IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Case No. 06-CV-00896**
	:	
J. KENNETH BLACKWELL,	:	**JUDGE MARBLEY**
	:	
	:	
Defendant.	:	

DEFENDANT J. KENNETH BLACKWELL'S MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs' last minute request to rewrite Ohio's election laws should be rejected for two reasons.

First, it is fundamentally flawed in its own right. It's too late: Plaintiffs have yet to explain why they waited until days before the election to challenge laws that have been on the books since January and have been applied several times since early May (the absentee ballot measures) and early August (the identification and provisional ballot laws). And once filed, their claims lack substance. The repeated, unproblematic, application of these laws makes it unlikely that Plaintiffs can show sufficient Article III injury. That same operational record, and the very nature of the laws themselves, establishes their validity under the controlling Fourteenth Amendment standards: the laws impose no significant burdens and there are legitimate bases for them, preventing fraud and building public confidence. Their poll tax claim fails because Ohio law simply does not require any payment to vote.

Second the relief sought is an invitation to chaos. It would change basic procedures too late in the process, less than a week before the election, forcing Ohio's 88 elections boards to devise and communicate new procedures and to retrain workers under unrealistic time pressure. The result is elections conducted by less-than-optimally trained workers, and probably less workers than normal because that confusion would surely dissuade some from showing up.

That's in no one's interest. Plaintiffs' motion should be denied, and the laws that have been applied without incident in four other elections should be applied here.

FACTS

Plaintiffs challenge the constitutionality of certain of Ohio's election laws. Two sets of facts are relevant here: the actual results of the challenged statutes' implementation during multiple sets of elections and the contents of those statutes.

A. The challenged statutes' unproblematic implementation in multiple elections

This case challenges the laws controlling absentee ballots, in person identification, and provisional ballots.

The absentee ballots laws went into effect January 27, 2006. They have been applied in multiple elections since then:

- The May 2, 2006 statewide primary.
- The 53 special elections held in 28 counties on August 8, 2006.[1]
- The September 14, 2006 primary in the 18th Congressional district.
- The September 15, 2006 primary in the 3d Congressional district.

The identification and provisional ballot laws went into effect June 1, 2006 and were applied in the August special elections and September congressional primaries.

Those elections were held in a wide cross section of counties and there were no reports of problems. The May primary was a state wide election and more than 98 percent of the absentee ballots cast were counted, a percentage comparable to the rates in 2004.[2] The special and primary elections were held in both urban counties with large transient

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[1] Ohio Secretary of State, *Total Issues for the Special Elections Held August 8, 2006.* Available at: http://www.sos.state.oh.us/sos/electionsvoter/2006/specAug/total.pdf. Last visited Oct. 31, 2006.

[2] Ohio Secretary of State, *Absentee and Provisional Ballot Report Official Results: May 2, 2006.* Available at: http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=1779. Last visited Oct. 31, 2006.

populations (Cuyahoga, Franklin, Hamilton, Lucas, Montgomery) and rural counties facing very different conditions (Adams, Ashland, Carroll, Columbiana, Harrison, Morgan, Washington). There were no reports of problems with those elections, in spite of the fact that they were held in six of the eight counties Plaintiffs highlight as trouble spots. (Cuyahoga, Franklin, Hamilton, Lucas, Knox, Stark).

This case was filed on October 24, 2006, 14 days before the election. However, absentee voting started on October 5 and thousands of votes have already been cast. It is important to note that plaintiffs have never identified—in their Complaint, at last week's TRO hearing or in their preliminary injunction papers—a single person that was denied the vote by the matters they allege.

B. The provisions of the statutes at issue.

Plaintiffs' motion focuses on two statutes, R.C. 3505.18 and R.C. 3505.183. It is therefore important to examine what those statutes say.

R.C. 3505.18 (copy attached as Ex. 1) deals with verifying the identity of voters who go to the polls on election day. Those voters can establish their identity:

- With "a current and valid photo identification, a military identification that shows the voter's name and current address, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document… that shows the name and current address of the elector." R.C. 3505.18(A)(1).

- With a driver's license or state identification card that doesn't contain the voter's current address if the voter will provide the last four digits of his social security number. R.C. 3505.18(A)(1).

- If the voter can't provide any of those documents, he or she can cast a provisional ballot by providing the last four digits of his social security number. R.C. 3505.18(A)(2). Such a voter may also cast a provisional ballot if he can't remember, or won't provide, the last four digits of his social security number. R.C. 3505.18(A)(2) and (6).

- A voter's without either any of the documents listed above or a social security number can cast a provisional ballot[3] by executing a statement setting out his name, address, his date of birth, the current date, and the fact that he doesn't have a social security number. R.C. 3505.18(A)(4) and (5).

R.C. 3505.183(B) and (C) (copy attached as Ex. 2) control the process for determining whether provisional ballots are counted as valid. That statute, among other things:

- Requires the county board of elections "examine its records and determine whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election." R.C. 3505.183(B)(1).

- Lists certain pieces of information that must be provided for the ballot to be counted. R.C. 3505.183(B)(3).

- States that the failure to provide any of that information, as well as the existence of several other disqualifiers, prohibits the ballot from being counted. R.C. 3505.183(B)(4)(a).

- Requires the county board of elections to ultimately make a determination as to whether the ballot should be counted. R.C. 3505.183(B)(4)(b).

[3] A provisional ballot allows the voter to cast his vote, but is held out of the count until the voter provides the type of information provided by R.C. 3505.18. The voter has ten days to provide that information. R.C. 3505.181(B)(6)-(8). His ballot is counted if he provides that information within that time. Provisional ballots are cast for other reasons that raise doubts about the voters eligibility to vote in the manner he claims to be entitled to, R.C. 3505.181(A), and his assertions are later evaluated pursuant to R.C. 3505.181(B), discussed in the text.

ARGUMENT

A. Preliminary injunction standards.

A preliminary injunction is an extraordinary remedy. *Stenberg v. Checker Oil Company*, 573 F.2d 921, 925 (6th Cir. 1978); *Cincinnati Bengals, Inc. v. Bergy*, 453 F.Supp. 129, 145 (S.D. Ohio 1974). The courts have therefore required clear evidence of entitlement before granting such relief. *Detroit Newspaper Publishers Association v. Detroit Typographic Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972), (injunctive relief will not issue "until there has been a clear showing"); *Cincinnati Bengals*, 453 F.Supp. at 145 (a preliminary injunction "should not be granted unless the movant by a clear showing demonstrates his right to such relief").

In ruling on requests for preliminary injunctions the courts considerer the following factors:

- Whether the movant has shown a "strong" or "substantial" likelihood of success on the merits.
- Whether the movant has shown irreparable injury.
- Whether a preliminary injunction would cause harm to others.
- The public interest.

Cabot Corp. v. King, 790 F.Supp. 153, 155 (N.D. Ohio 1992). None of those factors support the motion at issue here.

B. Plaintiffs have poor prospects for success.

There are several reasons why Plaintiffs are unlikely to prevail. Actual experience under the disputed statutes makes it very unlikely that Plaintiffs can show injury sufficient to establish Article III standing. Further, Plaintiffs' unexplained, months-long, delay in bringing this case bars their claims. Just as importantly, those claims fail under the controlling constitutional standards.

1. Plaintiffs cannot prove Article III standing.

"It is to be presumed that a cause lies outside" the federal courts' "limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994). That requires proof of Article III standing, which in turn requires, "at an irreducible minimum," proof of "actual or threatened injury [.]" *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472, 102 S. Ct. 752 (1982). Not just any injury will suffice; the injury must be "concrete and particularized," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992), "distinct and palpable." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990).

There are two related reasons why Plaintiffs can't meet that burden. *Actual experience* under the laws challenged here shows that the likelihood of anyone suffering the injuries Plaintiffs predict is remote. Further the Plaintiff organizations lack associational standing because that experience belies Plaintiffs' claims that their members will be hurt.

a. Actual experience under the challenged laws belies Plaintiffs' predictions of injury.

A plaintiff asserting federal jurisdiction must prove a strong likelihood that the injuries it seeks to address will actually occur. The Supreme Court has "emphasized repeatedly" that the "alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore*, 495 U.S. at 155. These Plaintiffs cannot meet that burden because the laws they challenge have been applied without incident in multiple elections this year.

The absentee identification requirements have been applicable since January and there have been four sets of elections since then: the state wide primary in May, more than four dozen special elections in August, and two congressional primaries in September. They were applied state wide during the primary and more than 98% of the absentee ballots cast were counted[4] and there were no reports of problems in August or September.

The in person identification and provisional ballot provisions have a similar track record. They controlled the 53 separate special elections held in August and the two congressional primaries held in September. Those elections were held in both urban (Cuyahoga, Franklin, Hamilton, Lucas, Montgomery) and rural counties (Adams, Ashland, Carroll, Columbiana, Harrison, Morgan, Washington). There were, to the Defendant's knowledge, none of the problems Plaintiffs claim to be the inevitable result of the statutes at issue. Indeed, it's worth noting that those elections were held in six of the eight counties Plaintiffs identify as potential trouble spots. (Cuyahoga, Franklin,

[4] *Absentee and Provisional Ballot Report Official Results: May 2, 2006.* Available at: http://www.sos.state.oh.us/SOS/ElectionsVoter/results2006.aspx?Section=1779.Last visited Oct. 31, 2006.

Hamilton, Lucas, Knox, Stark). That's not surprising given that significantly more Ohioans hold drivers licenses than participate in even the highest turn out elections.[5]

In sum, the Court must choose between Plaintiffs' guesstimates of what will occur and actual experience, in multiple elections in a broad cross section of counties, of what has *actually* occurred. That actual experience strongly suggests that Plaintiffs' claims are "conjectural"' or "hypothetical" and hence insufficient to support jurisdiction.

b. The Plaintiffs lack associational standing because they can't show that any of their members have been injured.

Plaintiffs, two organizations, claim associational standing to press this case but their admitted inability to prove that *any* of their members have been harmed by the statutes they challenge precludes such standing. Further, that gap isn't filled by *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004), because historical facts make the presumption of injury underlying that case inapplicable here.

An organization claiming associational standing must, at a minimum, "allege that its members… are suffering immediate or threatened injury as a result of the challenged action[.]" *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197 (1975). An organization must move beyond allegations as the case progresses because standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of

[5] For example, while there were 7,675,007 licensed Ohio drivers in 2004, only 5,722,443 Ohioans participated in that year's general election. *See* U.S. Dept. of Transportation, *State Transportation Profile*, table 4-2, available at: http://www.bts.gov/publications/state_transportation_profiles/state_transportation_statistics_2005/html/table_04_02.html. See also Ohio Secretary of State, *Voter Turnout, official Tabulation: November 2, 2004*, available at: http://www.sos.state.oh.us/sos/ElectionsVoter/results2004.aspx?Section=134. Both sites were last visited on Oct. 31, 2006.

the litigation." *Lujan*, 504 U.S. at 561. The Sixth Circuit has enforced that requirement, rejecting associational standing in *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710, 717 (6th Cir. 1995), because the plaintiff organization couldn't show "that any injury-in-fact-has been inflicted upon its members[.]"

That precludes associational standing here because Plaintiffs have no proof that any of their members have been hurt by the statutes they challenge. At the temporary restraining order hearing Plaintiffs' weren't able to identify *any* members injured by the challenged statutes. Transcript at pp. 5-6, 13-14, 15, 39-40. Their submissions in support of a preliminary injunction add nothing on this point; their memorandum does not address standing at all and none of its exhibits identify any injured member. Plaintiffs have simply not proven this element of their case.

That is not cured by their invocation of *Sandusky County Democratic Party* because that case is factually distinguishable. The Circuit excused proof of member injury because it found that the requisite harm was "inevitable," 387 F.3d at 574, but no such presumption can be indulged here because we have solid evidence that the harm alleged is not even likely, let alone inevitable, for Plaintiffs' members.

As previously discussed, the absentee provisions have been successfully applied in a statewide primary and three special elections and the in person and provisional laws have been applied in three special elections—with none of the adverse affects Plaintiffs predict. If no member of the voting public generally has reported any injury, it is a near certainty that the much smaller subset of Plaintiffs' members will be harmed. That is the negative image of the inevitability underlying *Sandusky* and that case's exception to the normal rules of associational standing is therefore inapplicable

2. Plaintiffs' unexplained delay bars equitable relief.

The federal courts have repeatedly refused to grant injunctions superseding state election laws in cases brought too close to election day. The Supreme Court has both reached and ratified that result. *Purcell v. Gonzalez*, __ U.S. __, 2006 U.S. LEXIS 8000 (2006) slip Op. at ** 6-8 (copy attached as Ex. 3); *Reynolds v. Sims*, 377 U.S. 533, 585-6, 84 S. Ct. 1362 (1964). The Sixth Circuit has also done so. *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980); *Nader v. Blackwell*, 230 F.3d 833, 835 (6th Cir. 2000). Indeed, that has occurred even in the face of undisputed constitutional violations, *Reynolds*, *supra*, *Chisolm v. Roemer*, 853 F.2d 1186, 1190 (5th cir. 1988)(collecting cases); *French v. Boner*, 771 F. Supp. 896, 902 ((M.D. Tenn. 1991)(collecting additional cases).The Ninth Circuit put it well when it observed that "[i]nterference with impending elections is extraordinary and interference with an election after voting has begun"—what Plaintiffs seek here—"is unprecedented." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

The courts consider two factors in deciding whether a claimant has waited too long. Such relief "may be barred … if (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *ACLU of Ohio v. Taft*, 385 F.3d 641, 647 (6th Cir 2004). Both cut against these Plaintiffs

a. Plaintiffs can't justify their months long delay.

The Sixth Circuit "require[s] that any claims against the state [election] procedure be pressed expeditiously," and has held that waiting less than a month after learning of such a claim is fatal. *Kay*, 621 F.2d at 813. The Supreme Court requires similar promptness; it has rejected or affirmed rejection of requests made a little over a month

out precisely because of their proximity to the elections—without regard for the reasons for the delay. *Purcell*, 2006 U.S. LEXIS 8000 at **3-5; *Reynolds*, 377 U.S. at 516 and 586. These Plaintiffs' request comes too late and with too little justification.

This case was filed just 14 days before the election. That is too close to Election Day under the Supreme Court's precedents, regardless of their reasons for the delay.

Just as importantly, Plaintiffs have no good reason for that delay. The absentee ballot provisions went into effect on January 27 and have been applied in four sets of elections, starting with the May 2 primary. The in person identification and provisional ballot statutes went into effect on June 1 and were applied as early as August 8.

Plaintiffs could therefore have brought their facial challenge to the absentee requirements in January and their facial challenges to the in person identification and provisional ballot laws in June. And since there is no claim that implementation of those measures has changed, Plaintiffs' as applied claims could have been brought shortly after those laws were first applied: in May for the absentee provisions and August for the in person and provisional laws.

But they weren't, and Plaintiffs conceded at last week's hearing that they have no real explanation for that delay as to their facial challenge. Tr.at pp. 34-36. They argue only that they couldn't have known about implementation problems until October, but even accepting that as true (though it's not), that does not relieve them of the duty to bring a *facial* challenge before the last minute. That weighs heavily, if not decisively, against them.

b. Judicial intervention this close to the election will be disruptive.

Further, judicial action this close to the election will have real, and adverse, effects.

On a general level, changing the rules in the middle of an election (remember that voting started in early October) will undermine already shaky public confidence. As the Supreme Court recently observed, "Court orders affecting elections…can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 2006 U.S. LEXIS 8000 at * 6. Public confidence, already weakened by the problems of 2000 and 2004, will be further undermined by changing the rules at the last minute, particularly since the laws to be changed are intended to prevent fraud. That, together with today's generally corrosive political atmosphere, will further undermine public confidence.

It is also likely to cause problems within Ohio's electoral machinery. It could well create confusion at the polls because it would force poll workers to "wing it" on Election Day. Most workers have already been trained and there is little money—and less time—for retraining. And it is no answer to say that those workers will simply revert to prior procedures because Ohio's chronic shortage of poll workers assures that a significant percentage of them will have no prior experience. In short, county boards of election will be faced with the Hobson's choice of having to divert extremely limited time and money to retraining or to rely on "on the job training."

Further, the confusion from upsetting established procedures will make it harder to recruit new poll workers, a task some counties are still undertaking, and could discourage existing workers from showing up. That same confusion will, and already has,

prompted thousands of public inquiries for election workers to respond to, placing additional demands on their time at the very busiest time of their year.

Those very real consequences combine with Plaintiffs' failure to provide any real explanation for their delay to bar their request for equitable relief.

3 Plaintiffs' claims fail on the merits.

a. Fourteenth Amendment claims

Plaintiffs allege several Fourteenth Amendment violations in support of their motion, but analysis of the matters alleged under the controlling constitutional standard reveals that they have little, if any probability of success.

i. The controlling standard: deference to state law absent a "severe" burden on voting rights.

Initially, it is important to note that "voting regulations are not automatically subjected to heightened scrutiny." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586 (6th Cir. 2006). Instead, the Supreme Court's cases "have clarified [that] strict scrutiny is appropriate only if the burden [on voting rights] is severe." *Clingman v. Beaver*, 544 U.S. 581, 592, 125 S. Ct. 2029 (2005). In judging whether a law imposes such a burden the Sixth Circuit considers, among other things, "whether alternative means are available to exercise those rights [effected by the law]…evidence of the real impact the restriction has on the process [.]" *Libertarian Party*, 462 F.3d at 587.

Absent such a burden, "the State's important regulatory interests are generally sufficient to justify" challenged laws, *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2509 (1992), a standard the Sixth Circuit views as "deferential." *Morrison v. Colley*, __ F.3d __, __, 2006 U.S. App. LEXIS 25416 (6th Cir. 2006), slip Op. at *12 (copy attached as Ex. 4). Consistent with the Sixth Circuit's holding that state election laws are

presumed to be constitutional, *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 542 (6th Cir. 2004), a party challenging a law not imposing a severe burden "bears a heavy constitutional burden" to show that the law is invalid. *Schrader v. Blackwell*, 241 F.3d 783, 790-1 (6th Cir. 2001).

Plaintiffs can show neither severity with regard to any of the matters raised in their motion nor meet their burden of disproving the validity of the laws they challenge.

ii. Plaintiffs can't show that anyone has been disenfranchised by the supposed vagueness of the laws at issue.

Plaintiffs claim that the challenged laws are so vague as to result in varying interpretations that will inevitably deny some persons the vote, thus violating the Fourteenth Amendment. [6] Doc. No. 26 at pp. 8-9, 10-11, 13-14.[7] However, a review of Plaintiffs' evidence reveals that they do not identify a single voter who has been prevented from voting. That is a particularly telling omission because those laws have been applied in multiple elections—and in most of the counties Plaintiffs claim are problematic—and because controlling precedent makes "evidence of the real impact the restriction" very relevant. *Libertarian Party*, 462 F.3d at 587.

[6] Plaintiffs assert this violates both equal protection and due process requirements, but Defendants will not analyze those theories separately because the Sixth Circuit precedent requires the same analysis for both types of Fourteenth Amendment claims. *Libertarian Party*, 462 F.3d at 586, n.6.

[7] All references to specific pages of Doc. No. 26 are to the PDF pagination of the document as fixed by the Court's electronic filing system.

iii. R.C. 3505.18 does not disenfranchise voters with social security numbers but who lack appropriate identification.

Plaintiffs assert that Ohio violates the Fourteenth Amendment by supposedly denying the vote to persons who lack the types of identification listed in R.C. 3505.18(A)(1) but who have social security numbers. That claim fails on two levels.

First, it overlooks R.C. 3505.18(A)(2). That statute allows such voters to vote via provisional ballot based solely on the last four digits of his or her social security number. Second, Plaintiffs offer no proof that anyone has actually been hurt by this, in spite of the fact that this law has been applied in three sets of elections.

In sum, there is no burden here, severe or otherwise. This law is therefore protected by the usual presumption of constitutionality. *Summit County Democratic Cent. & Exec. Comm.*, 388 F.3d at 542, and should be enforced.

iv. The laws properly distinguish between absentee and in person voters.

Plaintiffs also claim that Ohio imposes undue burdens on those who vote in person, instead of via absentee ballots, because they face long lines and might have additional burdens if they provide the wrong identification, Doc. No. 26 at p. 11, but that fails on four levels.

Initially, it overlooks the fact that this is a completely avoidable harm; voters are free to vote absentee. That "alternative means … to exercise [electoral] rights" negates the existence of a severe burden. *Libertarian Party*, 462 F.3d at 587.

Secondly, it overlooks the fact that R.C.3505.18(A)(1), provides a wide variety of alternate ways to establish one's identity, so it is unlikely that a voter would be unable to

use at least one of them. And even if he or she couldn't, R.C. 3505.18(A)(2) allows that voter to vote via provisional ballot.

Third, Plaintiffs provide no evidence that anyone has actually been prevented from voting by this supposed problem, negating the "evidence of [] real impact" vital to the existence of a severe burden. *Libertarian Party*, 462 F.3d at 587.

Fourth, there are reasonable grounds for the distinction at issue. Absentee voters have already provided some evidence that they are the registered voters they claim to be, otherwise they wouldn't have received a ballot. See R.C. 3509.03. No such prior vetting occurs before in person voters appear, so it's perfectly reasonable to ask them to show that they are who they claim to be.

v. No one has been denied the vote because they can't provide independent proof of their current address.

Plaintiffs claim that voters who prove their identity with documents not containing their current addresses will be denied the vote, Doc. No. 26 at p. 15, falls well short of the mark.

Initially, it overlooks several alternatives apparent from the face of R.C. 3505.18(A). Voters with social security numbers may supply the last four digits of those numbers in lieu of proof of their current addresses and vote provisionally. R.C. 3505. 18(A)(2) and (3). A voter lacking both such documentation and a social security number may also vote provisionally via R.C. 3505.18(A)(4) and (5).

Further, Plaintiffs have provided no proof that anyone has actually been denied the vote in such a situation, negating the "evidence of [] real impact" vital to their claims. *Libertarian Party*, 462 F.3d at 387. In short, Plaintiffs can show no burden here, severe or otherwise.

. **vi. Plaintiffs claims about provisional ballots ignore history and the plain language of R.C. 3505.183.**

Plaintiffs claim that Ohio's laws concerning provisional ballots are fatally vague in two respects: that there are insufficient substantive standards for evaluating ballots and that the procedure established by R. C. 3505.18 is unclear. Neither is valid.

Plaintiffs' claims about substantive standards fail for multiple reasons. Like their other claims, Plaintiffs cannot identify any problems that have actually resulted from the supposed deficiencies they allege here, in spite of the fact that the same standards have been applied since the 2004 general election. Further, the Ohio standards are drawn directly from the federal Help America Vote Act, and no one has either identified any problems with that statute elsewhere or claimed that it is unconstitutionally vague. Finally, since it is effectively a challenge to the constitutionality of federal law, it can't be decided without input from the U.S. Attorney General.

Plaintiffs' procedural claims are no stronger. Contrary to their assertions, the statute does identify the records to be considered. Each county board of elections is directed to examine "its" records. That is far from ambiguous and it's very relevant to note that Plaintiffs have identified no problems resulting from this supposed deficiency in spite of the fact that the law has been applied in three sets of elections.

The fact that R.C. 3505.183(B)(3) and (4) provide different numbers of factors is not a contradiction; R.C. 3505.183(B)(3) simply identifies the bare minimum standards for a ballot's acceptance and R.C. 3505.183(B)(4) simply provides additional grounds for rejecting a ballot that otherwise met the standards of R.C. 3505.183(B)(3). In other words, R.C. 3505.183(B)(4) does not contradict R.C. 3505.183(B)(3), it supplements that statute.

Finally, the fact that R.C. 3505.183(C)(1) authorizes a final decision on a provisional ballot's acceptance is unremarkable. All disputes must be resolved at some point. Plaintiffs can point to no evidence that anyone's provisional ballot has been improperly rejected under this statute—in spite of the fact that it's been applied in three sets of special elections this year.

b. Plaintiffs' poll tax claims are rebutted by R.C. 3505.18's plain language.

Last, and most definitely least, is Plaintiffs' claim that R.C. 3505.18 imposes a poll tax because it supposedly forces voters to spend money on government documents in order to vote. Doc. No. 26 at pp. 17-19. Even a cursory review of the statute reveals that it provides multiple ways to vote without having to pay anything. R.C. 3505.18(A)(1) authorizes use of private photo IDs, utility bills, bank statements or other government documents that set out the voter's current address. They are still acceptable if they don't contain the voter's current address if the voter provides the last four digits of his or her social security number. And if that won't work, R.C. 3505.18(A)(2) through (6) provide a number of other alternatives. None of those options costs a penny. This claim comes very close to being frivolous.

C. Plaintiffs cannot show irreparable injury.

It is settled law that, regardless of its showing on the other factors considered in connection with injunctive relief, "the Plaintiff must *always* demonstrate some irreparable injury before a preliminary injunction may issue." *Friendship Materials, Inc. v. Michigan Brick, Inc.* 679 F.2d 100, 104 (6th Cir. 1982) (emphasis added). Two sets of undisputable facts indicate that no such showing can be made here.

The first is experience with the actual application of the statutes at issue. We are not operating in a vacuum here. The challenged statutes have been applied in multiple elections. One was statewide. Others were held a cross section of rural and urban counties. Yet there were no reports of the types of problems Plaintiff predict, even though those elections were held in most of the counties they identify as trouble spots. That raises serious doubt about the existence of any harm, let alone irreparable harm.

The second is Plaintiffs' delay in bringing this case. The laws at issue have been on the books since early this year and were first put into effect in May and August. Surely, if they are as harmful as they are claimed to be, Plaintiffs would have acted long ago. But they didn't and, as the Sixth Circuit has noted "[a]s time passes…claims …[of] serious injury become[] less credible." *Kay*, 612 F.2d at 813.

D. Injunctive relief would hurt the Defendants and the public they serve.

As discussed in more detail at pp. 15-16 above, the relief sought here, coming as less than a week before the election, will have real world consequences.

At a minimum, it will create a public perception of "changing the rules in the middle of the game," discouraging turnout and undermining already diminished confidence in the ultimate outcome of the elections.

It will also wreak havoc within elections boards across the states, requiring them to either scramble to retrain their poll workers or hope for the best as workers (those who aren't scared away by the confusion that would follow) struggle with procedures that a significant number have never tried to implement before. One election official out it well: "When the courts get involved, it leaves us hanging." M. Niquette & R. Vitale, *Flip-Flop in rules flusters officials*, Columbus Dispatch, Oct. 31, 2006 at A1.

That is in no one's interest and strongly counsels against the last minute changes Plaintiffs seek here.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2006, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Todd Marti
TODD R. MARTI