IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	:	Case No. 2:14-cv-00404
Plaintiffs,	:	Judge Peter C. Economus
v.	:	Magistrate Judge Norah McCann King
JON HUSTED, et al.,	:	
Defendants.	:	

PLAINTIFFS' OPPOSITION TO PROPSOED INTERVENOR-DEFENDANT THE OHIO GENERAL ASSEMBLY'S EMERGENCY MOTION FOR RECONSIDERATION OF THE COURT'S OPINION AND ORDER DENYING ITS MOTION TO INTERVENE

Plaintiffs oppose Proposed Intervenor-Defendant Ohio General Assembly's ("OGA") "Emergency" Motion for Reconsideration of this Court's Denial of Their Motion to Intervene (ECF No. 50), which barely disputes the presence of multiple factors bearing on the timeliness of their intervention motion. The motion should be denied.

First, any such "emergency" was entirely of OGA's own making. Their motion does not dispute that it "has offered no reason justifying [their] delay" in moving to intervene. (ECF No. 48 at 3.) And they do not dispute that "the suit ha[s] progressed to a significant degree by the time" that motion was filed. (*Id.* at 3-4.)

Second, OGA says nothing that undermines this Court's correct observation that OGA's "position in support of SB 238 is ultimately [no] different than those advocated by the Attorney General and Secretary of State." (*Id.*) OGA now argues that they have different interests, only

because Defendants and OGA apparently coordinated with one another to each defend SB 238 and the 2014 Directives separately. (ECF No. 41 at 1.) But OGA cannot *post-hoc* manufacture an artificial distinction of interests in an attempt to force this Court's hand. It was Defendants' and OGA's *tactical* decision to divide their labor and to have OGA file an unauthorized opposition brief before this Court had ruled on OGA's motion to intervene. That their tactical decision did not work out as planned does not mean that they suddenly have sufficiently different interest to merit intervention; indeed, the fact that they have been able to coordinate such tactics only proves that their interests align. OGA's continued desire to have "some say in deciding litigation tactics" does not justify intervention. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 477 (6th Cir. 2000). OGA's remaining arguments concerning their interest in defending the constitutionality of the legislation it enacted simply repeat their previous arguments which this Court already rejected.

Lastly, OGA argues that there is *now* no prejudice to Plaintiffs because OGA promises not to submit new evidence or seek a delay of any deadline. This Court already saw right through this argument, noting "the *prospect* for delay still exists if the General Assembly were *permitted* to intervene and submit new evidence." (ECF No. 48 at 4 (emphasis added).) Plaintiffs join with the Court in taking OGA at its word that it will not do these things (*id.*), but anything can happen between now and August 11 that might, in the OGA's view, give it justification to seek delay, serve new discovery requests on Plaintiffs, or proffer new evidence. Indeed, OGA has yet to see Plaintiffs' reply (being filed today), two expert depositions are coming up (Drs. Smith and McCarty) and Defendants have requested two additional expert depositions of Plaintiffs' rebuttal expert witnesses (Drs. Burden and Gronke), during any of

which new facts may be revealed. OGA's intentions, no doubt genuine, do not remove the *prospect* of delay and the *prospect* of additional discovery obligations on Plaintiffs.

Furthermore, prejudice is not limited to discovery obligations and deadlines. This case is at its eleventh hour, and it is highly prejudicial at this late stage to force Plaintiffs to engage with a new party while they engage furiously with the existing Defendants, on a daily basis, on coordinating multiple additional expert depositions, resolving potential discovery disputes, and hashing out the numerous pre-hearing submissions that are due soon on August 7. (*See* ECF No. 22.) It also would be prejudicial to burden Plaintiffs with having to respond to and defend against new lines of questioning OGA tactically wishes to pursue that they think Defendants forgot to ask, during any of the upcoming depositions. And indeed, Plaintiffs have *already* suffered enough prejudice from OGA's unauthorized involvement in this case, such as preparing, out of an abundance of caution, responses to the combined 80-plus pages of opposition briefing from both Defendants and OGA, and drafting this very opposition to OGA's "emergency" motion on the night that Plaintiffs' reply brief is due. Time is not a luxury, and Plaintiffs can no longer afford to spar with OGA.

For the foregoing reasons, OGA's motion should be denied.

Dated this 30th day of July, 2014.

Respectfully submitted,

/s/ Freda J. Levenson
Freda J. Levenson (0045916)
Trial Attorney for Plaintiffs
Drew S. Dennis (0089752)
ACLU of Ohio Foundation, Inc.
4506 Chester Ave.
Cleveland, OH 44103
Tel: (216) 472-2205

Fax: (216) 472-2210
flevenson@acluohio.org
ddennis@acluohio.org

Dale E. Ho*
Sean J. Young*
ACLU Foundation
Voting Rights Project
125 Broad St., 18th Floor
New York, NY 10004
Tel: (212) 284-7359
Fax: (212) 549-2675
dho@aclu.org
syoung@aclu.org

Paul Moke (0014099)
paul.moke@gmail.com
6848 West State Route 73
Wilmington, Ohio 45177
(937) 725-7561

Attorneys for Plaintiffs

Kim Keenan (DC Bar# 419241)
Marshall Taylor (DC Bar# 454615)
Victor Goode (0067863)
National Association for the Advancement of Colored People
4805 Mt. Hope Drive
Baltimore, MD 21215
Tel: (410) 580-5777
Fax: (410) 358-9786
kkeenan@naacpnet.org
mtaylor@naacpnet.org
vgoode@naacpnet.org

Attorneys for Plaintiff Ohio State Conference of the National Association for the Advancement of Colored People

* Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

The foregoing Opposition to Proposed Defendant-Intervenor's Emergency Motion for Reconsideration was filed this 30th day of July, 2014 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

/s/ Freda J. Levenson
Freda J. Levenson (0045916)
Trial Attorney for Plaintiffs