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

League of Women Voters of Ohio, et. al., Plaintiffs, and Jeanne White, Plaintiff-Intervenor v. J. Kenneth Blackwell, Secretary of State of Ohio, et. al., Defendants.	Case No. 3:05CV7309 Hon. James G. Carr Richard M. Kerger (0015864) Kimberly A. Donovan (0074726) KERGER & ASSOCIATES 33 S. Michigan St., Suite 100 Toledo, Ohio 43602 Telephone: (419) 255-5990 Fax: (419) 255-5997 Counsel for Intervenor

PLAINTIFF-INTERVENOR WHITE'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Now comes Plaintiff-Intervenor Jeanne White, by and through counsel, and respectfully opposes Defendants J. Kenneth Blackwell and Governor Taft's motions to dismiss her Complaint. (Docket No. 198.)

I. BACKGROUND

During the 2004 Presidential Election Intervenor Jeanne White cast her vote in Mahoning County, Ohio on a direct recording electronic ("DRE") voting machine. When

she attempted to make her selection, the wrong candidate's name appeared on the screen. (White Complaint, ¶ 23A.) This problem, whereby the machine "jumped" from her candidate of choice to another, occurred several times. (Id.) Ms. White believes that significant numbers of voters in Mahoning County and elsewhere in Ohio were disenfranchised by the "jumping" voting machines. (Id.)

Further, Ms. White believes that Defendants' promulgation and maintenance of non-uniform rules, standards, procedures, and training of election personnel throughout Ohio, and the inadequate and inequitable allocation of funds, facilities, and election personnel, unconstitutionally burdens voters and that the likelihood of such voters being disenfranchised were materially greater for voters in Ms. White's county than in certain others in Ohio. (Id.) Ms. White requested leave to intervene in this action. (Docket No. 43.) The Secretary of State and Governor opposed Ms. White's intervention, arguing, inter alia, that permissive intervention was improper because her claims failed to allege a constitutional violation. (Docket No. 67.) Nevertheless, the Court granted Ms. White's motion, finding that she met the standard set forth in Fed. R. Civ. P. 24(b)(2) for permissive intervention. (Docket No. 182.)

Now before the Court is Defendants' Motion to Dismiss the Complaint of Intervenor White wherein it is argued - for a second time - that Ms. White fails to allege a constitutional violation. In addition, Defendants assert that Ms. White's claims are moot and violate the Eleventh Amendment to the United States Constitution. For the reasons set forth below, Defendants' contentions are without merit and the motion should be denied.

II. LEGAL ANALYSIS

A. Plaintiff-Intervenor White's Complaint Alleges a Constitutional Violation.

The Defendants' contention that Ms. White has failed to allege a constitutional violation is simply untenable. The U.S. Constitution protects an individual's right to vote. *See Lawson v. Shelby County, TN*, 211 F.3d 331, 336 (6th Cir. 2000). Indeed, "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979). The Constitution imparts the right of all citizens to have their votes counted in an honest election. *Anderson v. United States,* 417 U.S. 211, 227, 94 S.Ct. 2253, 2263-64 (1974). In *Bush v. Gore*, 531 U.S. 98 (2000), the United Supreme Court held that the lack of uniform standards for conducting a recount violated the Equal Protection Clause. The Due Process Clause also demands that citizens have a fundamental right to vote and to have their vote counted by way of election procedures that are fundamentally fair. *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978).

In both her original and amended Complaint, Ms. White alleges that Defendants maintain a constitutionally defective voting system and because of this system, she believes that she was disenfranchised in November 2004. (Amended Complaint, ¶23A.) Ms. White further alleges that she and significant numbers of voters in Ohio were disenfranchised by "jumping" votes on DRE voting machines, and that absent injunctive relief, she and other Ohio voters will be disenfranchised or severely burdened in exercising the fundamental right to vote in future elections. (Amended Complaint, ¶23A.) Finally, Ms. White alleges that voters in the Ohio counties that utilized the DRE Machines were subjected to difference standards and were disadvantaged, thereby making an Equal

Protection claim under *Bush v. Gore*, supra and *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("[A]ll qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.") (Amended Complaint, ¶23A.)

It is axiomatic that in considering a motion to dismiss under Rule 12(b)(6), the court must accept all well-pleaded factual allegations of the complaint as true. *See Inge v. Rock Fin. Corp.,* 281 F.3d 613, 619 (6th Cir.2002) (citing *Turker v. Ohio Dep't of Rehab. & Corr.,* 157 F.3d 453, 456 (6th Cir.1998)). Thus, Ms. White is entitled as a matter of law to the inference that her vote did not count. *See, e.g., Horrigan v. Thompson,* No. 96-4138, 1998 WL 246008 (6th Cir. May 7, 1998). ("In determining whether intervention should be allowed, we must accept as true the nonconclusory allegations of the motion.'") [Exhibit A.]

Applying the allegations in her Complaint to the law, it is clear that Ms. White's has stated numerous claims for constitutional violations. The Defendants' assertions to the contrary are simply untrue.

B. Plaintiff- Intervenor White's Claims Are Not Moot.

Defendants present three arguments in support of their contention that Ms. White's claims are moot: 1) H.B. 262 will address her concerns in the future, 2) the November 2005 statewide election has already occurred and there have been no new allegations of constitutional violations stemming from that election, and 3) different candidates will appear on the next Presidential ballot. Each of these arguments is without merit.

1. <u>Ohio HB 262 Does Not Provide The Relief Sought By Ms. White.</u>

In May of 2002, prior to the 2004 Presidential Election, the Ohio General Assembly passed H.B. 262 requiring that on and after the first federal election that occurs

after January 1, 2006, all DRE voting machines must provide a voter verified paper audit trail. R.C. 3506.10(P). Defendants maintain that this provision renders Ms. White's Complaint moot because it will provide the relief she seeks. This is simply not the case.

It is true that the "voter verified paper audit trail" as defined by R.C. 3506.10(P) will allow a voter to visually or audibly inspect the physical print out of the voter's ballot choices. However, this is the entirety of the protection provided by H.B. 262 with regard to the DRE machines. The statute does not ensure that the audit trail is used to help ensure that votes are properly counted, except in the narrow situation of a recount. In comparison, Ms. White's Complaint seeks specific remedies from the Defendants to include pre-election and parallel (election day) testing, post-election auditing, transparency and poll worker training specific to DRE machines (White's Complaint at ¶ X.5.), all of which will be supported by the voter verified paper audit trail provided in H.B. 262, but none of which are now required by the statute. Put simply, Ms. White's Complaint seeks relief above and beyond what H.B. 262 might eventually provide.

Even with the limited audit trail H.B. 262 is intended to address, the act provides the Defendants with an enormous amount of discretion to delegate. H.B. 262 does not make the Secretary of State or Governor accountable or even responsible for ensuring that voters are not disenfranchised. H.B. 262 does not specifically require the Defendants to cure the constitutional defects in Ohio's voting system. It is exactly this accountability that Ms. White and the Plaintiffs seek. Moreover, since the DRE provisions will not be implemented until the *next* Federal election, it is simply too early to declare that H.B. 262 has cured constitutional deficiencies.

Even assuming H.B. 262 will make *some* difference in the next election, a voluntary corrective action does not render litigation moot, it merely affects the relief a court may order. *See E.E.O.C. v. New York Times Broadcasting Service, Inc.,* 542 F.2d 356, 361 (6th Cir.1976); *Rowe v. General Motors Corp.,* 457 F.2d 348 (5th Cir.1972); *United States v. I.B.E.W., Local 38,* 428 F.2d 144 (6th Cir.1970). In *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004), the court held that new, stricter state regulations did not render claims against a district health department moot. Similarly, here, the provisions in H.B. 262 do not make Ms. White's claims moot. Rather, H.B. 262 will merely impact the relief fashioned by this court i.e., the court may supplement or build on the base set forth in the act.

Finally, it is important to note that in her Complaint in intervention, Ms. White reasserted each allegation and prayer for relief asserted by the Plaintiffs. In this regard, Ms. White has not only brought her own claim to this action, but has joined in the action filed by Plaintiffs. The Defendants do not address this fact or claim that H.B. 262 has cured each of the allegations and provided the entire relief sought in the main Complaint. Thus, Ms. White's Complaint sets forth viable claims for which this Court is capable of granting relief.

2. The Occurrence of the 2005 Election Did Not Render Plaintiff-Intervenor White's Claims Moot.

In her original Complaint, Ms. White seeks prospective relief for future elections (White's Complaint, Docket 46, p. 59.), which intention is manifest throughout her Complaint. Nonetheless, the Defendants claim Ms. White's Complaint is moot because of the November 8, 2005 election, which occurred the day after the Court granted her motion to intervene in this case. Order of November 7, 2005 (Docket 182).

To be consistent with the amended complaint filed by Plaintiffs, Ms. White moved for leave to file an Amended Complaint, which, among other things, prays for a preliminary and permanent injunction "prior to future statewide general elections including, but not limited to, the November 2006 election." (Compare White's Amended Complaint, Docket No. 217, Attachment 1, with Plaintiffs' Amended Complaint, Docket 200.) Defendants did not oppose Ms. White's motion for leave to file her Amended Complaint nor have they amended their motion to dismiss to address the amended complaint. Perhaps this is because the suggestion that the Plaintiffs and Ms. White were only concerned about the conduct of the 2005 election is absurd.

3. Different Names On Future Ballots Do Not Bar The Relief Sought By White.

Equally absurd is the suggestion that Ms. White's claim is moot because the DRE machines can be programmed with different candidates during the next Presidential election. The false premise of this argument is that White seeks an order that the State of Ohio must allow her to vote in future elections for the candidate she wanted to vote for in 2004. To be clear, Ms. White does not want the court to turn back time and guarantee that her 2004 vote count towards the candidate of her choice. Rather, Ms. White seeks a declaration that for all future elections the State of Ohio will be required perform post election audits, to maintain equipment audit logs and redundant system data, and to make said audits and data publicly available. (White's Amended Complaint, Docket No. 217, p. 37, ¶5(m).)

To summarize, "[t]he test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." M*cPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc). Here, H.B. 262, the 2005 general

election and new candidates notwithstanding, Ohio is not currently under an obligation to alter its voting procedures to redress the problems alleged in Ms. White's Complaint. Nor are the Defendants obligated to perform equipment audits or to make those audits publicly available. Ms. White seeks relief that if granted would make a difference to the legal interests of the Parties. Thus, her claims are not moot.

C. Plaintiff-Intervenor White's Claim Is Not Barred By The Eleventh Amendment To The United States Constitution.

Defendants' Eleventh Amendment argument is premised solely upon the occurrence of the 2005 general election. Specifically, Defendants maintain that Ms. White's Complaint seeks retroactive relief, which violates the Eleventh Amendment to the United States Constitution. As previously stated, Ms. White seeks prospective relief "prior to future statewide general elections including, but not limited to, the November 2006 election." (Docket Nos. 46 and 217, Attachment 1.) In addition to the request for injunctive relief, Ms. White's Complaint seeks a declaration that Ohio's voting system violates her right to Equal Protection, her substantive Due Process rights, and her procedural Due Process rights as guaranteed by the Fourteenth Amendment to the United States Constitution. (White Complaint, p.58-59.) This request for declaratory relief is not retroactive and is therefore proper under the Eleventh Amendment.

Defendants' contention that Ms. White's Complaint runs afoul of the Eleventh Amendment ignores a century of precedent allowing equitable relief against state officials. Filing a request for declaratory and injunctive relief is a time-honored way of remedying unconstitutional behavior by state officials authorized by the U.S. Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Verizon Md., Inc. v. PSC*, 535 U.S. 635, 645-46 (2002).

III. Conclusion

For the reasons stated, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

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Dated: January 5, 2006

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 5th day of January 2006. 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