

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

LEAGUE OF WOMEN VOTERS, *et al.*, :
Plaintiffs, :
VS. : **CASE NO. 3:05-CV-7309**
J. KENNETH BLACKWELL, *et al.*, : **JUDGE CARR**
Defendants. :

**DEFENDANTS’ MEMORANDUM IN OPPOSITION TO INTERVENOR-PLAINTIFF
WHITE’S MOTION TO LIFT THE DISCOVERY STAY AND FOR A PRESERVATION
ORDER**

Defendants’ J. Kenneth Blackwell and Bob Taft respectfully oppose Intervenor-Plaintiff White’s Motion to Lift the Discovery Stay and For a Preservation Order. (Docket No. 234 and Docket Number 235). Defendants’ opposition is fully articulated below.

I. Argument

A. Intervenor-Plaintiff White’s request for a preservation order should be denied.

Intervenor-Plaintiff White asks this court to order the Defendants “to preserve evidence from the 2004 Presidential election – namely voting machines, their contents, manuals, and other election-related information.” Doc. No. 235, at 1. However, such an order is inappropriate because much of what White asks this Court to preserve is not the property of, or in the control of the Defendants. Further, issuing an order mandating the Defendants to preserve evidence that

is in their possession and control is inappropriate in that Defendants, as litigants to this case, already have a duty to take appropriate measures to preserve documents and information which are reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery.

As an initial matter, the State has raised Eleventh Amendment immunity to these claims. Thus, the State is entitled to a stay on this basis alone. However, even if the Court were to look at the substance of the Intervenor's request to lift the stay it would reject that request.

Voting machines and their contents are not the property of, or in the control of the Defendants. Instead, each county board of elections purchases its voting equipment and is responsible for retaining the contents of those machines as is required by federal law, state law and that county's records retention policy. Because Defendants have never had possession or control over the voting equipment employed by the various county boards of election during the 2004 Presidential election, ordering the Defendants to preserve evidence relating to these machines would be meaningless.

As for the "manuals and other election-related information" that White seeks to have this Court protect, issuing an order to preserve this evidence is unnecessary. As White points out in her own motion, the federal discovery rules imply a duty "to preserve documents and other information that may be relevant in a case." Doc. No. 235, at 3 (citing *Danis v. USN Communications, Inc.*, 53 Fed.R.Serv.3d 828 (N.D. ILL. 2000)). Even the court in *Madden v. Wyeth*, No. 3-03-CV-0167-R, LEXIS 6427, WL 21443404 (N.D. Texas, April 16, 2003), the case attached as Exhibit 1 to White's Memorandum in Support of Her Motion to Lift the Discovery Stay and for a Preservation Order, notes that "[t]o supplement every complaint with an order requiring compliance with the Rules of Civil Procedure would be a superfluous and

wasteful task, and would likely create no more incentive upon the parties than already exists.” (citing *Hester v. Bayer Corp.*, 206 F.R.D. 683, 685 (M.D. Ala. 2001)).

As litigants to this case, the Defendants already have a duty to take appropriate measures to preserve documents and information which are reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery. Issuing an order ordering the Defendants’ to comply with the federal discovery rules would be a superfluous and unnecessary undertaking. Accordingly, Intervenor-Plaintiff White’s request for a preservation order should be denied.

B. Discovery should continue to be stayed.

In her Motion, Intervenor-Plaintiff White argues that this Court should lift its stay of discovery pending this Court’s consideration of the Plaintiffs’ Immunity Defense. However, since the time this Motion was filed, this Court has issued its decision on the Plaintiffs’ immunity defense and on February 27, 2006, the Plaintiffs appealed this Court’s decision to the Sixth Circuit Court of Appeals. On that same date, Defendants filed its Motion to Stay This Court’s Order of February 10, 2006 Concerning its Determination that Discovery is to Proceed. Doc. No. 240. In that Motion, the Defendants explain why it is inappropriate for this case to proceed during the pendency of the interlocutory appeal. The arguments set forth in that Motion are herein incorporated by reference into this memorandum.

Additionally, the magnitude of this case and the extraordinary importance of the legal issues involved, make it critical for both the Plaintiffs and the Defendants to have the time necessary to conduct thorough and comprehensive discovery. Even if discovery was to proceed during the interlocutory appeal, allowing the parties to have enough time to conduct the thorough

and comprehensive discovery that this case requires will make it impossible for this case to be heard until long after the 2006 general election.

Even more importantly, ordering the parties to conduct discovery during the interlocutory appeal would contradict the very rationale for certifying the interlocutory appeal in the first place. Here, an interlocutory appeal is appropriate due to the complexity of this case and the staggeringly burdensome discovery it will entail. Permitting discovery to go forward while the appeal is pending would subject the parties, the 88 county boards of elections, and hundreds of other individuals and entities to thousands of hours of potentially wasted time and effort.

II. Conclusion

For the foregoing reasons, Defendants respectfully request this Court to deny Intervenor-Plaintiff White's Motion to Lift the Discovery Stay and For a Preservation Order.

Respectfully submitted,

JIM PETRO
ATTORNEY GENERAL

/s Richard N. Coglianes
Richard N. Coglianes (0066830)
Deputy Attorney General
Constitutional Offices Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-2872
614-728-7592 (Fax)

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 2nd day of March, 2006.

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