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*., Plaintiffs, vs. JON HUSTED, *et al*., Defendants.	Case No.: 2:14-cv-00404 Judge Peter C. Economus Mag. Judge Norah McCann King

Applicant for Intervention Ohio General Assembly's Reply Memorandum in Support of Motion to Intervene

Plaintiffs' *Memorandum in Opposition to Proposed Intervenor Ohio General Assembly's Motion to Intervene* (doc. 33) (the "**Opposition**") argued the Court should deny the Ohio General Assembly's *Motion to Intervene* (doc. 29) (the "**Motion**") for two primary reasons: (1) the General Assembly's interests would be adequately represented by the Secretary of State and Attorney General; and (2) intervention is untimely. The first argument is barred by *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), which held the General Assembly has a right to intervene in election law cases; indeed, the State or General Assembly's intervention in election law cases is now common practice. Plaintiffs' timeliness argument is also misplaced. The General Assembly sought to intervene a month in advance of the preliminary injunction hearing and eleven days after the injunction motion was filed. Moreover, Plaintiffs will not be prejudiced by its intervention. The General Assembly's intervention will not delay the case or the August 11 hearing. For these reasons, more fully set forth below, the Court should grant the General Assembly's Motion.

ARGUMENT

A. The Defendants Do Not Adequately Represent The General Assembly's Unique Interests In This Case.

Plaintiffs argue that the Court should deny the General Assembly leave to intervene because the Secretary of State and the Attorney General, the two named Defendants in this case, allegedly adequately represent the General Assembly's interests. (Opp. 6).[1] Not so.

In general, a proposed intervenor need not prove to a mathematical certainty that existing parties do not represent its interest; rather, "proposed intervenors need only show that there is a *potential* for inadequate representation." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999)) (emphasis in original). In *Blackwell*, an election case, the Sixth Circuit held that the Secretary of State did not adequately represent the State and the General Assembly's interest, thereby permitting the State to intervene. 467 F.3d at 1008. The Court rejected the argument raised by Plaintiffs here (i.e., that the General Assembly's interest is represented by the Secretary of State simply because the Secretary sought the same ultimate result), focusing on the distinct constitutional role played by the Secretary in Ohio's government: "the Secretary's primary interest is in ensuring the smooth administration of the election, while the State and General Assembly have an independent interest in defending the validity of Ohio laws and ensuring that those laws are enforced." *Id.* Those same concerns motivated the General Assembly's proposed intervention in this case. *Compare* Mot. 3 (highlighting the unique and differing constitutional roles and interest of the General Assembly, Secretary of State, and Attorney General).

[1] An applicant for intervention must satisfy four elements to intervene of right under Fed. R. Civ. P. 24(a): "(1) timeliness of the application to intervene, (2) the applicant's 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." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Plaintiffs do not (and cannot) dispute that the General Assembly satisfied the second and third elements.

In fact, this divergence of interests has routinely resulted in the intervention of the State or the General Assembly in Ohio election law cases. *See, e.g., Blackwell*, *supra* (permitting the State and General Assembly to intervene); *Libertarian Party of Ohio v. Husted,* No. 2:11-cv-00722 (S.D. Ohio Mar. 12, 2012), slip op. at 2 (unreported, copy attached as **Exhibit A**) (permitting the General Assembly to intervene); *Northeast Ohio Coalition for the Homeless v. Husted*, 696 F.3d 580, 588 n.3 (6th Cir. 2012) (granting the State leave to intervene on appeal).

In this case, if leave to intervene is granted, the General Assembly intends to offer evidence and argument arising out of its interests in defending validly enacted and presumptively constitutional laws. In particular, the General Assembly notes that certain factual assertions by the plaintiffs in *Obama for America v. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012), *aff'd,* 697 F.3d 423 (6th Cir.) went effectively unchallenged; the General Assembly must intervene here in order to ensure that all of Plaintiffs' proofs are tested and their factual assertions, including those relating to the disproportionate impact Senate Bill 238 will allegedly have on African-American voters, are vigorously challenged. The Court should therefore find that the General Assembly's unique position is not adequately represented by other parties to this case and grant the Motion.

B. The General Assembly Has Timely Sought To Intervene.

Plaintiffs also complain that the General Assembly's proposed intervention is untimely. These complaints are unfounded. In fact, the Motion was timely filed and Plaintiffs will suffer no prejudice by virtue of the timing of the General Assembly's intervention.

In the Sixth Circuit, courts evaluate five factors to determine whether intervention is timely, while recognizing that "the determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances…" *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (*quoting Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). Those five factors include:

> (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 reasonably should have known of his interest in the case;
>
> (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and
>
> (5) the existence of unusual circumstances militating against or in favor of intervention.

Id.

In this case, these factors establish that the Motion was timely filed. Consider the timeline of this case:

- May 1, 2014 - Plaintiffs filed their Complaint (doc. 1).
- June 25, 2014 - Plaintiffs filed their Rule 26(f) report (doc. 16) in which Plaintiffs proposed May 15, 2015 as the discovery completion date and June 12, 2015 as the dispositive motion deadline. (Rep. 3).
- June 30, 2014 - Plaintiffs filed their Motion for Preliminary Injunction (doc. 17), two expert reports, and other materials.
- July 11, 2014 – the General Assembly filed its Motion seeking leave to intervene.
- July 23, 2014 – the deadline to oppose the Motion for Preliminary Injunction.
- August 11, 2014 – the date set for hearing on the Motion for Preliminary Injunction.

This timeline makes clear that intervention was sought *early* in the proceedings. The General Assembly filed its Motion only eleven days after the Motion for Preliminary Injunction was filed, a full month in advance of the scheduled hearing, and shortly after the Complaint was filed. The Motion was filed nearly a year in advance of Plaintiffs' proposed discovery and dispositive motion deadlines. This case can therefore be readily distinguished from *Stupak-Thrall*, where the intervenor waited seven months to intervene, by which point the discovery and expert disclosure deadlines had passed. *See Stupak-Thrall*, 226 F.3d at 474.

Nor will Plaintiffs suffer prejudice by the General Assembly's intervention at this stage. Plaintiffs suggest that the General Assembly's intervention would require a continuance of the August 11 hearing, but that is untrue. The General Assembly stated that it would comply with the established briefing schedule on the Motion for Preliminary Injunction. (Mot. 3-4).

Moreover, the General Assembly does not anticipate seeking a continuance of the hearing, and does not anticipate serving written discovery requests on Plaintiffs prior to the preliminary injunction hearing. The General Assembly will, if permitted to intervene, cooperate with the parties to schedule remaining depositions and will not seek to re-depose the one witness who has already been deposed. And it does not appear that Plaintiffs contemplate obtaining discovery from the General Assembly, either; Plaintiffs have not sought discovery from the General Assembly to date, nor have they asserted a need to do in their Opposition brief.

Finally, the unique nature of election litigation militates in favor of permitting intervention. When fundamental rights are at stake, the Southern District of Ohio has allowed intervention even "on the eve of a preliminary injunction hearing…" *Shreve v. Franklin County, Ohio*, No. 2:10-cv-644, 2010 WL 5173162, *3 (S.D. Ohio Dec. 14, 2010) (allowing the Government to intervene only a few days before a preliminary injunction hearing in a class action involving allegations of excessive force being used against prisoners). In this case, the General Assembly has sought intervention a *month* in advance of the preliminary injunction hearing, not on the "eve" of the hearing. Given the weighty issues at stake in this litigation, the General Assembly urges the Court to grant it leave to intervene in this case so that the case can be decided fully upon its merits with the benefit of the evidence and argument the General Assembly can present.

CONCLUSION

For these additional reasons, applicant for intervention the Ohio General Assembly respectfully requests that this Court grant its Motion and permit it to intervene in this action.

Dated: Cleveland, Ohio
July 21, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 21, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Patrick T. Lewis
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