
No. 14-3756

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Ohio State Conference of the National Association for the
Advancement of Colored People, et al.,**

Plaintiffs-Appellees

v.

Jon Husted, et al.,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of Ohio, Case No. 2:14-cv-00404

**Motion of Appellant, The Ohio General Assembly,
to Expedite Appeal**

Patrick T. Lewis (OH 0078314)

Lead Counsel

BakerHostetler LLP

1900 East Ninth Street, Suite 3200

Cleveland, Ohio 44114-3485

216-621-0200 / Fax: 216-696-0740

Email: plewis@bakerlaw.com

Robert J. Tucker (OH 0082205)

65 East State Street, Suite 2100

Columbus, Ohio 43215

614-462-2680 / Fax: 614-462-2616

Email: rtucker@bakerlaw.com

E. Mark Braden (OH 0024987)

Washington Square, Suite 1100

1050 Connecticut Avenue, NW

Washington, D.C. 20036-5304

202-861-1500 / Fax: 216-861-1783

Email: mbraden@bakerlaw.com

*Special Counsel for Appellant,
The Ohio General Assembly*

Appellant, The Ohio General Assembly (the “**General Assembly**”), respectfully moves this Court, pursuant to Fed. R. App. P. 2, 6 Cir. R. 2, and 6 Cir. R. 27(f), for an order expediting this appeal. In this appeal, the General Assembly seeks the reversal of a district court order denying its motion to intervene in an action challenging the constitutionality of an Ohio election statute and implementing Secretary of State directive, and striking its memorandum in opposition to Plaintiffs-Appellees’ motion for a preliminary injunction. A copy of the district court’s order is attached as **Exhibit A**.

The General Assembly seeks to expedite this appeal because the district court has set a hearing on Plaintiffs-Appellees’ (“**Plaintiffs**”) motion for a preliminary injunction for August 11, 2014. The General Assembly seeks expedited briefing and consideration of this appeal to permit it to participate in the preliminary injunction proceedings to adequately defend its interests related to the constitutionality of the legislation it passed; interests that might not otherwise be represented in the district court.

In further support thereof, the General Assembly respectfully represents as follows:

INTRODUCTION

In this litigation, Plaintiffs challenge the constitutionality of certain legislation enacted by the General Assembly in February, 2014, which amended

Ohio's early voting laws. In particular, Plaintiffs challenge the amendments to Ohio Rev. Code §§ 3509.01(B) and 3511.10 enacted by Senate Bill 238 ("SB 238"), which changed the start of Ohio's early in-person voting period from 35 days prior to Election Day, to the day following the close of voter registration. Plaintiffs have sought a preliminary injunction enjoining the enforcement of the amendments to those statutes, thus restoring the beginning of the early in-person voting period to 35 days before Election Day.

Plaintiffs did not name the General Assembly as a defendant in this action. For the reasons identified by the General Assembly in its motion to intervene, and its opposition to Plaintiffs' motion for a preliminary injunction, which has now been stricken by the district court, the General Assembly has a strong interest in defending constitutional attacks to legislation that it passes.

As such, the General Assembly moved to intervene in this lawsuit on July 11, 2014, only eleven days after the motion for preliminary injunction was filed. The General Assembly, while its motion was pending, timely filed a brief and evidence in opposition to Plaintiffs' motion for preliminary injunction on July 23, 2014. The Court denied the General Assembly's motion to intervene on July 30, 2014, and ordered the General Assembly's brief stricken from the record. The General Assembly moved for reconsideration the same day, which was denied the

next morning on July 31, 2014. The General Assembly filed this appeal the following day on August 1, 2014, along with this motion to expedite.

**EXPEDITING THE APPEAL IS NECESSARY TO AFFORD THE
GENERAL ASSEMBLY AN OPPORTUNITY TO PARTICIPATE IN THE
AUGUST 11, 2014 PRELIMINARY INJUNCTION HEARING**

At present, the district court has scheduled a hearing on Plaintiffs' motion for preliminary injunction for August 11, 2014 in Columbus. The parties to the case have agreed not to submit live testimony, and are currently completing depositions of expert witnesses in advance of the hearing.

Neither of the current defendants in the case has filed a brief directly addressing Plaintiffs' attack on the constitutionality of SB 238. The Ohio Secretary of State only addressed arguments relating to his directive, which set uniform hours for voting throughout the State. The Ohio Attorney General, the only other defendant to the litigation, simply adopted and incorporated the Secretary of State's and General Assembly's respective briefs. And because the district court *sua sponte* struck the General Assembly's brief from the record, the district court currently does not have before it any arguments or evidence regarding the State's interests in defending the constitutionality of SB 238.¹ Indeed, Plaintiffs in their reply brief supporting their motion for a preliminary injunction argued to the

¹ On July 31, 2014, the Ohio Attorney General filed a motion to supplement the record by re-attaching the General Assembly's brief and related evidence, which it had previously adopted and incorporated by reference. However, the district court has not yet granted the Ohio Attorney General leave to do so.

district court that no defense has been proffered on SB 238, and, thus, defendants have conceded that preliminary enjoining SB 238 is appropriate. (Pls' Reply in Support of Motion for a Preliminary Injunction, S.D. Ohio Dkt. No. 52).

As such, the district court is apparently planning to move forward with a hearing to decide the constitutionality of a statute after excluding from the case the party that most directly defended the legislation: the General Assembly. Because our adversarial system of justice requires a vigorous defense of this validly enacted legislation, and the People of the State of Ohio deserve the same, the General Assembly respectfully requests expedited consideration of this appeal.

Expedited consideration and briefing on this appeal will not harm the parties. The General Assembly had already filed its memorandum in opposition to Plaintiffs' motion for a preliminary injunction with all of its supporting evidence in the district court by the time its motion to intervene was denied. Additionally, it had already participated in two expert depositions. While the parties may submit additional evidence by August 7th, the General Assembly indicated to the district court that it did not intend on submitting any additional evidence to oppose Plaintiffs' motion for a preliminary injunction. Additionally, the General Assembly agreed to cooperate with Plaintiffs and the other defendants on the schedule for the various remaining expert depositions. Thus, a quick resolution of this appeal would allow the General Assembly to participate in the preliminary

injunction proceedings without any disruption to the schedule set by the district court for a ruling on Plaintiffs' motion for a preliminary injunction.

The General Assembly admits and understands that a prompt resolution of Plaintiffs' motion for a preliminary injunction is necessary in the district court with the pending November election. But the General Assembly believes it has a right to participate in those proceedings, including participation in the additional expert depositions scheduled for next week, and any oral argument at the hearing on August 11, 2014, in order to adequately protect its interests in defending the constitutionality of its legislation. As will be addressed in the General Assembly's merits brief, its intervention would not and will not interfere with the district court's schedule or delay a resolution of Plaintiffs' motion for a preliminary injunction.

CONCLUSION

For these reasons, an expedited resolution of this appeal is necessary to ensure that the arguments and evidence supporting the constitutionality of SB 238 are before the district court *prior* to its decision on Plaintiffs' motion for a preliminary injunction; a decision which could have significant ramifications for Ohio's voters and boards of elections statewide for the impending November general election. Therefore, the General Assembly requests an expedited briefing

schedule and expedited consideration of this appeal in advance of the August 11, 2014 hearing on Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

OHIO ATTORNEY GENERAL
MICHAEL DEWINE

/s/ Patrick T. Lewis
Patrick T. Lewis (Ohio Bar #0078314)
Lead Counsel
plewis@bakerlaw.com
BAKERHOSTETLER LLP
1900 E. Ninth Street, Suite 3200
Cleveland, Ohio 44114-1483
(216) 621-0200 / Fax (216) 696-0740

E. Mark Braden (Ohio Bar #0024987)
mbraden@bakerlaw.com
BAKERHOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036-5304
(202) 861-1500 / Fax (216) 861-1783

Robert J. Tucker (Ohio Bar #0082205)
rtucker@bakerlaw.com
BAKER & HOSTETLER LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
(614) 462-2680 / Fax (614) 462-2616

*Special Counsel for Appellant,
The Ohio General Assembly*

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically on the Court's electronic case filing system on August 1, 2014. Notice will be served by operation of the Court's filing system. Copies of the filing are available on the Court's system. Electronic service will also be made upon all counsel of record at the e-mail addresses on file with the Clerk of the District Court.

/s/ Patrick T. Lewis

Patrick T. Lewis

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

OHIO STATE CONFERENCE OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE, et al.,

Plaintiffs,

v.

JON HUSTED, et al.,

Defendants.

Case No. 2:14-cv-404

Judge Peter C. Economus

Magistrate Judge Norah McCann King

ORDER

This Matter is before the Court for consideration of the Motion to Intervene by Proposed Intervenor Ohio General Assembly. (Doc. 29.) For the reasons that follow, the motion is **DENIED**.

The Ohio General Assembly (“General Assembly”) moves to intervene as a defendant in this action pursuant to Rule 24(a), which provides that:

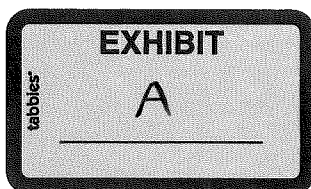
On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a). In the alternative, the General Assembly seeks permissive intervention pursuant to Rule 24(b).

In requesting leave to intervene under Rule 24(a)(1), the General Assembly cites 28 U.S.C. § 2403(b), which provides an unconditional right of a State to intervene in actions challenging the constitutionality of State statutes in instances where “a State or any agency,



Case: 2:14-cv-00404-PCE-NMK Doc #: 48 Filed: 07/30/14 Page: 2 of 5 PAGEID #: 1475

officer, or employee thereof is not a party” to the action. 28 U.S.C. § 2403(b). Section 2403(b), however, is inapplicable because state officers—the Attorney General and Secretary of State—are already parties to this action. See *Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006).

The Sixth Circuit has identified four elements within sub-rule 24(a)(2) that a proposed intervenor must satisfy to qualify for intervention of right: “(1) timeliness of application; (2) a substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court.” *Id.*

The Plaintiffs maintain that the General Assembly’s motion to intervene is untimely.

Regarding the issue of timeliness, the Sixth Circuit has stated:

The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances. [] We have held that 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 intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their 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) (citation omitted). Careful consideration of the above factors and other relevant circumstances indicates that the General Assembly’s motion to intervene is untimely.

This action was filed on May 1, 2014, Defendants Husted and DeWine filed their answer on May 23rd (Doc. 15), the Plaintiffs moved for a preliminary injunction on June 30th (Doc. 17), after conferring with the Parties, the Court issued a scheduling order on July 2nd (Doc. 22), and the General Assembly moved to intervene on July 11th (Doc. 29). The hearing on the Plaintiffs’

Case: 2:14-cv-00404-PCE-NMK Doc #: 48 Filed: 07/30/14 Page: 3 of 5 PAGEID #: 1476

motion for preliminary injunction is set for August 11th. (Doc. 22.) The Plaintiffs represent that extensive discovery has already taken place. Apropos of the first factor, the Court concludes that the suit had progressed to a significant degree by the time the General Assembly moved to intervene. While the motion to intervene was filed 11 days after the Plaintiffs had moved for preliminary injunctive relief, those days included the start of an expedited discovery period leading to a hearing less than six weeks in the future, a hearing that could as a practical matter resolve the merits of the litigation. As to the second factor, the General Assembly purports to intervene to protect its interest as Ohio's legislative body in defending validly enacted legislation. However, the General Assembly has failed to convince this Court that its position in support of SB 238 is ultimately any different than those advocated by the Attorney General and Secretary of State or that the General Assembly's presence in this case would not merely be superfluous to the other Defendants. Therefore, the General Assembly has not persuaded this Court that the Attorney General, the State's chief legal representative, cannot adequately represent its interests. Accordingly, the purpose for intervention weighs against a finding of timeliness.

Turning to the third factor, the Court determines that the General Assembly became aware or should have become aware of its interest in the case when the case was filed, but did not file the motion to intervene until two months later. The General Assembly has offered no reason justifying this delay. While two months may seem insignificant given that the Parties have proposed a dispositive motion deadline of June 2015 (see Doc. 16 at 3), the unique nature of this case renders the two month delay very significant. In this regard, the Plaintiffs complaint made clear that they would seek a preliminary injunction that would impact the coming November general election, scheduled to occur only six months from the filing of the case.

Case: 2:14-cv-00404-PCE-NMK Doc #: 48 Filed: 07/30/14 Page: 4 of 5 PAGEID #: 1477

Additionally, the fact that the Plaintiffs' suit relates to the period up to 35 days prior to the election practically reduced the period in which the preliminary injunctive issues need resolution to five months. Even disregarding potential appeals, the over two month delay in moving to intervene represents approximately 40% of the available time to resolve these issues, issues which may ultimately resolve the merits of the entire case. *See Serv. Emps. Int'l Union Local 1 v. Husted*, 515 F. App'x 539, 542 (6th Cir. 2013) (in election case evaluating timeliness factors in the context of motion for permissive intervention, "the delay [] posed a significant risk of upsetting the expedited schedule necessitated by the upcoming election.") As such, the Court assigns great weight to the General Assembly's delay.

The Court also determines that there is an issue of prejudice to the Plaintiffs if the General Assembly is allowed to intervene. The General Assembly has indicated its desire to "submit ... additional evidence" in support of SB 238. While the Court takes the General Assembly at its word that it is not planning to seek a continuance of the August 11th hearing and that it does not anticipate serving the Plaintiffs with discovery requests, the prospect for delay still exists if the General Assembly were permitted to intervene and submit new evidence. Furthermore, as noted by the Plaintiffs, delay could interfere with their attempt to secure a remedy prior to the general election. This prejudice to the Plaintiffs outweighs any potential prejudice to the General Assembly if intervention is denied given the overlapping interests of the General Assembly and the Defendants.

Based on a review of the above factors, the Court determines that the General Assembly has not timely filed its motion to intervene. The Court therefore concludes that the General Assembly has failed to establish that it is entitled to intervention as of right pursuant to Rule 24(a)(2). Further, as permissive intervention pursuant to Rule 24(b) also requires the filing of a

Case: 2:14-cv-00404-PCE-NMK Doc #: 48 Filed: 07/30/14 Page: 5 of 5 PAGEID #: 1478

motion that is timely, see FED. R. CIV. P. 24(b)(1), the Court declines to grant the General Assembly permissive intervention.

For the above-stated reasons, the Motion to Intervene by Proposed Intervenor Ohio General Assembly (Doc. 29) is **DENIED**. The Clerk is directed to **STRIKE** Document 40 from the Docket.

IT IS SO ORDERED.

/s/ Peter C. Economus

UNITED STATES DISTRICT JUDGE