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' MEMORANDUM IN OPPOSITION TO PROPOSED INTERVENOR OHIO GENERAL ASSEMBLY'S MOTION TO INTERVENE**

Plaintiffs submit this memorandum in opposition to the motion of the Ohio General Assembly (alternatively, "Proposed Intervenor") to intervene pursuant to Fed. R. Civ. P. 24, a motion that was filed over two and a half months after this lawsuit was initiated. The Ohio General Assembly argues that 28 U.S.C. § 2403(b) explicitly gives it the right to intervene. Alternatively, it asserts that it should be permitted to intervene because it might later disagree with the Ohio Attorney General's litigation strategy. Because the Ohio General Assembly misreads the plain text of Section 2403(b), because mere disagreement with the Ohio Attorney General – who is perfectly capable of zealously defending the interests of the State – over litigation strategy is insufficient grounds for intervention, and because intervention at this exceedingly late stage is prejudicial to Plaintiffs, this Court should deny the motion.

PROCEDURAL BACKGROUND

Over two and a half months ago on May 1, 2014, Plaintiffs filed a Complaint against Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine in their official capacities, challenging amendments made to Ohio law by Ohio Senate Bill 238 ("SB 238") and Secretary of State Directive 2014-06 (the "Directive") under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act of 1965. The Complaint specifically noted that it was seeking, *inter alia*, the issuance of a preliminary injunction against the application of SB 238 and the Directive to early voting. (*See* ECF No. 1 ¶¶ 1, 6; Prayer for Relief ¶ 3.) On May 16, Plaintiffs filed a Notice of Dispositive Filing in Related Case, publicly representing that Plaintiffs would "file a motion for a preliminary injunction" in the month of June (ECF No. 13 ¶ 10), and explicitly noting that resolution of the summary judgment motion in *Obama for America v. Husted*, No. 2:12-cv-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014) ("*OFA*") would not resolve the instant matter. (ECF No. 13 ¶ 3.) Defendants filed an Answer on May 23, which *inter alia* denied all allegations concerning the unlawfulness of SB 238. On June 10, the parties held a discovery conference pursuant to Fed. R. Civ. P. 26(f), and filed their Rule 26(f) report on June 25. (ECF No. 16.) On June 30, Plaintiffs filed a Motion for Preliminary Injunction. (ECF No. 17.) Initial disclosures were exchanged. Three days later, on July 2, the Court placed the case on an expedited timetable for discovery and briefing and set the preliminary injunction hearing for August 11. (ECF Nos. 22, 23.)

Pursuant to the schedule necessitated by the exigencies of this case and established by the Court, the parties have been engaged in discovery at a furious pace. On July 3, the parties exchanged discovery requests. Defendants propounded 162 Interrogatories and 33 document

requests upon the Plaintiffs. Plaintiffs have responded to 146 of the Interrogatories and produced *thousands of pages* of documents. In addition, Plaintiffs' two experts, Dr. Vincent Roscigno and Dr. Daniel A. Smith, have supplied their Expert Reports and supporting material, consisting of approximately 360 megabytes of information. On July 10, the Defendants conducted a nearly seven-hour deposition of Dr. Roscigno. On July 15, Defendants disclosed that they would potentially rely on up to *three* expert witnesses in opposing Plaintiffs' motion for preliminary injunction, and the parties have been working diligently towards setting deposition dates for the remaining expert witnesses. Defendants' responses to Plaintiffs' interrogatories and document requests were served yesterday evening. Altogether, Defendants served Plaintiffs' 1,927 documents yesterday, totaling approximately 187 megabytes. The compressed briefing schedule on Plaintiffs' Motion for a Preliminary Injunction is nearly over, with Defendants' Opposition Brief due next week on July 23, and Plaintiffs' Reply Brief due seven days later on July 30. (ECF No. 20.) This accelerated activity has been driven by the need for a timely determination at a hearing which is now little more than three weeks away.

ARGUMENT

A. The Ohio General Assembly is Not Entitled to Mandatory Intervention under Fed. R. Civ. P. 24(a)(1)

The Ohio General Assembly is not entitled to mandatory intervention under Rule 24(a)(1) of the Federal Rules of Civil Procedure. That subsection provides:

> On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute.

The Proposed Intervenor contends that a federal statute, 28 U.S.C. § 2403(b), provides an unconditional right for the Ohio General Assembly to intervene. It misreads the plain text of the statute, which provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is *not a party*, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence[.]

Id. (emphasis added). Here, *two* state officers, the Ohio Attorney General and the Ohio Secretary of State, are the party Defendants. Thus the Ohio General Assembly's presence in the case is not mandatory under Fed. R. Civ. P. 24(a)(1).

B. The Ohio General Assembly is Not Entitled to Mandatory Intervention Under Fed. R. Civ. P. 24(a)(2) or to Permissive Intervention Under Fed. R. Civ. P. 24(b)

The Proposed Intervenor next contends that it is entitled to mandatory intervention under Fed. R. Civ. P. 24(a)(2) on the theory that the Secretary of State and the Attorney General of Ohio cannot adequately defend its interests, or, failing that, that this court should at least grant it permissive intervention under Fed. R. Civ. P. 24(b). Both Fed. R. Civ. P. 24(a)(2) and Fed. R. Civ. P. 24(b) require that a motion to intervene be "timely." *See* Fed. R. Civ. P. 24(a)(2) ("On timely motion . . ."); Fed. R. Civ. P. 24(b) (same). As the Sixth Circuit has explained:

> The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances[, and] the following factors should be considered: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or should have known of its interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure to promptly intervene after it knew or reasonably should have known of its interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990); *see also United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001).

Nearly all of these factors point in favor of denying the motion to intervene on grounds of untimeliness. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 471-79 (6th Cir. 2000). *First*, this

case has progressed substantially on an extremely expedited timetable as detailed above. The volume of discovery that has already taken place is tremendous, and the parties are in the throes of scheduling, conducting, and defending expert depositions. The "finish line" for briefing on the merits of Plaintiffs' Motion for Preliminary Injunction is barely a week and a half away. *See Stupak-Thrall*, 226 F.3d at 472-74 (expedited nature of proceeding militated in favor denying intervention); *id.* at 474 ("when the appellants moved to intervene, discovery was closed, the experts were producing their reports, and the court's previously-identified 'finish line' . . . was fast approaching.").

Second, for over two and a half months since the filing of the Complaint, Ohio General Assembly members "knew or should have known" of their purported "interest" in the case, especially when Plaintiffs have been open at the outset about their desire to seek preliminary injunctive relief. And over two months ago, Plaintiffs explicitly spelled out their specific timetable for filing a Motion for Preliminary Injunction. (*See* ECF No. 13 ¶ 10.) Plaintiffs respectfully note the irony in the Ohio General Assembly waiting over two months to intervene, when, during a similar period, it could introduce and pass a bill affecting the rights of thousands of Ohio voters.[1] *See Stupak-Thrall*, 226 F.3d at 477-78.

Third, intervention at this point would substantially prejudice Plaintiffs' rights due to the foreseeable, if not inevitable, prospect of delay. *See Stupak-Thrall*, 226 F.3d at 478 (eleventh-hour intervention would cause delay); *see also* Fed. R. Civ. P. 24(b)(3) ("the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"). Postponement of the August 11 hearing date, especially given the possibility of

[1] SB 238 was introduced on November 13, 2013, and passed into law on February 21, 2014. *See* http://lsc.state.oh.us/coderev/sen130.nsf/Senate+Bill+Number/0238?OpenDocument.

appeals, would severely jeopardize the feasibility of any remedy sought by Plaintiffs for the conduct of early in-person voting in the 2014 general election, including the restoration of the first week of the early voting period and the period of concurrent registration and early voting that, if restored, would begin on September 30. "Allowing intervention would, indeed, cause delay and undue prejudice to the plaintiffs." *Stupak-Thrall*, 226 F.3d at 478.

Lastly, the "purpose for which intervention is sought" seems to be nothing more than the ability to have "some say in deciding litigation tactics." *Stupak-Thrawll*, 226 F.3d at 477. The Proposed Intervenors have put forth nothing to suggest that the Ohio Attorney General is not perfectly capable of defending the State's interests. Moreover, the Proposed Intervenor's views on the merits of the present litigation are precisely the same as those of the existing Defendants: all "flatly oppose" Plaintiffs' Section 2 and Equal Protection arguments. *Stupak-Thrall*, 226 F.3d at 476. The Proposed Intervenor's interest in looking over the shoulder of the Ohio Attorney General as he litigates this case is simply not enough to justify its last-minute intervention, nor is its unfounded speculation that the Ohio Attorney General will not appeal. *See, e.g.*, *id.* ("the proposed intervenors cannot meaningfully differentiate their concerns . . . [and] cannot legitimately believe the Federal Defendants might abandon the litigation."). Therefore, the Motion to Intervene is untimely under both Fed. R. Civ. P. 24(a)(2) and Fed. R. Civ. P. 24(b).

CONCLUSION

For the foregoing reasons, this Court should deny the Ohio General Assembly's Motion to Intervene.

Respectfully submitted,

/s/ Freda J. Levenson

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* Admitted *Pro Hac Vice*

CERTIFICATE OF SERVICE

The foregoing Memorandum in Opposition to Proposed Intervenor Ohio General Assembly's Motion to Intervene was filed this 18th 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.

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