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

LEAGUE OF WOMEN VOTERS,	**:**	
PLAINTIFFS,	**:**	
VS.	**:**	**CASE NO. 3:05-CV-7309**
J. KENNETH BLACKWELL,	**:**	**JUDGE CARR**
DEFENDANTS.	**:**	

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT OF INTERVENOR WHITE

Defendants J. Kenneth Blackwell and Bob Taft, pursuant to Fed. R. Civ. P. 12(b)(1) and (6) ask this Court to issue an order dismissing the complaint of intervenor Jeannie White. A memorandum in support is attached.

Respectfully submitted,

Jim Petro
Attorney General

/s Richard N. Coglianese
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Memorandum In Support

I. Introduction

Despite the fact that her claim is moot, her relief barred by the Eleventh Amendment, she has failed to state any constitutional violation against either the of the Defendants, and she has failed to name the real parties in interest, Jeannie White has attempted to intervene in this litigation.

II. Law And Argument

A. The Intervenor's Claim And Her Request For Relief Are Moot Since The State Has Held A Statewide Election And This Particular Particular Intervenor Failed To Allege Any Problems Whatsoever With Regard To That Election.

It is axiomatic that federal courts are courts of limited jurisdiction. The Constitution restricts this Court to the adjudication of "cases" or "controversies." U.S. Const. Art. III § 2; *Allen v. Wright*, 468 U.S. 737, 750 (1984). The mootness doctrine, which is a subset of the Article III "justiciability" requirement, demands that a case present a live case or controversy at *all times* during the pendency of the case. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). If, for example, a case presented a live case or controversy during the trial phase, but something happened during an appeal that mooted the case, the appellate court is bound to simply remand the case to the trial court with instructions to dismiss the case. *Id.* at 365.

The Sixth Circuit has recognized that "the test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson v. Mich.*

High Sch. Athletic Ass'n, 119 F.3d 453, 458 (6th Cir. 1997) (en banc). Mootness, therefore, turns on whether a court can award any effective relief for an allegation of a deprivation. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992).

In this case, it is clear that this Court cannot award any relief for the allegations concerning the Intervenor's claims. Her prayer for relief is contingent upon the relief itself occurring *prior* to the November 8, 2005 election. That election has already occurred. Furthermore, the Plaintiffs have failed to specify any facts which would show any routine problems from that election, much less any allegations that the election was conducted in an unconstitutional manner.

This concern is more than simply niceties concerning the allegations in the complaint. Her complaint revolves around the way a particular DRE was programmed to receive input in the November 2004 election. Different candidates, and by necessity, different programming will appeared on the Ohio general election ballot in 2005. Likewise, the Intervenor couches her complaint solely on the basis of one machine and one race – the Presidential race. One candidate about which White was complaining is constitutionally barred from ever appearing on the ballot again. There is simply no allegation whatsoever that any problem with the DRE will occur in the future. Thus, White's claim is moot.

The Supreme Court has noted that an "equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged against – a 'likelihood of substantial and immediate irreparable injury.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 *quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). Since there has been an intervening Statewide election

and the White has not alleged she is the victim of any unconstitutional behavior, there is simply no harm under which she can continue to allege an injury. Thus, her claim is moot.

B. White's Claim Is Barred By The Eleventh Amendment To The United States Constitution.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has long recognized that this Amendment bars the federal courts from hearing suits against a State by residents of that State. *Hans v. Louisiana*, 134 U.S. 1 (1890).

In its most recent announcement on Eleventh Amendment immunity, the Sixth Circuit recognized the well-known exceptions to Eleventh Amendment immunity including lawsuits filed against state officials "for purely injunctive relief enjoining the official from violating federal law." *Ernst v. Rising*, 427 F.3d 351, ___; 2005 U.S. App. LEXIS 23123 at * 14 (6th Cir., Oct. 26, 2005) (en banc).

The Sixth Circuit recognized that a federal court's jurisdiction is limited only to prospective injunctive relief and cannot include any retroactive awards. *Id.* at * 43 *citing Edelman v Jordan*, 415 U.S. 651, 677 (1974). Eleventh Amendment defenses, as well as any exception to the defense, must be considered on a case-by-case basis. *Id.* at *44 *citing Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 337 (6th Cir. 1990).

In this case, it is clear that the Interveneor, by the very terms of her complaint, is not seeking prospective injunctive relief. Rather, their prayer for relief, filed in July of 2005, is couched in terms of the "next Statewide general election." The Ohio Revised Code defines "General election" as "the election held the first Tuesday after the first Monday in each November." R.C. § 3501.01(A). Since this Court cannot issue any type of injunctive relief that

will apply to an election that has already passed, White cannot maintain that she is seeking prospective injunctive relief. Rather, she is seeking retroactive relief in violation of the Eleventh Amendment. Thus, this Court is without jurisdiction to hear any claim or to award any relief.

C. White Has Failed To Allege That The Defendants Have Violated Her Constitutional Rights.

White's basic complaint is that she had trouble working the voting machine when she voted in the 2004 Presidential election. She then alleges that she cannot be absolutely certain that the DRE properly recorded her vote.

White has failed, however, to point to any constitutional right that exists in either the Due Process or Equal Protection clauses of the Fourteenth Amendment that would give her a constitutional right to have absolute certainty how her vote was counted. Yet, despite the fact that she has been able to do so, her claim has been mooted by H.B. 262. *See* attached. Under the provisions of H.B. 262, each DRE will be equipped with a Voter Verified Paper Audit Trail which shows the voter how his or her vote has been recorded. Before finally casting her vote, White, starting with the next election, will be able to review her vote and verify it before finally casting it. Thus, the basic thrust of her complaint, that she cannot know for certain that her vote has been counted, has already been addressed by the State of Ohio, making her claim moot.

III. Conclusion

For the foregoing reasons, this Court should dismiss Jeannie White's complaint.

Respectfully submitted,

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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 22nd day of November, 2005.

/s Richard N. Coglianese
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