

candidate, but she could not verify her vote or correct the error. These problems affected many Ohio voters.

The League of Women Voters and the other current Plaintiffs in this case seek to remedy a variety of problems stemming from the 2004 Presidential election and earlier elections, but do not seek specific relief that would address Ms. White's problem and that of other voters. Ms. White moves to intervene to seek declaratory and prospective relief to ensure that the DRE voting machines on which she voted, and voting machines that she might vote on in the future, function properly and can be audited for accuracy in case they malfunction. Much of her case will either be the same as Plaintiffs or run parallel to the current case.

II. Legal Analysis

A. White Can Intervene As A Matter Of Right Under Fed. R. Civ. P. 24(a)(2)

Under Fed. R. Civ. P. 24(a)(2) a party has the right to intervene in an existing suit if: (1) a motion is timely made; (2) the applicant has a substantial legal interest in the subject matter of the case; (3) the applicant's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the applicant's interest. *See 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). Under this standard, White should be allowed to intervene as a matter of right.

White's motion for intervention is timely filed. Under the Court's scheduling order the existing parties had until September 30, 2005 to join other parties and they consented to Ms. White's filing of her intervention papers today. Although a motion to

dismiss has been briefed, it has not been decided.¹ Discovery has just begun, and White would both participate in and help Plaintiffs carry their burden in ongoing discovery processes to ensure that her intervention does not disrupt this case's progress. Rule 26 disclosures were filed just two weeks ago. White seeks intervention for a valid and compelling reason: Plaintiffs do not fully address her specific injury or ask for suitable relief. But White's Complaint is almost identical to the current Complaint; the one change is that it alleges facts and requests relief related specifically to malfunctioning voting machines.

Ms. White also has an interest in the subject matter of the case sufficient to grant a motion under Rule 26(a)(2) because her claims and Plaintiffs' claims are based on the same matter – Ohio's unconstitutional administration of the 2004 Presidential election – and premised on same fundamental right to vote. Accordingly, White easily satisfies the second requirement of Rule 24(a)(2) – substantial legal interest. That requirement is viewed liberally by the Sixth Circuit. *See Grutter*, 188 F.3d at 398-99 (stating that the Sixth Circuit has an expansive notion of the interest sufficient to invoke intervention of right).

Ms. White also meets the third prong of Rule 24(a)(2)'s test – the disposition of this case may impair or impede her ability to protect her interest. An adverse ruling by this Court on the existing Complaint would certainly hinder White's own efforts to litigate the violation of her constitutional right to vote. *See Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992) (holding that potential *stare decisis* effects alone can be a sufficient basis for finding an impairment of interest).

¹ If her Motion to Intervene is granted, White would adopt the Plaintiffs' Opposition to Defendant's Motion to Dismiss, and, accordingly, there would be no need for additional briefing.

Finally, White's interests are not adequately represented by Plaintiffs. The Plaintiffs' Complaint alleges a myriad of defects in Ohio's voting system but does not fully address White's particular injury or offer her necessary relief. *See Mich. State AFL-CIO*, 103 F.3d at 1247 (noting that this prong could be met where plaintiffs are not making all of the arguments that the intervenor would make). Although the Complaint seeks some general relief relevant to White's injury in the form of "accurately calibrated and functioning voting machines," Complaint at ¶ X.5.b (Prayer for Relief), White seeks more specific remedies from the Defendants, with respect to pre-election, parallel (election day) testing, and post-election procedures, including auditing, transparency, and poll worker training on all matters regarding voting equipment. White's Complaint at ¶ X.5 (attached as Exhibit A are the few pages of the League of Women Voters complaint to which White has added text; this text appears in bold on the attached pages).²

B. White May Also Intervene Permissively

Under Fed. R. Civ. P. 24(b)(2) a court may allow a party to intervene when the applicant's claim and the main action have common questions of law or fact. *See* 6 Moore's Federal Practice § 24.10. Permissive intervention is liberally granted to promote the convenient and prompt disposition of all claims in one litigation. *See City of Cleveland v. Cities Serv. Oil. Co.*, 47 F.R.D. 543, 546 (N.D. Ohio 1969). In exercising its discretion, the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

² White's intervention will also promote judicial economy. If White is not allowed to intervene, she may file her own lawsuit to vindicate her interests. Such a lawsuit would require another court to master the facts of this complex case, hear argument and render decisions on similar or identical legal matters, and integrate the relief granted in this case with the relief White is granted. Judicial economy and swift resolution of disputes urge that White's related matter be addressed in this primary lawsuit. *See Grubbs*, 870 F.2d at 347.

Under this standard, the Court should allow White to intervene. As discussed above, there is no doubt that White's Complaint and the Plaintiffs' Complaint share common questions of law and fact. A common issue of law or fact routinely exists if, as here, "the intervenor has a claim against the defendant that is identical to a claim asserted by the existing plaintiff." *See* 6 Moore's Federal Practice § 24.11. White's Complaint is almost identical to the Plaintiffs' Complaint, and, as discussed above, White's intervention will not delay the current schedule of the case. Under these circumstances, this Court should find that White's intervention will neither delay nor prejudice the adjudication of the rights of the original parties.

III. Conclusion

For the reasons discussed above, this Court should allow White to intervene as a matter of right under Rule 24(a), or, in the alternative, permissively under Rule 24(b). Pursuant to Rule 24(c), White has simultaneously filed her Complaint for which intervention is sought.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 4th 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
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