

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

_____)	
LEAGUE OF WOMEN VOTERS)	
OF OHIO, et al.,)	
Plaintiffs,)	
)	
v.)	Case No. 3:05CV7309 (JGC)
)	
J. KENNETH BLACKWELL,)	
Secretary of State of Ohio, and)	
BOB TAFT, Governor of Ohio,)	
Defendants.)	
_____)	

**JEANNE WHITE’S REPLY TO DEFENDANTS’ OPPOSITION TO HER
MOTION TO INTERVENE**

Jeanne White respectfully replies to Defendant Ohio Secretary of State Blackwell and Governor Taft’s opposition to motion to intervene (“Opp. Memo.”) (Docket No. 67).

In the memorandum in support of her motion (“Supp. Memo.”) (Docket No. 44), Ms. White explained why she met each prong of the four-part test for mandatory intervention under Federal Rule Civil Procedure 24(a)(2), in the Sixth Circuit. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999), *rev’d on other grounds sub nom., Gratz v. Bollinger*, 539 U.S. 244 (2003). Ms. White addresses the Defendants’ responses to her arguments below.¹

1. *Timeliness of Ms. White’s Intervention.* Defendants cannot dispute that the application is timely. Opp. Memo at 3. Ms. White moved to intervene within the

¹ As explained in her memorandum in support of intervention, Ms. White also satisfies the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(2). See Supp. Memo. at 4-5.

time set by the Court's Amended Case Management Order (Docket No. 31) for the joinder of other parties.²

Defendants admit as much, but then argue the point anyhow. Their suggestion that allowing intervention will delay the proceedings is wrong. The Mahoning County claims are already a part of the Plaintiffs' Complaint, *see* ¶ 122 (Docket No. 1). White's Complaint is identical to Plaintiffs' Complaint, except for the paragraph adding her as a Plaintiff and her Prayer for Relief, *see* Exhibit A to Supp. Memo. The motion to dismiss has been fully briefed. Docket Nos. 25, 28, 38 and 48. As Defendants acknowledge, Ms. White has already adopted the opposition papers filed by Plaintiffs. Opp. Memo. at 3. It is not credible to suggest that adding Ms. White will require significant additional briefing. At any rate, pending motions to dismiss in this case do not delay discovery. *See* Amended Case Management Order (Docket No. 31). Ms. White is ready to proceed once her intervention is granted.

2. *Ms. White's Substantial Legal Interest.* Defendants next argue that Ms. White has failed to articulate a substantial legal interest in the subject matter of the case. The thrust of the argument seems to be that because Ms. White does not know to a 100% certainty that her vote was not counted, she can have suffered no harm and therefore has no interest. Opp. Memo. at 1, 4-5.

That argument turns the rules governing a motion to intervene on their head. Ms. White has substantial doubt that her vote was counted. She has pleaded in detail the reasons for that doubt: she, like many others in Mahoning County in the 2004 Presidential election, repeatedly attempted to vote on an electronic voting machine for

² The Order required the joinder of other parties by September 30, 2005, and Defendants consented to extend that deadline for two business days, to October 4, 2005.

her candidate of choice, repeatedly observed the touchscreen register her vote for another candidate instead, and was never able to confirm that her vote counted. White Complaint ¶¶ 26A, 122 (Exhibit A to Supp. Memo, Docket No. 44; *see also* Docket Nos. 1 and 46). She is entitled as a matter of law to the inference that her vote did not count. *See, e.g., Horrigan v. Thompson*, 1998 U.S. App. LEXIS 9506 * 4-6 (6th Cir. 1998) (“In determining whether intervention should be allowed, we ‘must accept as true the non-conclusory allegations of the motion.’”), a copy of which is attached as Exhibit B. Ms. White’s allegations that Defendants, through maladministration of the Ohio election system, have disenfranchised or substantially burdened the vote of her and others in Mahoning County, and will continue to do so absent judicial relief, must likewise be taken as true. *Id.* Her Complaint therefore makes out a number of constitutional violations. “[A]ll qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added); *see also Bush v. Gore*, 531 U.S. 98, 103-06 (2000) (deeming it a violation of equal protection where, as here, voters in different counties were treated substantially differently); *compare* White Complaint ¶¶ 26A, 122 (alleging disparate treatment of voters in different counties). That is more than the substantial legal interest necessary to intervene.

Under binding Sixth Circuit precedent, Ms. White need not actually have “the same standing necessary to initiate a lawsuit” or even a “specific legal or equitable interest” in order to intervene as of right, merely a substantial interest, expansively defined. *Grutter*, 188 F.3d at 398. Ms. White is a Mahoning County voter who suffered the harm pleaded in Paragraph 122 of Plaintiffs’ Complaint, who is at substantial risk of

the same harm again in future elections, and who as such has an interest in the case that is direct, substantial and compelling. *See, e.g., Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (granting intervention to voters who sought to vindicate “substantial legally protectible interests” in maintaining an election system governing their exercise of political power); *Miller v. Blackwell*, 348 F. Supp. 2d 916, 919 (S.D. Ohio 2004) (finding intervention proper based on voters’ substantial legal interests in preventing the “possible dilution” of their votes).

The Eleventh Circuit case of *Athens Lumber* cited by Defendants is not to the contrary. *Opp. Memo.* at 4, citing *Athens Lumber Co., Inc. v. Federal Election Commission*, 690 F.2d 1364 (11th Cir. 1982). In that case, the Eleventh Circuit held that a union’s “generalized” interest in a statute was insufficient for intervention in an action regarding the constitutionality of the statute. By contrast, Ms. White alleges a specific legal interest: the loss of her right to equal protection and to have her vote counted in 2004 and future elections.³ *See* Plaintiffs’ Opposition to Defendants’ Motion to Dismiss at 14-24 (Docket No. 28).

3. *Impairment of Ms. White’s Ability to Protect Her Interest.* Plaintiffs mischaracterize Ms. White’s position on this point. They assert that Ms. White concedes her ability to protect her interests because she asserts the right to file a separate lawsuit if she is not allowed to intervene. *Opp. Memo.* at 5. In fact, Ms. White argues exactly the opposite: that a decision on Plaintiffs’ Complaint, which includes allegations about the

³ Ms. White’s situation is more analogous to the one found in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). There, the Sixth Circuit allowed an entity to intervene under virtually the same circumstances found in *Athens Lumber*; the sole difference was that the intervenor had been involved in the political process that produced the disputed statute and so was held to have a substantial interest in the dispute. *See id.* at 1247. Similarly, Ms. White was involved as a voter in the election here at issue and thus has a substantial interest in this litigation about the election.

problem she faced in Mahoning County, could limit her ability to bring her claims in the future. Supp. Memo. at 3. Ms. White’s impairment showing clearly exceeds this “minimal” requirement for intervention. *Grutter*, 188 F.3d at 399.

4. *Adequacy of Current Plaintiffs to Protect Ms. White’s Interest.*

Defendants do not dispute that no voter Plaintiff currently in the case adequately represents Ms. White; none of them voted on a “jumping” touchscreen, as she did. Defendants instead assert that the organizational Plaintiffs can adequately represent Ms. White’s interests because they can “protect the general interest of voters.” Opp. Memo. at 5. That misunderstands the law. Adequate representation is a question of whether there is a “minimal” possibility that Plaintiffs will not protect the intervenors’ interests. *Grutter*, 188 F.3d at 400-01. Ms. White has already established that potential. She has demonstrated that the organizational Plaintiffs did not seek in their Complaint the specific relief that Ms. White requests to remedy the problems that she has identified with DRE machines. Supp. Memo. at 4; *compare Grutter*, 188 F.3d at 400-01 (intervention proper where existing defendant might possibly not articulate certain defenses). The value added by having a Mahoning County voter as a Plaintiff has, moreover, been acknowledged by all current Plaintiffs, who support Ms. White’s Motion to Intervene. Plaintiffs’ Response to Jeanne White’s Motion to Intervene (Docket No. 47).⁴

5. *Ms. White Seeks Testing, Transparency, and Training – Not Paper Ballots.*

Finally, we address Defendants’ assertion that, according to Ms. White, “the United

⁴ Defendants simply rehash their earlier arguments with respect to permissive intervention, Opp. Memo. at 5-6, and we will not separately address them except to observe that Defendants do not invoke “prejudice” to them as a reason to deny intervention, because in fact there is none. As demonstrated in our initial Memorandum and above in this Reply, Ms. White does have cognizable constitutional claims and her intervention will not materially alter this action as her claims are already a part of it.

States Constitution requires paper ballots that are hand counted.” Opp. Memo. at 1-2. That is not so. Nowhere does Ms. White’s prayer for relief mention paper ballots, much less demand their use in any election. White Complaint at 65-68 (Docket No. 46). Indeed, Ms. White does not pray for any particular method of voting. Rather, she requests procedures to make sure that what happened to her and many other Mahoning County voters on Election Day 2004 does not happen again. *See* Exhibit A to Supp. Memo. (describing relief sought). It makes much more sense to address these issues now, when those procedures can be put in place, than to wait for the recurrence of the problems on Election Day 2008. Those problems are already an issue in this case and can best be addressed by allowing the intervention of a voter who actually experienced them.⁵

Conclusion

For the reasons stated here, in Ms. White’s Memorandum in Support of Her Motion to Intervene, Plaintiffs’ Response to Ms. White’s Motion to Intervene, and the entire case herein, Ms. White’s Motion to Intervene should be granted.

Respectfully submitted,
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⁵ Ms. White’s complaint against Secretary of State Blackwell and Governor Taft for maladministration of elections includes the claim brought by existing Plaintiffs to enforce the Help America Vote Act (“HAVA”), 42 U.S.C. § 15301 *et seq.* There is simply no basis for Defendants’ claim, in footnote 2 of their Opposition, that Ms. White’s adoption of the existing complaint somehow converts the claims therein into ones seeking to invalidate HAVA. Nor do Defendants support their assertion, in footnote 3 of their Opposition, that Ms. White’s intervention would somehow trigger the addition of voting machine manufacturers as defendants when Blackwell and Taft are responsible for elections in Ohio and for providing the requested relief.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 26th day of October, 2005. 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/ Richard M. Kerger
Richard M. Kerger