

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

LEAGUE OF WOMEN VOTERS, <i>et al.</i>,	:	CASE NO. 3:05-CV-7309
	:	
Plaintiffs,	:	JUDGE JAMES G. CARR
	:	
vs.	:	
	:	
J. KENNETH BLACKWELL, <i>et al.</i>,	:	
	:	
Defendants.	:	

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO JEANNE WHITE’S MOTION
 TO INTERVENE**

I. Introduction

During the proud history of our county, numerous individuals fought and died to protect the notion of “One Man, One Vote.” Federal Courts, when necessary, forcefully upheld the right of all Americans to vote. The proposed intervening Plaintiff, as well as all other Plaintiffs in this case, have not brought to this Court an allegation that they were denied the right to vote. Rather, Purported Intervenor Jeanne White admits that her claim merely revolves around the notion that her vote “*may* have been cast and counted for the wrong candidate, but *she could not verify her vote* or correct the error (that she can never be certain actually took place).” White Motion To Intervene at 1-2. White’s basic complaint is that she voted on a direct recording electronic voting machine. (“DRE”). She then claims that she cannot be certain that the machine properly recorded her vote. Under White’s theory, apparently the United States Constitution requires paper ballots that are hand counted.¹ Based upon the allegations that White has made, it appears

¹ All voting systems currently in place in the State of Ohio use some type of computer technology in order to tally vote totals. Punch cards, which will no longer be used in the State of Ohio after this November’s election, run

she is simply advancing a theory that the Constitution requires people to vote on paper ballots and those ballots must then be counted by hand.² This claim, like the claim of every single Plaintiff in this litigation, is absurd on its face and should not further add to the lack of any cognizable claim filed by the other plaintiffs in this case. As a result, this Court should reject White's attempt to intervene in this litigation.

II. Law and Argument

A. **Since The Proposed Intervenor Has Not Met The Requirements For Intervention As A Matter Of Right, This Court Should Reject Her Motion To Intervene.**

In order to intervene as a matter of right, a person must demonstrate either that a federal statute confers upon him an "unconditional right to intervene" or the proposed intervenor "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest...." Fed. R. Civ. P. 24(a). White has no such interest in this case. First, White has failed to identify any federal statute which would give her the right to intervene in this litigation. Thus, she clearly does not qualify under the first prong of Rule 24(a).

In addition, White has failed to show that she has any unique interest in the subject matter of this lawsuit. The original plaintiffs in this litigation have put together a laundry-list of rumor and innuendo pointing out isolated problems that may have occurred at a couple of polling

through a computer tabulator that determines votes. Optical scan ballots are counted by computer when they are cast. DREs, which under State law will add a Voter Verified Paper Audit Trail, record and count votes electronically. Thus, there is simply no way for any voter to *know* that his vote was correctly counted by any voting technology in use in the State of Ohio.

² If the constitution does in fact require hand counted paper ballots, then this Court must join the United States of America as a Defendant. Under the proposed Intervenor's theory of this case, the Help America Vote Act, 42 U.S.C. § 15301, *et seq.*, is unconstitutional. HAVA mandates that voting machines be accessible to visually impaired voters so that they can vote unassisted. The Act, therefore, mandates that States adopt a technology that the Intervening Plaintiff asks this Court to find to be unconstitutional.

locations across the State of Ohio. White has added to that the notion that because she cannot say with 100% certitude that her vote was counted correctly the Secretary of State and Governor violated her constitutional rights. Where does this end? If the Court is going to start allowing this level of generality to equate to an allegation of a constitutional violation, why not simply join every registered voter in the State of Ohio since they may have a question about an election.

The Sixth Circuit has recognized the following criteria must be met in order for a person to intervene in a lawsuit:

- The application must be timely;
- The applicant must have a substantial, legal interest in the subject matter of the pending litigation;
- The applicant's ability to protect that interest must be impaired; and
- The present parties do not adequately represent the applicant's interest.

Grubbs v. Metropolitan Government of Nashville and Davidson County, 870 F.2d 343, 345 (6th Cir. 1989). Under these criteria, it is clear that White cannot be allowed to intervene.

Although the Defendants do not specifically challenge the timing of the White application, such timing must be addressed. This Court had initially set a date of September 29 to finalize the briefing on the motion to dismiss. White, however, did not file her intervention motion until October 4. The Defendants do not challenge that White's motion is untimely. Their attorneys had previously told White that they would not object on this ground. However, White's assertion that her intervention will not alter the schedule in this case is simply incorrect. White may claim that she "adopts the other Plaintiffs' memorandum contra the Plaintiffs' motion to dismiss," that simply does not alter the fact that were this Court to grant her motion, the Defendants will exercise their rights, under the Rules of Federal Procedure, to file a responsive pleading. That pleading will be a motion to dismiss. Once she receives that, she can determine

what her “response” is. If it is to simply file a statement “adopting” the memo contra that had been previously filed, the Defendants reserve the right to file a reply brief in support of those arguments as well. Thus, there will be a period of time of several months after the Court rules on this motion before the Court will have to rule on whether White has actually stated a cognizable claim.

In addition to the timing problem described above, White does not have a substantial legal interest in the subject matter of the case. In *Athens Lumber Co., Inc. v. Federal Election Commission*, 690 F.2d 1364 (11th Cir. 1982), the proposed intervenor, a union, sought intervention in a case regarding the constitutionality of a Federal Elections Campaign Act statute. The union argued that they were entitled to intervene because they would “lose significant political ground if restrictions on corporate political expenditures are lifted.” *Athens Lumber Co., Inc. v. Federal Election Commission*, 690 F.2d 1364, 1365. The court denied the union’s motion to intervene explaining that the “sole basis of its interest is general concern for the disproportionate corporate expenditures . . .” and “[b]ecause this interest is so generalized it will not support a claim for intervention of right.” *Id.* at 1366 (citations omitted).

White’s application for intervention must fail because White’s unsupported allegations of perceived wrongs do not point to a specific harm that she had suffered as a result of voting in the State of Ohio. She simply alleges that the DRE she voted upon might not have counted her vote correctly and that she cannot be certain that her vote was counted. This is not a discrete injury suffered by this particular voter. This also is not a substantial legal interest that must be protected. Rather, this is rank speculation that a machine may not have performed properly based upon no factual allegation whatsoever. Accordingly, White does not allege that the

defendants maintained an unconstitutional voting system and White's motion to intervene should be denied as White failed to show that she has a substantial, legally protectable interest.

Likewise, White has failed to demonstrate that her ability to protect her interests will be impaired. She herself simply alleges that if she is not allowed to intervene in this lawsuit, she may file a separate lawsuit of her own. Obviously, she does not believe that any decision of this court adverse to her motion to intervene would prevent her from protecting any legal interest she might have. Thus, she failed to meet this criteria.

Finally, the Plaintiffs' argument that the present parties do not adequately represent her interests seems somewhat confusing. At its heart, the Plaintiffs' lawsuit seems to claim that the State of Ohio has not held a constitutional election for 30 years. Since White was a voter in these elections, it appears that either the organizational plaintiffs can represent her interests or the organizational plaintiffs have no standing whatsoever since they simply cannot protect the general interests of voters.

B. Likewise, This Court Should Reject White's Request For Permissive Intervention.

Under Rule 24(b), the following standard must be satisfied for permissive intervention: the proposed intervenor's "claim or defense and the main action have a question of law or fact in common" and "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The Sixth Circuit found that the district court did not abuse its discretion in denying permissive intervention because "additional parties inevitably delay proceedings." *Athens Lumber Co.*, 690 F.2d at 1367 (citing *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore*, 51 Supp. 972, 973 (D. Mass. 1943)). Permissive intervention should be denied when that intervention would "clutter the action unnecessarily . . ." *Arney v. Finney*, 967 F.2d 418, 421 (10th Cir. 1992).

In this case, White's interest is as remote as her perceived allegation of wrong-doing.³ Because White has apparently failed to state a cognizable claim that her constitutional rights were violated by either of the Defendants, this Court should not allow her intervention. Such intervention would only add to the confusion of this case. Therefore, the court in its discretion should deny White's motion for permissive intervention.

III. Conclusion

For the foregoing reasons, the Court should issue an order denying Jeanne White's Motion to Intervene.

Respectfully submitted,

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³ Furthermore, White has asked for relief that may well necessitate the addition of the voting machine manufacturers as additional defendants.

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 17th day of October, 2005.

/s Richard N. Coglianesi
Richard N. Coglianesi
Deputy Attorney General