IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LEAGUE OF WOMEN VOTERS, *et al.*,	**:**	
Plaintiffs,	**:**	
VS.	**:**	**CASE NO. 3:05-CV-7309**
J. KENNETH BLACKWELL, *et al.*,	**:**	**JUDGE CARR**
Defendants.	**:**	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION AND APPLICATION FOR LEAVE TO BRING AN INTERLOCUTORY APPEAL OF THIS COURT'S DECEMBER 2, 2005 ORDER

On December 8, 2005, pursuant to 28 U.S.C. §1292(b), Defendants J. Kenneth Blackwell and Bob Taft ("Defendants") requested leave to file an interlocutory appeal of this Court's December 2, 2005 order partially denying Defendants' motion to dismiss Plaintiffs' claims under 42 U.S.C. §1983 and the Fourteenth Amendment of the United States Constitution. A memorandum in support follows.

I. Introduction

This memorandum presents five questions for interlocutory review.[1] The first question presented asks whether Plaintiffs have failed to state a claim upon which relief can be granted against Defendants, where Plaintiffs' allegations of voting irregularities at various Ohio polling locations over the past thirty years, even if taken as true, do not violate the Fourteenth Amendment or 42 U.S.C. §1983 as a matter of law. The second question presented asks whether

[1] Should the Court deny the Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, dated December 7, 2005, Defendants would request this Court to certify those claims for interlocutory review as well.

Plaintiffs have failed to state a claim upon which relief can be granted against Ohio's Governor, where Plaintiffs' assertions, even if taken as true, are unrelated, as a matter of law, to the Governor's official duties as Ohio's Chief Executive. The third question presented asks whether Plaintiffs have failed to state a claim upon which relief can be granted against Ohio's Secretary of State, where Plaintiffs' contentions, even if taken as true, could, at most, only give rise to a cause of action against offending county election boards and their officers. The remaining two issues concern Plaintiff League of Women Voters of Ohio and Plaintiff League of Women Voters of Toledo ("the organizational plaintiffs"). Specifically, the fourth question presented asks whether the organizational plaintiffs lack standing to assert these claims against Defendants, while the fifth asks whether claim preclusion bars them from raising these causes of action against Defendants.

Due to the depth and breadth of Plaintiffs' sweeping claims, several state agencies and 88 county election boards are bracing for an unprecedented onslaught of discovery, which will significantly impair their ability to perform governmental services for Ohio's citizens. As a result, this case presents that rare exception to the federal courts' general preference for avoiding piecemeal appellate review: "where an immediate appeal may avoid protracted and expensive litigation." *In re Baker & Getty Fin. Servs.*, 954 F.2d 1169, 1172 (6th Cir. 1992); *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F. Supp. 346, 353 (E.D.Pa. 1993). Because of this case's magnitude and the extraordinary importance of the legal issues involved, therefore, Defendants believe interlocutory review of these questions presented is appropriate here. *See Zenith Radio Corp. v. Matsushita Elec. Inds. Col.*, 478 F. Supp. 889, MDL No. 189 (E.D.Pa. Aug. 21, 1979). Accordingly, Defendants respectfully request this Court to grant them leave to appeal this Court's December 2, 2005 order partially denying their motion to dismiss Plaintiffs' complaint.

II. Standard of Review

28 U.S.C. §1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order….

In *Cardwell v. Chesapeake & Ohio Railway Co.*, 504 F.2d 444, 446 (6th Cir. 1974), the Sixth Circuit identified four elements that must be established before granting review of interlocutory orders: "(1) the question involved must be one of 'law'; (2) it must be 'controlling'; (3) there must be substantial ground for 'difference of opinion' about it; and (4) an immediate appeal must 'materially advance the ultimate termination of the litigation.'" *See also*, *Vitols v. Citizens Banking Co.*, 984 F.2d 168, 170 (6th Cir. 1993). Because all four elements are present here, this Court should grant Defendants' motion for leave to bring an interlocutory appeal of its December 2, 2005 order.

III. Law and Argument

A. The Issues Presented Involve Controlling Questions of Law.

As an initial matter, each of the five questions presented involves legal, rather than factual matters. Indeed, even assuming Plaintiffs' allegations to be true, Plaintiffs cannot, as a matter of law, assert such claims against either the Governor or the Secretary of State. For instance, the first three questions presented each examine whether Plaintiffs have stated a legal cause of action against Defendants; the fourth question turns on whether the organizational plaintiffs have standing to assert this cause of action; while the final question involves the issue

of claim preclusion, and whether it procedurally bars Plaintiffs from advancing these claims. Consequently, Defendants' request for interlocutory review is based exclusively on questions of law.

Moreover, these legal issues control this case's outcome. In other words, should the Sixth Circuit answer any of these questions in Defendants' favor, Plaintiffs' claims will ultimately be dismissed.[2] *See W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, (In re City of Memphis), 293 F.3d 345, 352 (6th Cir. 2002) (holding that petitioner must show that "resolution of the issue on appeal could materially affect the outcome of litigation in the district court"); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982) (same); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974), *cert. denied*, 419 U.S. 885, 42 L.Ed. 2d 125, 95 S.Ct. 152 (1974). Accordingly, Defendants have met the first two elements of the well-established test for certifying an interlocutory appeal.

B. Substantial Grounds Exist for Disagreeing with the District Court's Decision on These Issues.

A question of law is appropriately certified for interlocutory review if "the question is not settled by controlling authority and there is a substantial likelihood…that the district court ruling will be reversed on appeal." *Gamboa v. City of Chicago*, 2004 U.S. Dist. LEXIS 25105, at *11 (N.D. Ill. Dec. 13, 2004) (internal citations omitted). *See also, Praxair, Inc. v. Hinshaw & Culbertson*, 1997 U.S. Dist. LEXIS 16707, at *2 (N.D. Ill. Oct. 15, 1997) (same). In *Gamboa*, the defendants presented the district court with a question for certification—what constitutes "pattern of activity" under the federal RICO statute—that the Seventh Circuit had not yet settled. *Gamboa*, 2004 U.S. Dist. LEXIS, at *8. Moreover, the district court recognized that because of

[2] The one exception, of course, would be if the Sixth Circuit agreed with Defendants only as to their fourth and/or fifth questions presented—the standing and claim preclusion issues—which would control the outcome of this case only as to the organizational plaintiffs, but would, nevertheless, substantially reduce this case's massive scope by limiting it to the individual plaintiffs' particularized voting rights claims.

the complexity and scope of the question presented, a substantial likelihood existed that the Seventh Circuit might disagree with its initial decision. *Id*. at *11. As a result, the district court certified the question to the Seventh Circuit, noting that "because Defendants pose a question that has not been settled and could ultimately overturn a jury verdict a year or more in the future, an immediate resolution of this question seems sensible." *Id*. at *12.

The same is true with the questions presented here. Because this appears to be a case of first impression, the attendant legal theories have not been tested in the Sixth Circuit. And, although this Court has every reason to believe it correctly decided Defendants' motion to dismiss, *Gamboa's* rationale is persuasive: because Defendants' questions presented have never been addressed in federal court and could ultimately obviate the need to conduct massive discovery on a statewide scale—as well as expensive and protracted litigation—immediate resolution of these questions is proper. *See also*, *Wieboldt Stores, Inc. v. Schottenstein Stores Corp.*, 1989 U.S. Dist. LEXIS 5216 (N.D. Ill. May 5, 1989) (noting that novelty and complexity will be key factors when considering §1292(b)'s "substantial disagreement" element).

C. An Immediate Appeal Materially Advances the Ultimate Termination of the Plaintiffs' Case.

As to the fourth element, federal courts have held that in determining whether certification will materially advance the ultimate termination of the litigation, a district court is to examine whether an immediate appeal would eliminate: (1) the need for trial; (2) complex issues so as to simplify the trial; or (3) issues to make discovery easier and less costly. *Zygmuntowicz*, 828 F. Supp. at 353 (citing *In re Magic Marker Secs. Litigation*, 472 F. Supp. 436, 439 (E.D. Pa. 1979)). Quite simply, certifying the above questions presented will give the Sixth Circuit the opportunity, at the outset, to resolve this case without dragging state agencies and Ohio's county boards of elections through an onerous discovery process or protracted and expensive litigation.

And, even if some of Plaintiffs' claims remain after appellate review, the Sixth Circuit will have the opportunity to (1) eliminate the organizational plaintiffs to make discovery significantly "easier and less costly;" and (2) set forth the legal standards Plaintiffs must meet to prevail on their claims before this Court. As such, Sixth Circuit review of the questions presented above will materially advance the ultimate termination of the litigation; and, accordingly, these questions warrant certification.

IV. Conclusion

For the foregoing reasons, Defendants respectfully request this Court to grant their December 8, 2005 motion pursuant to 28 U.S.C. §1292(b), and certify the above questions presented for interlocutory review.

Respectfully submitted,

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Certificate of Service

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 15th day of December, 2005.

/s Richard N. Coglianese
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