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

NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*,	:	
Plaintiffs,	:	CASE NO. C2:06-0896
v.	:	
	:	JUDGE ALGENON MARBLEY
J. KENNETH BLACKWELL,	:	
Defendants.	:	

INTERVENOR STATE OF OHIO'S MEMORANDUM IN OPPOSITION TO PRELIMINARY INJUNCTION

I. INTRODUCTION

Confidence in the integrity of our elections system underlies a viable democracy. Ohio's Voter ID law was enacted for two reasons: to comply with the Help America Vote Act (HAVA) and to bring Ohio's system of verifying identification into the 21st century. Before this law, pollworkers, under laws that have been in effect since the 1930s, verified identity solely by comparing the voter's signature to that appearing in the pollbooks. Although this is a better system than dipping our fingers in ink, it is out of sync with other identification requirements in our modern world. For example, public access to a federal courthouse implicates the constitutional rights of those seeking access, and yet anyone who desires to enter must show photo ID. This practice, however, is justified by the Court's concern for its own security. Likewise, Ohio's common sense Voter ID provisions are justified by a desire to deter fraud and verify identification of those voting.

Under Ohio's law no one is turned away from the polling place. First, so many different types of ID are acceptable that Plaintiffs cannot find an individual who will be unable to vote

under these provisions. Indeed, terms such as current and government document are not defined, not to create inconsistency, but to allow boards to exercise their discretion in favor of permitting votes to be counted. At most, Plaintiffs point to those who will be given a provisional ballot not a regular ballot. But those voters will still have their votes counted, so long as their identity can be confirmed in the days after the election. But voting provisional versus "regular" is not an irreparable harm. This, along with Plaintiffs lack of standing (See *NEOCH v. Blackwell*, Case Nos. 06-4412, 06-4421, pp. 15-17 (6th Cir. 2006), issued October 31, 2006) and the fact that Plaintiffs offer no reason for their failure to assert their facial challenges to voter ID and provisional ballot procedures until 14 days before an upcoming election, dooms their request for injunctive relief, just as it doomed their request for a TRO.

II. STATEMENT OF FACTS

The Voter ID Laws challenged by Plaintiffs became effective earlier this year. First, the Help America Vote Act (HAVA), enacted in 2002, and requiring first time voters to provide one of a number of different types of ID, is the genesis of Ohio's Voter ID Laws. But before the General Assembly enacted its Voter ID Laws, it expanded voters' ability to cast absentee ballots, by allowing any voter to cast a ballot in this manner, as compared to prior law, which required the voter to have a reason as to why they were unable to vote at the polls. See Substitute House Bill 234 (effective January 27, 2006). At this time, to provide safeguards against fraud, absentee voting ID requirements were also enacted, which lays the groundwork for proper identification that must be presented at the polls. See Substitute House Bill 234 (effective January 27, 2006). Then, Amended Substitute House Bill 3 was signed by the Governor on January 31, 2006, and became effective on May 2, 2006, with some provisions taking effect June 1, 2006. Together,

these laws make up the Ohio's Voter ID Laws, which Plaintiffs challenge in their Motion for Preliminary Injunction.

The intent of the Voter ID Laws is to improve Ohio's election system by increasing protections against fraud, adapting to the availability of new technology, adapting to the expanded use of initiative and referendum to change Ohio's laws and Constitution, and further streamlining the process to maintain the ease with which Ohio voters exercise their right.

Under the law, permissible forms of identification include, but are not limited to, a current and valid photo identification., Voters may also provide copy of any of the following if it includes the current name and address: a utility bill, bank statement, government check, paycheck, military identification with current address, or other government document (excluding the voter reminder card sent by the board of elections). As an alternative, voters may provide the last four digits of their Social Security Number (SSN) and vote provisionally, allowing boards of elections to verify the number and count the ballot. Voters choosing this option will not have to provide their full SSN – only the last four digits of the number. Finally, voters who do not have any of the permissible forms of ID or a SSN will not be turned away. These voters may sign an affirmation as to their identity and vote provisionally.

Additionally, the Voter ID Laws provide clarification for the use of provisional ballots by ensuring that no voter is turned away from the polls and clarifies in what cases provisional votes will be counted. The law ensures that provisional voters may provide additional information to board of elections within 10 days of the election for purposes of verifying eligibility to vote, and requires boards of election to maintain a toll-free number that voters may call to track their provisional ballots.

Before October 24, 2006, the day this lawsuit was filed, the new absentee procedures were already been implemented in four separate elections: May 2, 2006 statewide primary election; the 53 special elections held in 28 counties on August 8, 2006; the September 14, 2006 primary in the 3d Congressional district, and the September 15, 2006 primary in the 18th Congressional district. The provisional and voter identification portions of the statues were effective June 1, 2006, and thus were implemented in the August special elections and September special congressional primaries.

III. LAW AND ARGUMENT

Plaintiffs are not entitled to the preliminary injunction that they seek. In determining whether to grant injunctive relief, a court must consider the following factors: (1) Plaintiffs' likelihood of success on the merits; (2) whether Plaintiffs will suffer irreparable injury if the injunction is not granted; (3) whether third-parties will suffer substantial harm if the injunction is issued; and (4) whether the public interest will be served by granting the injunction. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998); *Frisch's Restaurant, Inc., v. Shoney's, Inc.,* 759 F.2d 1261, 1263 (6th Cir.1985). A court should not weigh these factors mechanically, *Wayside Farm, Inc. v. Bowen*, 698 F. Supp. 1356, 1359 (N.D. Ohio 1988), but "should weigh each of the factors in light of the factual circumstances of the particular case." *Id.*; *Columbia Gas Trans. Corp. v. An Exclusive Natural Gas Storage Easement*, 688 F. Supp. 1245, 1248 (N.D. Ohio 1988). In this case, the balance of equities weighs against the issuance of a preliminary injunction, for two reasons: because Plaintiffs cannot demonstrate that they have acted with the diligence necessary before invoking the Court's equity jurisdiction, and because Plaintiffs are unable to demonstrate the likelihood that they will succeed on the merits of their challenges. For these reasons, injunctive relief should be denied to the Plaintiffs.

A. Plaintiffs have no right to seek immediate injunctive relief when they have delayed months before filing their facial challenges to this statute.

A party seeking to invoke the equitable jurisdiction of the Court must do equity, and cannot, through its own delay, create an emergency that justifies extraordinary remedies. This principle, invoked by the Sixth Circuit in cases like *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547 (2004),[1] was recently confirmed by the Supreme Court in a different case involving voter ID. In *Purcell v. Gonzales*, 549 U.S. __, 2006 Lexis 8000 (Oct. 20, 2006), the Supreme Court vacated an injunction issued by the Ninth Circuit regarding Arizona's voter-identification law, and allowed the law to go into effect. See *Purcell*, 549 U.S. ___, 2006 U.S. Lexis 8000, at *8. In doing so, the Supreme Court cautioned federal courts not to rewrite election laws in the weeks before an election, as late-breaking court orders can cause chaos: "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at *6. The Court further explained that allowing Arizona's voter identification law to go into effect could not truly harm the complaining voters, as those without identification would not be turned away at the polls, but would instead be allowed to vote a provisional ballot, which is counted after any identification issues are resolved after the election. *Id.* at *1-*2. This ruling applies with equal force to this case.

[1] In *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547 (6th Cir. 2004), the Sixth Circuit stayed a temporary restraining order enjoining Ohio's laws regarding challengers at the polls during the 2004 general election. In reaching its decision, the court noted that the State's interest in not having its voting processes interfered with is great. It further noted that "[i]t is particularly harmful to such interests to have the rules changed at the last minute." *Id*. at 551. And as Judge Ryan noted in his concurrence, should the "horrors the plaintiffs posit become a reality tomorrow, the federal courts will be open to respond to proof-supported allegations of an unconstitutional burden on Ohio's citizens' right to vote. *Id*. at 552.

Although Plaintiffs couch their claims as "as applied" challenges to Ohio's Voter ID Laws, the majority of these claims are facial in nature. In their motion for preliminary injunction, filed on October 27, 2006, Plaintiffs assert that they are entitled to injunctive relief because they allege that: (1) Boards are applying conflicting interpretations of six provisions of the law, (2) that the law imposes more burdensome identification requirements on Election Day voters than on absentee voters, (3) that the law does not permit voters who provide their social security number but who have no ID to vote on Election Day, (4) that only voters using certain forms of identification must demonstrate their current address, (5) that the law imposes a poll tax to the extent that a voter must purchase a state-identification card in order to comply with its requirements, and (6) that the law governing the counting of provisional ballots is vague and internally inconsistent. The second through the sixth arguments are all patently facial, in that they are arguments apparent from the face of the statutes, and thus challenges that could have been raised as early as January 31, 2006, when the Governor signed House Bill 3.[2] These facial challenged should have been asserted months, not days, before the election, and thus should not be enjoined 5 days before the election.

HB 3 as signed by the Governor on January 31, 2006, and most of the provisions at issue did not take effect until June 1, 2006. Thus Plaintiffs had ample opportunity to challenge these provisions before they took effect, or at least well before voting procedures were finalized. And they make no attempt to justify their delay other than trying to characterize all of their challenges as "as applied."

[2] In addition many of the six issues identified as part of Plaintiffs' first argument are also facial challenges. For example, the requirement that only military id's with current addresses count as id is expressly provided for by statute.

Nor can they justify their delay. Both of the Plaintiffs participated in the legislative process leading to the enactment of HB 3, through providing opposition testimony. For example, Plaintiff SEIU submitted a letter on June 15, 2005, over 16 months ago, stating its opposition to the Bill. (Attached as Exhibit A). Plaintiff NEOHC did likewise in December 2005, 10 months ago. (Attached as Exhibit B). Thus, the Plaintiffs before this Court were well aware that the Ohio General Assembly was enacting a law that contained the very same provisions of which they now complain. Under these circumstances, their delay in filing this lawsuit and the motion for preliminary injunction are both inexcusable and inexplicable.

B. Plaintiffs cannot show a strong or substantial likelihood of success on the merits.

Ohio is not the first State to enact Voter ID provisions. Currently, about 25 States have some type of law requiring Voter ID, and five of those States' provisions have been challenged. The Voter ID provisions throughout the country vary from extremely strict, such as Georgia's Voter ID laws, to those like Ohio's and Arizona's, which are more liberal. See *Gonzalez v. Arizona*, slip op., attached. Some courts have upheld Voter ID provisions stricter than Ohio's. *See Indiana Democratic Party v. Rokita*, Case No. 06-2218 (7th Cir. 2006) (Indiana requires photo ID in all circumstances). Other states, such as Missouri and Georgia, also accept only a photo ID, and their provisional ballot provisions are stricter than Ohio's laws. For example, Georgia requires the voter to return to the election office within 48 hours to present proper ID (Official Code of Georgia Annotated §21-2-417), and Missouri only allows a provisional ballot to be cast without photo ID when the voter swears he or she does not have Voter ID due to a

special need, religious belief or a birth date before 1941. See R.S. Mo §115-427.[3] Accordingly, Ohio's laws are like those that have been upheld by other Courts.

1. Ohio's Voter ID Laws are constitutional because they are reasonable and nondiscriminatory.

Plaintiffs' argument that the Voter ID requirements set forth in R.C. 3505.18, *et seq.*, abridge their members' fundamental rights to vote by violating both the due process clause and the equal protection clause is without merit. Given the minimal burden created by the new identification requirements, and the important interest served by these laws, Plaintiffs' constitutional challenges fail.

States are charged by the Constitution with determining the time, place and manner of holding their own elections. Art. I, §4, cl. 1; *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). "The Constitution itself plainly 'compels the conclusion that government must play an active role in structuring elections;' since 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick v. Takushi*, 504 U.S. 428 (1992).

It is unavoidable for a state to regulate its election process without imposing some burden on individual voters. "[T]he mere fact that a voting regulation excludes some voters is not enough to warrant strict scrutiny." *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of

[3] Both Georgia and Missouri's laws are currently enjoined. See *Weinschenk v. Missouri*, Missouri Supreme Court Case No. 88039 (decided October 16, 2006); *Common Cause/Georgia v. Billups*, Case No. 05-15784, 06-11927 (11th Cir. 2006).

States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

To give States the ability to carry out their elections without holding every regulation to the highest degree of scrutiny, the United States Supreme Court has developed a more flexible standard of review for election laws. Courts considering a challenge to a state's election law must "weigh 'the character and magnitude of the asserted injury to the [plaintiffs'] . . . First and Fourteenth Amendment [rights] . . . against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983). Subsequently, only regulations that impose "severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), citing *Burdick* at 433. If laws "impose only 'reasonable nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the state's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick* at 434, quoting *Anderson* at 788-789.

Ohio's Voter ID Laws impose only minimal, nondiscriminatory requirements on Ohio voters. There is nothing burdensome about these laws. These laws were specifically designed in such a way to provide voters with as much flexibility as possible with regard to what they can present for identification. For example, a voter can has the option of providing items such as a photo i.d., a copy of a utility bill, a bank statement, or even the last four digits of their SSN. R.C. 3505.18(A).

Additionally, these laws were enacted to help ensure the public's confidence in the election process and to prevent the possibility of fraud. Both of these considerations qualify as

important regulatory interests under *Burdick*, and more than justify the extremely minimal burden created by this common sense law.

2. Ohio's Voter ID Laws were designed to be flexible and are not vague.

Contrary to Plaintiffs' assertions, Ohio's Voter ID Laws are not vague or confusing. Plaintiffs present a facial challenge to the Voter ID Laws on the grounds that they are unconstitutionally vague in violation of due process. To succeed on such a facial challenge, however, the plaintiffs must demonstrate that the law is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982).

The classification of a statute as void for vagueness is a significant matter. *United States v. Caseer*, 399 F.3d 828, 838 (6th Cir. 2005). Federal courts have repeatedly held that every reasonable construction must be used in order to save a statute from unconstitutionality. *Columbia Natural Res. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995), cert. denied, 516 U.S. 1158 (1996); *Screws v. United States*, 325 U.S. 91, 98 (1945) ("This Court has consistently favored that interpretation of legislation which supports its constitutionality"). A statute is unconstitutionally vague if it denies fair notice of the standard of conduct for which the citizen is to be accountable, or it if is an unrestricted delegation of power that leaves the definition of its terms to law enforcement officers. *Leonardson v. City of East Lansing*, 896 F.2d 190, 196 (6th Cir. 1990).

The fact that a legislature could have chosen clearer and more precise language equally capable of achieving the end that it sought does not mean that a statute is unconstitutionally vague. *United States v. Powell*, 423 U.S. 87, 94 (1975). As the Supreme Court noted in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), while a statute must be sufficiently clear that persons of ordinary intelligence can "steer between lawful and unlawful conduct," *id*. at 108, the

language need not have mathematical precision. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Id*. at 110. A law is therefore permitted to have "flexibility and reasonable breadth, rather than meticulous specificity." *Id*. at 110, citing *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088 (8th Cir. 1969).

Here, the Voter ID Laws create flexibility in what voters can present at the polls to demonstrate who they are. Plaintiffs would have this Court read each provision of the statue in isolation of the other, ignoring interrelated sections and how one provision supports the other.

3. Directive 2006-78 enhances the Voter ID provision's flexibility.

On October 26, 2006, Secretary of State Blackwell issued Directive 2006-78. This directive resolved all of the issues in Ohio's Voter Laws that Plaintiffs argue are vague, confusing and impossible to apply.

Plaintiffs argue that the definition of the "current" in Ohio Rev. Code § 3505.18(A) is vague. However, Directive 2006-78 clears up any potential confusion by specifically defining the "current" status for identification documents in Ohio's Voter ID Laws as being "dated not more than six months from the date it is presented to the election official." Directive 2006-78, at 3. Similarly, Plaintiffs argue that the definition of the phrase "government document" as it is used in Ohio's Voter ID Laws is vague. However, Directive 2006-78 clears this up by specifically defining the phrase to mean "any local, state or federal government document that shows the voter's name and current address."

Directive 2006-78 also clarifies both of Plaintiffs' concerns regarding the use of a driver's license as identification when voting. Plaintiffs argue that Ohio's Voter ID Laws do not make it clear whether the photograph number on a driver's license is acceptable. Plaintiffs also argue there is confusion regarding whether a driver's license can be used as identification if it

does not contain a current address. The Directive explicitly states that "license number" as used in Ohio's Voter ID Laws refers to the actual number labeled "License No." and not, the number located on the photograph of the voter. The directive also clarifies that a driver's license that does not contain the current address of the voter is a sufficient form of identification.

Under Ohio law, a military I.D. is an acceptable form of identification to cast a ballot so long as it "shows the voter's name and current address." R.C. 3505.18(A). Plaintiffs argue that this provision is unclear because many military I.D.'s do not contain the holder's address. While this may be true, the statue makes it clear that the only time a military I.D. by itself can be considered sufficient is when it contains the voter's current address. Furthermore, HAVA requires that military I.D. be included in the list of required identification. Directive 2006-78 again clarifies the law to the boards of elections and reminds them that, for a military I.D. to be sufficient, it must contain the voter's current address.

Additionally, it is important to note that none of the requirements mandated under Ohio's Voter ID Laws are in any way severe or overly burden any Ohioan's right to vote. Instead, Ohio's Voter ID Laws are simply a process the General Assembly has put in place to ensure that the person casting the vote is actually who they say they are. As such, asking a person to provide identification or to provide the last four digits of their Social Security card is no more burdensome than having to sign the envelope of an absentee ballot. Because these requirements are not unduly burdensome, they are entitled to the lowest standard of review. And, as we explained earlier, the State's interest in ensuring the public's confidence in the election process and the State's interest in preventing fraud certainly provide a rational basis for enacting these laws.

4. The law was designed to provide either a regular or provisional ballot to every registered voter in Ohio.

Plaintiffs' speculative parsing of each separate requirement and what is or is not included in the law ignores the overall intent of the Voter ID laws and federal law. Many of Plaintiffs' interpretations are contrary to the laws of statutory interpretation, which provide that statutes are not to be construed to reach an absurd result. See *In re Election Contest of Democratic Primary Election Held May 4, 1999 For Nomination To The Office Of Clerk, Youngstown Municipal Court*, 88 Ohio St.3d 258, 266 (2000), citing *State ex rel. Sinay v. Sodders* , 80 Ohio St.3d 224, 232 (1997). When R.C. 3505.18 is read as a whole, it is apparent that the law does not provide that someone who refuses to present any identification at the polls can cast a provisional ballot, but that someone who presents a SSN will be disenfranchised. This is so because both Ohio law and HAVA provide that anyone who does not present some unique identifier at the polls will be provided a provisional ballot.

a. Voters who lack required identification, but who have a SSN, will not be disenfranchised.

Plaintiffs' argument that a voter who lacks any form of identification but has a SSN will be unable to cast a ballot is simply untrue. To begin, as Plaintiffs admit, the notice mailed to all voters specifically states that voters who do not provide one of the acceptable forms of identifications "will still be able to vote by providing the last four digits of the voter's SSN and by casting a provisional ballot." Plaintiffs' brief at p.9, citing R.C. 3501.19.

The law provides that presenting a SSN is enough to receive a provisional ballot. As R.C. 3505.18(A)(2) provides, if a voter is unable to present any of the forms of ID listed in division (A) (the HAVA documents), but has a SSN, the voter may vote by casting a provisional ballot. This provision can be used even if a voter has one of the HAVA documents but forgot to bring it. This way, the voter may vote provisionally using the last four digits of their SSN, and

they are not required to come back with ID (if they forgot to bring it) or provide additional information to their local board of elections within 10 days following the election.

Additionally, R.C. 3505.18(A)(3) also applies when the voter has one of the HAVA docs and the voter has a SSN, but is not able to provide any ID on election day. This provision allows the voters to cast a provisional ballot and then they are required to bring one of the forms of ID to the BOE within 10 days following the election. See R.C. 3505.181 for a list of who has to bring ID to the Board within 10 days - these are the HAVA first time voters who have not yet provided any form of ID and other voters who have ID or a SSN but have not brought ID with them and cannot provide their SSN for some reason.

The Ohio also contemplates that when a voter has no identification, they can execute an affirmation and vote provisionally. R.C. 3505.18(A)(4) provides the affirmation that voters may use when they do not have any of the required documents or a SSN. To argue that these voters will be disenfranchised ignores the clear intent of the law to generate a broad list of unique identifiers that voters may present to cast a vote.

b. The Voter ID laws are reasonable.

The rationale for requiring provisional voting when a voter uses a SSN or affirmation is twofold. First, the provisional ballot allows boards of elections to check SSNs in a secure manner. Rather than have a list of voter SSNs at each of the precinct locations, it is much more secure to allow voters to cast a provisional ballot so the SSN can be cross-checked later if necessary. Documents that verify the voter's name and address, or have the voter's picture linked to the voter's name, are used to verify information available in the poll book. In lieu of these provisions, the affirmation provides one last deterrent to anyone who may plan to vote

fraudulently. The State of Ohio intended for all of the votes to be counted so long as there were no other questions related to the voter's eligibility.

Directive 2006-78 also specifically advises all boards of elections that if a voter is without any of the acceptable forms of identification, but the voter does have a SSN, "the voter may provide the last four digits of the social security number" and then will be permitted to cast a provisional ballot. Directive 2006-78. The Secretary of State has interpreted Ohio's Voter ID Laws to allow any voter who has a SSN to vote a provisional ballot regardless of whether or not they have any form of identification. Ohio courts give the Secretary of State great deference in his interpretations of elections laws. See *Rust v. Lucas County Bd. Of Elections*, 108 Ohio St. 3d 139 (2005); *Whitman v. Hamilton County Board of Elections*, 97 Ohio St.3d 216 (2002). This court should not interfere with the Secretary of State's interpretation.

Additionally, it is important to note that two special congressional primary elections, as well as a number of local special elections, have been conducted using Ohio's Voter ID Laws and yet Plaintiffs still have not produced a single individual who was prevented from voting in either of these elections.

5. Ohio's Voter ID Laws do not violate equal protection.

Plaintiffs attempt to support their equal protection argument by pointing out the difference in the way absentee voters are treated under Ohio's Voter ID Laws compared to those voters who appear in person at the polls. The very nature of an absentee voting system, however, requires a different process to be applied than that applied to those who appear in person. It is not necessary to, and in fact would be impossible, to submit these two sets of voters to the same identification requirements.

The purpose of the Voter ID Laws is to confirm that a voter lives at the address claimed, and is in fact the person registered to vote. An absentee ballot is sent to an address only after the voter residing there receives an application mailed to that address by the Board of Elections, fills out that application with a driver's license number or the last four digits of their SSN, or provides a copy of a current and valid photo ID, a utility bill, bank statement, government check, paycheck, or other government document with the voter's name and current address, and returns that form to the Board. Under these circumstances, the board has independent indicia that the absentee ballot application was received and returned by the registered voter. However, voters who appear in person on election day should be required to independently prove their identification. Indeed, they always have been required to prove identification; it was simply done by signature verification in the past, which is hardly an exact science. Indeed, no doubt persons may have wrongfully had their vote challenged in the past because their handwriting looked different from their previous signature. The fact that such a person could be hypothesized did not make those provisions unconstitutional, any more than do Plaintiffs' speculative assertions here.

As noted above, the State is permitted under the U.S. Constitution to set the time, place and manner for electors to exercise their right to vote. Indeed, the Constitution does not require that a State provide absentee balloting at all. Nor is the Constitution offended by local variations in the process. There is also no constitutional requirement that a state provide absentee voting. Courts have consistently held that local variations in the voting process does not make a statute unconstitutional. For example, *Bush v. Gore*, 531 U.S. 98 (2000) was not a case about local variation, but a case about a complete lack of standards. That *Bush v. Gore* does not control here could not be more clear, as the Court itself expressly noted that it was not addressing the

question here: "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109.

C. The Plaintiffs have not shown irreparable injury.

As asserted above, Plaintiffs waited nine months to challenge Ohio's Voter ID laws. And despite that absence of time, they've failed to come up with real people who have been negatively affected by the law. See Secretary of State's Memorandum in Opposition to Motion for Preliminary Injunction, at pp. 10-11. Plaintiffs' speculation is not sufficient to demonstrate irreparable injury that warrants enjoining all of the provisions challenged here. Unless and until injury can be demonstrated by the Plaintiffs, they are not entitled to injunctive relief. And, as discussed above, at any rate, they are not entitled to injunctive relief given their failure to pursue their predominately facial claims in a timely manner.

D. A preliminary injunction will cause great harm to all Ohioans.

The chaos that Plaintiffs created by filing this lawsuit and seeking the relief they want at this hour before the election has already caused and will continue to cause great harm to Ohio voters. As stated in *Purcell v. Gonzalez*, litigation disrupts elections and the integrity of the election process.

E. The public has a great interest in maintaining a stable elections process.

Not only will a preliminary injunction harm Ohioans, it is in the best interest of the public for Ohio to continue to utilize the statutes that have been in place during balloting to date. To proceed otherwise will interfere with Ohio's election, disrupt the current status quo, and create yet one more changed circumstance to be implemented by the local Boards, thus creating the very inconsistencies that Plaintiffs complain of. Plaintiffs are asking this Court to dramatically alter election procedures 5 days before the election, and to once again disrupt the status quo.

Accordingly, the injunction sought will harm Ohio voters and Ohio boards of elections, and invalidate legislation duly enacted by representative of all of the people in Ohio.

F. This Court has the duty to give effect to as many portions of the law as possible.

In the event that this Court enjoins any portion of the Voter ID laws, the Court is obligated to allow those portions of the law that are severable go into effect. The issue of whether parts of a statute are severable is a question of state law. *WMPC v. Voinovich,* 130 F.3d 187, 202 (6th Cir. 1997). In this case, section 15 of H.B. 3 contains a severability clause that provides:

> If any item of law that constitutes the whole or part of a codified section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a codified section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the codified sections contained in this act are composed, and their applications, are independent and severable.

In order to determine whether an unconstitutional provision may be severed under Ohio law, the Court must consider the following questions:

(1) Are the constitutional and the unconstitutional parts capable of separation so that each may read and may stand by itself?

(2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken out?

(3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

WMPC v. Voinovich, 130 F.3d at 202.

In this case, to the extent that the Plaintiffs have not challenged a provision, or the Court determines that they have not sustained their challenge to a specific provision, those provisions of the law must be upheld.

IV. CONCLUSION

For these reasons, the State of Ohio asks the Court to deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2006, the foregoing Memorandum in Opposition to the preliminary injunction was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Holly J. Hunt
Holly J. Hunt