

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

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| Ohio Democratic Party | : | |
| | : | Case No. C204-1055 |
| Plaintiff, | : | |
| v. | : | Judge Marbley |
| | : | |
| J. Kenneth Blackwell, et al., | : | Magistrate Judge Abel |
| | : | |
| Defendants. | : | |

**REPLY BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR VOLUNTARY
DISMISSAL WITHOUT PREJUDICE AND
MOTION TO STRIKE OR DISMISS PURPORTED COUNTERCLAIM**

I. Introduction.

The State of Ohio’s memorandum contra is void of any support for its proposition that there remains a real live controversy. The State of Ohio did not contest Plaintiff’s argument that leave should be granted for it to dismiss this action because the controversy that gave rise to this action – the unprecedented and extremely long lines and delays at certain polling places in Franklin and Knox counties – is now moot, and the Court’s temporary restraining order has expired by its terms. The State of Ohio’s memorandum contra solely defended the State of Ohio’s purported counterclaim based on the notion that Plaintiff requested and the Court ordered the Secretary of State or the boards of election “to simply pass out pieces of paper and a pen.” Not only does the State of Ohio’s memorandum contra mischaracterize the relief granted by the Court, but the State of Ohio’s counterclaim is procedurally improper because it did not properly intervene in this case.

Further, the State of Ohio’s purported counterclaim is improper because it is based on nothing more than pure speculation, which is insufficient to warrant the application of the

capable of repetition doctrine. Indeed, the State of Ohio's counterclaim is nothing more than a law school hypothetical it desires to pose to the Court in order to obtain an advisory opinion declaring that Defendants did not violate the Constitution and could not violate it for similar conduct in the future. Although the State of Ohio's hypothetical may prove to be an interesting intellectual exercise, Plaintiff asks this Court to grant it leave to voluntarily dismiss its complaint, as it is moot, and to strike or dismiss the purported counterclaim because it is not a proper counterclaim, was filed without leave of court, and improperly seeks to have the Court issue an advisory opinion.

II. The State of Ohio Did Not Contest Plaintiff's Motion for Leave to Voluntarily Dismiss This Action.

The State of Ohio's memorandum contra focused only on its counterclaim and whether the State of Ohio properly intervened in this litigation. Absent from the State of Ohio's memorandum contra is any rebuttal of Plaintiff's request to voluntarily dismiss this action. As discussed more fully in Plaintiff's motion, Plaintiff seeks to voluntarily dismiss this action because the sole claim for relief advanced by Plaintiff is moot. This action was brought for the sole purpose of securing the right to vote of all citizens in Franklin and Knox counties during the November 2, 2004 national election. Plaintiff asked the Court to issue immediate equitable relief ordering Defendants to provide additional or alternative voting mechanisms in these two precincts. The Court issued a temporary restraining order directing Defendants to provide alternative mechanisms, but provided that the order would expire by its own terms at the close of the polls on November 2, 2004. This Court's Order, now expired, was the sole relief Plaintiff requested.

The State of Ohio did not rebut the fact that no party would be prejudiced by the dismissal of this action in light of the fact that this action has been pending for a short period of

time and the parties have not incurred expense in preparing for trial and will incur no duplicative expense of relitigation. In fact, the State of Ohio did not allege that it suffered any prejudice from the Court's Order or that it would suffer any prejudice from a dismissal of this action. The Defendant Franklin County Board of Elections, an actual party defendant, agreed to the dismissal of the complaint. (Stipulation of Dismissal of Claims Against the Franklin Cty. Bd. of Elections.) Further, Defendant Franklin County Board of Elections filed a motion to dismiss its appeal of the Court's Order before the Sixth Circuit Court of Appeals because "the necessity of this appeal is moot." (Franklin Cty. Bd. of Elections Mot. to Dismiss at 1.) The Sixth Circuit Court granted the motion to dismiss and ordered Franklin County's appeal dismissed. This action is moot and Plaintiff has no intention to refile this action.

The State of Ohio also failed to address the fact that in its Answer it admitted that this action is moot, stating, "Plaintiff's claims are barred, in whole or in part, because they are moot."¹ (Answer at ¶17) (emphasis added). Although the State of Ohio cited language from Plaintiff's brief immediately preceding this point, the State of Ohio has not explained away its own admission. Indeed, this case is moot and should be dismissed.

III. The State of Ohio Did Not Properly Intervene And Its Purported Counterclaim Is Nothing More Than A Request For An Improper Advisory Opinion.

A. The State of Ohio Did Not Properly Intervene In This Litigation.

A review of this Court's Injunctive Proceedings of November 2, 2004 establishes that the State of Ohio did not properly intervene in this action. The State of Ohio alleges its intervention was proper because it "verbally moved to intervene in this lawsuit" and the Court allowed that

¹ Although the State of Ohio has attempted to intervene in this matter, it has offered no explanation for any interests that Defendant Blackwell would not represent on its behalf in his official capacity as Ohio Secretary of State. Since the State of Ohio fails to explain any difference between the interests of the two parties, and are represented by the same counsel, there is no reason to believe the Answer of the State of Ohio is inconsistent with the position of Defendant Blackwell.

intervention. (Mem. Contra at 3.) The State of Ohio states no further basis for its intervention. During the injunctive proceeding the State of Ohio’s counsel introduced himself as follows, “Richard Coglianese, . . . Assistant Attorney General. I am here on behalf of defendant Secretary of State Ken Blackwell.” (November 2, 2004 Injunctive Proceeding (“Inj. Proc.”) at 3). At that point in time, Mr. Coglianese made no mention that he served in a dual role, representing both the Secretary of State and the State of Ohio as an independent intervenor.

Later in the proceeding, both Mr. Todd, on behalf of the Ohio Republican Party, and Mr. Coglianese, on behalf of the State of Ohio, requested to intervene in this lawsuit. In response to Mr. Todd’s request, the Court stated, “I will *provisionally* allow you to intervene so as to entertain your arguments.” (Inj. Proc. at 4) (emphasis added).² In response to Mr. Coglianese’s verbal request the Court stated, “I will *provisionally* grant that. And when you address the issues raised by Ms. Trafford, you can address the basis for intervention.” (Id. at 5) (emphasis added). The State of Ohio never addressed the basis for its intervention and never filed any motion for intervention in this case. The transcript of the proceeding contains no further discussion of or basis for the State of Ohio’s purported intervention. The Court only allowed the State of Ohio to provisionally intervene for purposes of argument; however, even in that respect counsel for the State of Ohio and Mr. Blackwell’s counsel, Mr. Coglianese, did not distinguish between the two parties in argument, never identified any differing interests between the two parties, and never stated an independent ground for intervention.

The State of Ohio does not contest that 28 U.S.C. § 2403 is not applicable because that section, which does authorize state intervention in actions in federal courts, applies only if the constitutionality of a state statute has been called into question and there is no state officer

² Mr. Todd represented that his requests was oral, but that he would “follow it up with a written motion, to intervene on behalf of the Ohio Republican Party.” The Ohio Republican Party submitted a written pleading on November 3, 2004.

named as a defendant. The complaint in this action did not attack the constitutionality of any state statute. The complaint named Defendant Blackwell, and there is no reason to believe that Defendant Blackwell did not or would not adequately represent the interests of the State of Ohio. Thus, the State of Ohio does not have a statutory right to intervene in this action. But even if it did, it nevertheless would have to make a proper application to this Court consistent with Fed. R. Civ. P. 24(a).

B. The State of Ohio's Purported Counterclaim Requests an Impermissible Advisory Opinion.

Although the State of Ohio's recitation of the facts that serve as the basis for its purported counterclaim poses an interesting hypothetical, it misconstrues virtually all that transpired during this Court's injunctive hearing on the eve of the November 2, 2004 national election and requests this Court to do nothing more than enter an impermissible advisory opinion. The State of Ohio represents that Plaintiff requested and the Court ordered Defendants "to pass out pens and paper to all those in line so they could cast votes." This was not the case.

At the injunctive hearing the parties explored various options for addressing the long lines with Franklin County Election Commissioner, Matthew Damschroder ("Damschroder"). Damschroder rejected nearly all of the alternatives presented to him by the Plaintiff and the Court. (Inj. Proc. at 16-26.) For example, Plaintiff proposed making copies of the official ballot for voters to use, but Damschroder testified that this alternative would be infeasible because the ballot would be too small to read and very difficult for a voter to use. (Id. at 18-19.) However, from Mr. Damschroder's testimony it appeared that absentee ballots might have been a possible alternative and that the Franklin County Elections Commission could continue to place the approximately 100 machines it withheld prior to the election day. (Id. at 17, 20-26.)

The Court questioned Damschroder extensively regarding alternative voting mechanisms. Further, the Court throughout the Order and during the injunctive hearing made it clear to the Defendants that the Defendants were “required to provide paper ballots or another mechanism to provide adequate opportunity to vote.” (Order) (emphasis added). In other words, the Court ordered the defendants to utilize all the resources at their disposal to address the problems with the long lines in Franklin and Knox counties. The Court’s Order gave the defendants ample discretion to provide Franklin and Knox County voters with “adequate opportunity to vote.” If any of the Defendants passed out illegal ballots, such action would not have complied with the Court’s Order, as a ballot that would not be counted could not be viewed as an “adequate opportunity to vote.”

Further, while the State of Ohio alleges paper and pens were passed out to voters, it offers no support for that statement. Ultimately, the State of Ohio is making a theoretical argument without any proof that this Court’s Order caused any individual to complete an illegal ballot.

The State of Ohio’s memorandum contra is based on pure speculation, providing no facts and demonstrating no real impact on the State of Ohio. The only parties that seemed to take any action in response to the Order were Franklin County, who agreed to dismiss the case as moot, and Knox County, who never was served with the pleadings yet complied with the Order. The State of Ohio claims a basis for the counterclaim is that voters were disenfranchised, but it offers no support for this contention.

The State of Ohio further speculates that a similar dispute over excessively long lines may arise in the future, and the Court should hear the purported counterclaim because the action is capable of repetition yet evading review. However, the State of Ohio’s speculation is insufficient to warrant the application of the capable of repetition doctrine. The State of Ohio

fails to offer any case law in support of its proposition. Nor does it explain why “there is a reasonable expectation that the complaining parties will be subject to the same action again.” *See Forbes v. Bd. of Directors for the NAACP*, 65 Fed. Appx. 517, 518 (6th Cir. 2003). The State of Ohio apparently expects the same voting problems, the long-lines experienced in Franklin and Knox counties that transpired during the 2004 election, in future elections. The Court, however, is not required to assume that no lesson was learned on November 2, 2004, and that unacceptably inadequate facilities or supplies is to be the norm for the future. *See Forbes*, at 518 (“there is no reasonable expectation that the plaintiff or other officers will once again refuse to participate in required training and be summarily removed from office.”); *see also Honig v. Doe*, 484 U.S. 305, 320 (1988) (noting that the Court has “been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”); *Haley v. Pataki*, 60 F.3d 137, 141 (2nd Cir. 1995) (when the repetition of the events giving rise to the preliminary injunction is entirely speculative, the capable of repetition exception does not apply); *Dean v. Austin*, 602 F.2d 121, 124 (6th Cir. 1979) (dismissing appeal as moot because “there is no reason to believe from this record that any inadequacy of the ballot instructions in 1978 will be repeated in future elections.”) Indeed, “the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.” *Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (finding the plaintiff lacked standing to enjoin an LAPD police practice of choking arrestees until they were unconscious because even though he himself had been choked once, he could not show there was a reasonable likelihood that he would be choked again). The State of Ohio offers no reason to believe that unacceptably

long lines are now inevitable. Any such conjecture is entirely speculative and precludes the application of the capable of repetition exception.

The State of Ohio's purported counterclaim should not preclude the dismissal of this action because it is not a proper counterclaim. The sum and substance of the purported counterclaim is the State's allegation that "[t]he refusal of the [Defendants] to provide paper ballots or 'adequate voting machines' as alleged in the Plaintiff's complaint does not violate the right to vote of any person as secured by the United States Constitution as alleged in the Plaintiff's complaint." (Counterclaim at ¶ 4.) The relief the State of Ohio seeks is a declaration that "none of the Defendants violated the United States Constitution as alleged in the Plaintiff's complaint." The purported counterclaim is a purely defensive pleading and really an affirmative defense. Consistent with Rule 8(c), the counterclaim should be treated as an affirmative defense, and should not preclude the dismissal of this action. *See Hinfin Realty Corp. v. Pittston Co.*, 206 F.R.D. 350, 354 (E.D.N.Y. 2002).

Alternatively, the purported counterclaim should be dismissed for lack of subject matter jurisdiction. The counterclaim seeks a declaration that Defendants' actions related to making adequate provision for voting in the November 2, 2004 national election did not violate federal law. The counterclaim, in effect, is seeking nothing more than an advisory opinion. Yet, it is well-settled that federal courts sit to decide actual cases and controversies and do not have jurisdiction to give advisory opinions that cannot affect the rights of the litigants or give effective, meaningful relief. *Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 458 (6th Cir., 2004); *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 597 (6th Cir., 2002). Accordingly, even if the purported counterclaim was a real and proper counterclaim, it still would be subject to dismissal for lack of subject matter jurisdiction.

IV. Conclusion.

For the foregoing reasons and the reasons stated in Plaintiff's Motion to Dismiss, Plaintiff asks that the purported counterclaim be stricken or dismissed and that the action be dismissed without prejudice.

Respectfully submitted,

/s/ Kathleen M. Trafford

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CERTIFICATE OF SERVICE

I certify that on January 7, 2004, a copy of the foregoing *Reply Brief in Support of Plaintiff's Motion for Voluntary Dismissal Without Prejudice and Motion to Strike or Dismiss Purported Counterclaim* were filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Kathleen M. Trafford _____
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