Vote Act of 2002, Public Law 107-252, 116 Stat. 1666, as required to conform with the provisions of this act⁵.

Accordingly, Ohio has fully complied with HAVA, which sets standards that change the relevant analysis here.

C. The Appellees’ Claim that Ohio’s Elections *System* is Ripe for “Institutional Reform” Does Not Present A Justiciable Case or Controversy

1. The Claim for “Institutional Reform” is Moot on Any Reading of the Facts in the Amended Complaint.

Appellants’ ultimate allegation in support of their unsupportable claim for injunctive and declaratory relief appears in Part V of the Amended Complaint:

Plaintiffs have been disenfranchised or otherwise severely burdened in their right to vote as a direct and proximate result of Defendants’ actions and inactions in maintaining Ohio’s constitutionally defective voting system.

(R. 200, Amended Complaint, ¶ 195; Appx. at 261).

But each of the facts alleged to support this conclusory allegation occurred sometime between 1971 and 2004. Thus, even if this Court were to presume the truth of the conclusion – *i.e.* that Ohio’s voting *system* selectively “disenfranchised” voters in 2004, which Appellants deny – the “massive structural

⁵ The State of Ohio’s State HAVA Plan was published in the *Federal Register* on March 24, 2004. Ohio State HAVA Plan, 69 Fed. Reg. 14879-14893 (March 24, 2004), *filed as amended* in 2005, 70 Fed. Reg. 17662-01 (April 7, 2005).

changes” wrought by HAVA and Ohio’s implementing legislation moot any such claims.

Appellants failed to state a cognizable § 1983 claim here because they did not meet the requirement that they point to a specific law, policy, practice, or omission adopted by the State of Ohio under which either the Governor or the Secretary of State, or persons acting under their control, *acted* “under color of [a] state law” *currently in effect*. See *Kentucky Right to Life v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) (holding claims are mooted by changes in the governing law). They had to allege that the Appellants are currently taking, or are threatening to take, action that either mandates, ratifies, or actively ignores illegal or unconstitutional acts, *and* that these actions, when taken together, constitute a “pattern or practice” that is both forbidden *and current*. They failed to do so.

Stingley v. City of Lincoln Park, 429 F.Supp. 1379, 1390 (E.D. Mich. 1997), observed that “an exact date can be determined on which the alleged discriminatory practice[s] occurred.” Here, all of the alleged events took place between 1971 and 2004, but Appellees seek to avoid the jurisdictional problem by alleging a continuing violation. The court in *Stingley* correctly rejected that approach:

... [I]n every case of employment discharge ... plaintiffs invariably plead a pattern and practice of discriminatory conduct. Since this pattern and practice arguably continues, the end result would be that a discharged employee would have forever to bring his complaint.

The State of Ohio does not question the assertion that “the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters,” *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980), nor does it question either the right or the duty of the federal courts to fashion a remedy in a case where the facts pleaded show that specific State laws, regulations, or practices are unconstitutional. However, the Appellees have alleged no such facts in this case.

The lack of such specificity distinguishes this case from cases Appellees rely on, such as *Baker v. Carr*, 369 U.S. 186 (1962), where the allegation was that Alabama’s 1901 Apportionment Act was unconstitutional. *Id.*, 369 U.S. 190, n.9. Nor is this case similar to *Reynolds v. Sims*, 377 U.S. 533 (1964), where the attack was aimed at invalidating an existing legislative apportionment scheme and two legislatively proposed alternatives. In *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969), on which Appellees rely heavily for the proposition that they need not challenge specific actions, the District Court found that that the problems began when the Village of Wilmette adopted Ordinance No. 69-0-6, reducing the number of precincts in the town from 32 to 6. Its “Conclusion of Law #6” makes it clear that *specific actions* taken under color of law are the basis for its holding:

In conducting the election of April 15, 1969, in reducing the number of precincts from 32 to six, in providing for precincts grossly unequal in number of registered voters, and in failing to provide sufficient

election judges or adequate voting facilities, defendants acted under color of the statutes of the State of Illinois and the ordinances of the Village of Wilmette within the meaning of 42 U.S.C. 1983.

Id. at 125.

Other cases on which the Appellants rely just as clearly reject the proposition that there is (or can be) a distinction between “general” and “specific” claims. The Plaintiffs in *Common Cause v. Jones*, 214 F. Supp. 1106, 1109 (D.C. Cal. 2001), alleged that the California “Secretary of State’s *permission* to counties to adopt either punch-card voting procedures or more reliable voting procedures is unreasonable and discriminatory.” (Emphasis added.) In *Black v. McGuffage*, 209 F. Supp. 2d 889, 894 (N.D. Ill. 2002), the plaintiffs sought injunctions against the use of *specific* voting technologies, notably “the use of punch card voting systems and voting systems that lack effective error notification.”

The same pattern holds true in every other case Appellants cite, including *Bush v. Gore* itself, where the Court divided over the constitutionality of a *specific* Florida Supreme Court holding, but both the majority and dissenters recognized that they were dealing with specific allegations. *See Bush v. Gore*, 531 U.S. at 109; *id.*, 531 U.S. at 122 (Rehnquist, C.J. & Scalia and Thomas, JJ., concurring) (“the remedy prescribed by the Supreme Court of Florida cannot be deemed an “appropriate” one as of December 8.”); *id.*, 531 U.S. at 126 (“Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal

Protection Clause, I could not subscribe to the majority's disposition of the case.” (Stevens, Ginsburg & Breyer, JJ., dissenting); *id.*, 531 U.S. at 131 (Souter, Breyer, Stevens & Ginsburg, JJ., dissenting) (“What Bush does argue ... is that the interpretation of §102.168 was so unreasonable as to ... the point of being a nonjudicial act and producing new law untethered to the legislative Act in question.”); *id.*, 531 U.S. at 139 (Ginsburg, Stevens, Souter, & Breyer, JJ., dissenting) (“Rarely has this Court rejected outright an interpretation of state law by a state high court.”); *id.*, 531 U.S. at 145 (Breyer & Souter, JJ dissenting in Part I(A)(1)) (“The majority raises three equal protection problems with the Florida Supreme Court's recount order”).

In sum, it is not enough for the Appellees to assert that Ohio’s entire voting system is in need of “massive reform.” Nor is it enough to recite that several of the plaintiffs have had problems on voting day, or to conclude from the facts asserted “that the voting system in Ohio routinely subjects voters to unacceptably wide variations in their basic ability to register, vote and have their vote counted.” (Appellants Brief at 35). Appellees must allege facts that do more than argue the conclusory claim that *at present* there exists in Ohio a “widespread pattern of constitutional infractions.” (R. 200, Amended Complaint, ¶¶ 4, 7; Appx. at 261). Rather, they must plead that these *Defendants* have failed so badly in their duty to bring Ohio into compliance with laws adopted during the period between the

adoption of HAVA in 2001 and the recent enactment of Ohio House Bill 3, 126th Ohio General Assembly (effective May 2, 2006) that the State of Ohio's *entire system* of election administration must be placed under federal judicial supervision and control.

Neither HAVA nor the Constitution goes that far. *See* 42 U.S.C. §15485 (2006) (giving the states discretion regarding the methods of compliance) and 42 U.S.C. §15511 (2006) (permitting a limited class of suits by the Attorney General of the United States).

2. The Claim for Injunctive Relief Based on Fears of Harm or Unspecified “Chilling Effects” is Not Ripe.

Appellees have alleged no facts that indicate that the system described in the Amended Complaint even *exists* in 2006, much less that the post-HAVA system that *does* exist in Ohio at present is “ripe for systemic reform.” The most that can be said for Appellees’ Amended Complaint is that it alleges that they *fear* the new system to which they allude, but never describe:

Plaintiffs reasonably anticipate that, absent injunctive relief, they *may be* disenfranchised or severely burdened in the exercise of their fundamental right to vote *in the future*. Defendants’ conduct also has a chilling effect *on the future exercise* of the fundamental right to vote.

(R. 200, Amended Complaint, ¶195; Appx. at 261) (emphasis added).

Because the Amended Complaint fails to state a present course of action that violates federal law, it fails on both mootness and ripeness grounds to state a claim

on which relief can be granted. Appellees' argument that the mootness argument is not properly before this court is clearly wrong. The requirement that there must be a present case or controversy is jurisdictional and can be raised at any point in the proceedings.

III. NEITHER *BUSH V. GORE*, NOR ANY OTHER VOTING RIGHTS CASE, SUPPORTS FEDERAL COURT SUPERVISION OF A "MASSIVE SYSTEMIC REFORM" OF OHIO'S ENTIRE VOTING SYSTEM.

Appellants' immunity from suit is not lost because Appellees have dredged up 35 years worth of alleged mistakes at the local and county levels. Their allegations of fact are, for the most part, largely disconnected in both time and space from one another. Further, none of them allege *current* violations of either the Constitution, of HAVA, or of any other law that guarantees voting rights or equal protection of the laws.

The State of Ohio's immunity in this case thus rests on two grounds: 1) The nature of the fact claims asserted; and 2) the nature of the relief requested. As will be demonstrated below, neither ground requires consideration of the merits of Appellees' claims.

The first ground for immunity simply requires recognition that the relief the Appellants are seeking is not aimed at the elimination of specific acts that are alleged to be unconstitutional or otherwise illegal under federal law. *See Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002).

The second basis for the State’s immunity claim rests on the nature of the relief requested: *i.e.* the Appellees’ claim that they are entitled to “massive systemic reform” of Ohio’s entire election *system*. Even if this Court were to find that Appellees had stated a justiciable claim for relief based on credible allegations of a presently existing violation of federal law, federalism and separation of powers do not permit an Article III court to exercise its equity powers in the manner contemplated by the District Court.

In *Bush v. Gore*, a plurality of the United States Supreme Court observed that “the problem of equal protection in election processes generally presents many complexities.” 531 U.S. at 109. All the opinions recognize that those complexities arise, *not* from the mechanics of election administration, as the District Court appears to hold in this case, but rather from the way in which the “Framers split the atom of sovereignty.” *Id.*, 531 U.S. at 142 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting), quoting *Saenz v. Roe*, 526 U.S. 489, 504, n. 17 (1999).

The Justices were unanimous in their opinion that the separation of powers, federalism, equal citizenship, and Equal Protection guarantees must be read together in order to preserve the joint state-federal authority granted to Congress and the State legislatures by Article I §§2, 4 and Article II §1. Here, the District Court was “confident that its December 2 order follows naturally from established precedent,” but conceded that the nature of the relief requested would involve

“plat[ting] ... as yet unexplored uncharted constitutional territory.” (R. 236, Order of February 10, 2006; Appx. at 459).

The State disagrees with such a reading of the Supreme Court’s federalism cases. Accordingly, the characterization of the State’s immunity claim as “without merit” (R. 237, Order of 12/10/2006 Denying Motion to Dismiss on Sovereign Immunity Grounds, Appx. at 465) ignores the structural immunities the Constitution preserves for the States. Equal citizenship and equal protection are the *result* of a system of laws in which powers are separated first between the states and the federal government, and then among the branches. Without the structural protections afforded by U.S. Const. art. I §§2, 4, U.S. Const. art. II §1, U.S. Const. art. IV §4; U.S. Const. Amends. XIV §§1, 2, 5; XV, XVII, XIX, XXIII, XXIV, XXVI, our government cannot deliver on its promise that “equal weight [is] accorded to each vote,” or its guarantee of “the equal dignity owed to each voter.” *Bush v. Gore*, 531 U.S. at 104 (plurality opinion).

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51 (Alexander Hamilton or James Madison) available online at the Library of Congress: http://thomas.loc.gov/home/histdox/fed_51.html.

Appellees rest their case for injunctive relief on the general civil rights statute, 42 U.S.C. §1983, and allege that Ohio's *entire* "voting system" violates both Due Process and Equal Protection because "non-uniform rules, standards, and procedures among the counties and precincts" are alleged to cause "sever[e] ...burdens and likelihood of total disenfranchisement" of Ohio's voters. (R. 200 Amended Complaint, ¶ 2, Prayer for Relief, ¶¶ X5(a) through 5(l); Appx. at 261).

Even though the Supreme Court specifically distinguished the cases in which a State "by ... arbitrary and disparate treatment, value[s] one person's vote over that of another," *Bush v. Gore*, 531 U.S. at 105, from those in which "local entities, in the exercise of their expertise, may develop different systems for implementing elections," *id.* at 109, the District Court began its analysis of the State's Motion to Dismiss with the observation that "[t]he State of Ohio uses a two-tiered system to administer its elections." (R. 202, Order of 12/02/2005, at 4; Appx. at 324). In its view, this structure creates a colorable systemic violation of equal protection and due process whenever it is possible for a plaintiff to string together a series of errors in election administration at various local polling stations.

Put simply, LWV contends that [Ohio's] election system provides different voting rights to different citizens based solely on where those citizens happen to reside and vote.

(R. 202, Order of 12/02/2005, at 4; Appx. at 324).

The case law Appellees cite does not support their assertion that federal courts can take control of state election administration and mandate “massive systemic reform,” because *none* of these cases supports their sweeping conception of judicial remedial authority. Nor do *Bush v. Gore* and *City of Canton v. Harris*, 489 U.S. 378, 387 (1989) authorize judicial intervention into state election administration whenever inaction by State authorities with the power “to guarantee equal treatment and fundamental fairness ... foreseeably impairs the fair and equal exercise of the franchise.” (R. 202, Order of 12/02/2005, at 5; Appx. at 324).

Appellees have made no showing that Appellants are administering a system constitutionally deficient at the *systemic* level. Nor have they made any claim that Ohio’s *existing* laws, procedures, resources, training, and other details of election administration are *structurally* inadequate⁶. The Amended Complaint thus fails to state a claim on which relief can be granted.

⁶ The “offer of proof” at p. 58, n.10 of Appellees’ Proof Brief actually undercuts their claim. The Report of the Cuyahoga Election Review Panel cited there demonstrates conclusively not only that Ohio’s local officials are *very* responsive to complaints about errors at the local level, but also that Ohio’s local governments understand how to differentiate between mistakes that occur as result of isolated negligence or simple ineptitude, and those that provide evidence of a more serious defect. Appellees’ citation to *Project Vote v. Blackwell*, No. 1:06cv1628 (N.D. Ohio Sept. 8, 2006)(granting preliminary injunction against Ohio statute forbidding compensation of those who gather signatures for certain petitions) is equally devastating to their assertion that *systemic* relief is the only guarantee of their rights. Other plaintiffs have sought, and will continue to seek, injunctive relief for claims that present otherwise justiciable cases or controversies. Had Appellees’

It is axiomatic that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *See Washington v. Reno*, 35 F.2d 1093, 1103 (6th Cir. 1994), *citing Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). *Compare Dayton Board of Education v. Brinkman*, 433 U.S. 406, 417 (1977) (reversing this court’s imposition of a system-wide remedy because “[t]here had been no showing that such a remedy was necessary to ‘eliminate all vestiges of the state-imposed school segregation.’”). *Accord, Bush v. Gore*, 531 U.S. at 109 (plurality opinion); *id.*, at 116 (Rehnquist, C.J., Scalia & Thomas, JJ., concurring) (noting that elections are to be administered by the State’s chief elections officer, not the courts); *id.*, at 126 (Stevens, Ginsburg & Breyer, JJ. dissenting) (noting that unless “a little play in its joints” is permitted in State elections systems, the “decision to leave to each county the determination of what balloting system to employ – despite enormous differences in accuracy (footnote omitted) – might run afoul of equal protection”); *id.*, at 135-143 (Ginsburg, Stevens, Souter, & Breyer, JJ., dissenting) (arguing that federalism requires deference to a State’s interpretation of its own law).

HAVA’s administrative complaint and alternative dispute resolution procedures 42 U.S.C. §15512 (2006), make much the same point: remedies should

Amended Complaint presented a justiciable claim for relief from a colorable allegation that Appellants are *presently* violating federal law, this case would not be pending on interlocutory appeal.

not exceed the scope of the violation. *Accord*, Prison Litigation Reform Act (PLRA), 42 U.S.C. §§1997a-1997h (2006) (limiting equitable relief to alleviation of unconstitutional conditions of incarceration and recognizing that the states should have an opportunity to remedy such cases before the imposition of sweeping equitable remedies).

IV. CONCLUSION

For the reasons stated above, Appellants respectfully submit that the complaint should be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) and 6 Cir. R. 32(a), the undersigned certifies that this reply brief complies with the type-volume limitations 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)(ii), this reply brief contains 5,788 words.

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CERTIFICATE OF SERVICE

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