

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

|                                    |   |   |
|------------------------------------|---|---|
| League of Women Voters of Ohio,    | ) | Case No. 3:05CV7309                     |
| et. al.,                           | ) |   |
|                                    | ) | Hon. James G. Carr                      |
| Plaintiffs,                        | ) |   |
| and                                | ) | Richard M. Kerger (0015864)             |
|                                    | ) | Kimberly A. Donovan (0074726)           |
| Jeanne White,                      | ) | KERGER & ASSOCIATES                     |
|                                    | ) | 33 S. Michigan St., Suite 100           |
| Intervenor-Plaintiff,              | ) | Toledo, Ohio 43602                      |
|                                    | ) | Telephone: (419) 255-5990               |
| v.                                 | ) | Fax: (419) 255-5997                     |
|                                    | ) |   |
|                                    | ) | Cindy A. Cohn, Esq.                     |
| J. Kenneth Blackwell, Secretary of | ) | Matthew S. Zimmerman, Esq.              |
| State of Ohio, et. al.,            | ) | ELECTRONIC FRONTIER FOUNDATION          |
|                                    | ) | 454 Shotwell Street                     |
| Defendants.                        | ) | San Francisco, California 94110         |
|                                    | ) |   |
|                                    | ) | <i>Counsel for Intervenor-Plaintiff</i> |

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**INTERVENOR-PLAINTIFF WHITE’S REPLY IN SUPPORT OF HER  
MOTION TO LIFT THE DISCOVERY  
STAY AND FOR A PRESERVATION ORDER**

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Plaintiff Jeanne White respectfully replies to Defendant Ohio Secretary of State Blackwell and Governor Taft’s Opposition to White’s Motion to Lift the Discovery Stay and for a Preservation Order (R. 243).

The need to push the discovery process forward is paramount. White has alleged ongoing, systematic constitutional flaws in the administration of the state’s elections, specifically arising from electronic voting machines that will be in use in dozens of Ohio counties in the 2006 primaries and general election. White’s case in particular requires a prompt resumption of the discovery process as evidence critical to her claims – including forensic data documenting the failures of electronic voting equipment – may be compromised as the state gears up for

multiple wide-ranging elections in 2006 that will, among other things, require the use of some of the voting equipment used in 2004. In light of the absence of adequate protections that would ensure that crucial data is preserved for trial, a preservation order is also appropriate at this time. Given the lack of a colorable defense that could cut short any remaining claims, Defendants' primary argument against both resuming discovery and the issuance of a preservation order – that the burden would be too great on the *state* – rings hollow.

**I. Defendants are the Appropriate Subjects of a Preservation Order.**

**A. Defendants Control the State's Electoral Process.**

Defendants – Secretary of State Blackwell and Governor Taft – argue that the discovery sought by White is not in their control. To the contrary. Defendants are the chief elections officials in the state<sup>1</sup> and can instruct each county to comply with any preservation order related to the administration of elections and election equipment.<sup>2</sup> Defendants are the logical and appropriate subjects of a court order requiring the preservation of relevant materials, both from a logistical standpoint as well as from a desire (no doubt shared by all parties) to streamline the discovery process and avoid confusing or inconsistent litigation practices from emerging from county to county.

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<sup>1</sup> Defendant Blackwell is the Chief Elections Officer of Ohio (*see* Ohio Rev. Code Ann. § 3501.04) while Defendant Taft is the chief executive officer of the state and can require subordinate officials to report to him regarding the proper discharge of their respective duties under state law (*see* Ohio Const. Art. III §§5-6). As Ohio's Chief Elections Officer, Defendant Blackwell is responsible for the entirety of the voting process in each of Ohio's 88 counties and is empowered with broad authority to carry out that responsibility. Among other explicit powers, the county boards of elections are the designees of the Secretary of State, act under the direction of the Secretary of State, must obey the lawful orders of the Secretary of State, and may not issue rules or instructions that are inconsistent with direction from the Secretary. *See* R.C. § 3501.11.

<sup>2</sup> Defendants concede the broad scope of the Secretary of State's power in their own Memorandum in Support of Defendants' Motion to Stay This Court's Order of February 10, 2006 Concerning Its Determination That Discovery is to Proceed (R. 240 at p.2): the powers of the Secretary of State include the ability to control "the manner in which Ohio conducts voter registration, provides absentee ballots, *deploys and calibrates voting machines*, determines the exact manner in which voters are allowed to cast ballots in their precincts, determines the number of poll workers hired and how they are trained, determines the manner in which precincts are organized, and *requires reports and audits to be done of every local county board of elections...*" (emphasis added).

B. Defendants Have Not Ensured that the Boards of Elections Will Preserve Critical Evidence.

Defendants also argue that a preservation order is unnecessary as the materials sought by White are already being preserved as per the obligations imposed by the discovery rules. This too is incorrect. As discussed above, county election officials – acting under the legal rubric established by the Defendants – both administer elections as well as retain possession of materials relevant to White’s claims. Defendants have made no assurances – let alone provided any authority to support the contention – that the boards of election will preserve materials relevant to this case.

Defendants further argue that as every county board of elections “is responsible for retaining the contents of [voting] machines as is required by federal law, state law and that county’s records retention policy” a preservation order is unnecessary.<sup>3</sup> Defendants fail to identify these laws, produce these policies, and specify how long any such preservation requirements would be in effect and if any such obligations could possibly expire before this lawsuit is concluded. For example, the preservation requirements of 42 U.S.C. § 1974 expire 22 months after an election. Twenty-two months will have passed since the 2004 election come September 2006. Moreover, Defendants do not identify what materials are being preserved under these unidentified laws and 88 separate, and potentially inconsistent, county policies.

Foremost to White is her request for a Court order that requires Defendants to:

[T]ake all necessary steps to ensure preservation of all equipment and records (in whatever form or medium, such as paper and electronic and including any software, program, and the like) relating to the use of Direct Recording Electronic (DRE) voting machines, and optical scan (OPSCAN) voting machines, in the presidential election of November 2, 2004 and the recount...<sup>4</sup>

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<sup>3</sup> R.242 at p.2.

<sup>4</sup> See R.234 (Proposed Order) at pg.2.

This would likely include, among other things, making perfect digital copies, called “mirrors,” of DREs used in the election so that the information will not be lost if the machines are prepared for or used in subsequent elections. White needs this information preserved so she can prove that Defendants are continuing to violate her voting rights in their fundamentally flawed regulation and use of electronic voting machines, including the “jumping” voting machines made available to her and other Ohio voters in the 2004 Presidential election.

## **II. Discovery Should Be Permitted to Continue as Expeditiously as Possible.**

### **A. Defendants’ Eleventh Amendment Defense is Without Merit.**

Defendants’ Eleventh Amendment arguments are frivolous and do not provide any basis to impede the discovery process.<sup>5</sup> White hereby incorporates her and Plaintiffs prior briefing on the subject.<sup>6</sup>

### **B. The Balance of Equities Strongly Favors the Plaintiffs.**

Defendants recognize the “magnitude of this case and the extraordinary importance of the legal issues involved” – indeed, they note the need to “allow[] the parties to have enough time to conduct the thorough and comprehensive discovery that this case will require” – yet believe that the case should be kept at a standstill until they reiterate their failed constitutional defense. Time spent on discovery conducted in order to remedy wide-ranging constitutional violations will hardly amount to “wasted time and effort.” Quite the contrary. Given the importance of the issues involved and the immediate risk to the integrity of evidence residing on electronic voting machines, any equitable balance strongly favors protecting the evidence and using discovery to move the case forward now.

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<sup>5</sup> See, e.g., R.237 (Court Order of February 10, 2006) at p.7: “Defendants’ sovereign immunity claim is without merit. . . . Nevertheless, defendants persisted with a sovereign immunity motion that, in light of my previous ruling, was obviously unfounded. Therefore, that motion shall be certified as frivolous and this court will retain jurisdiction during the pendency of any appeal of that order.”

<sup>6</sup> See R.226, R.227, R.235, R.246.

### III. Conclusion

Defendants have failed to show how continuing the discovery suspension would accomplish anything other than unduly prejudicing the claims of the Plaintiffs and Intervenor-Plaintiff White, and putting the state's voters at further risk. Ms. White respectfully requests that the stay placed upon discovery be lifted and a preservation order be entered.

Respectfully submitted,

/s/ Richard M. Kerger  
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Dated: March 8, 2006

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was electronically filed this 8th day of March, 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