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 King
JON HUSTED, et al.	:	
Defendants.	:	

REPLY MEMORANDUM OF PROPOSED INTERVENOR-DEFENDANT THE OHIO GENERAL ASSEMBLY IN SUPPORT OF EMERGENCY MOTION FOR RECONSIDERATION OF THE COURT'S OPINION AND ORDER DENYING ITS MOTION TO INTERVENE AND STRIKING ITS MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Attorney General merely incorporated the arguments and evidence submitted by the General Assembly presumably in the interests of saving the Court time in having to read what likely would have been similar, if not duplicative arguments and evidence. Because the General Assembly's motion to intervene was denied and its opposition brief struck, however, Plaintiffs now wish to gain a tactical advantage by claiming that no arguments or evidence have been submitted in support of SB 238. Indeed, that is exactly what Plaintiffs argue in the second sentence of their reply brief in support of their motion for a preliminary injunction. (Pls' Reply in Support of Motion for P.I., Dkt No. 52, p. 1). According to Plaintiffs, "Defendants' opposition briefs offer no defense to SB 238 *at all*, thus conceding that preliminary enjoining SB 238 is appropriate." (*Id.*) (internal citation omitted). But that is exactly why the emergency relief requested by the General Assembly is necessary. The General Assembly must be permitted to

intervene or the interests of the State of Ohio on the constitutionality of SB 238 have not and will not be represented in this case. Cases should be decided on their merits, and this Court should have before it all arguments and evidence necessary to evaluating the history, effect (or lack thereof), and legitimate justifications for the enactment of SB 238. *See, e.g., Thacker v. City of Columbus*, 328 F.3d 244, 252 ("cases should be decided on their merits and not merely upon the technicalities of the pleadings"). This is particularly true where the case implicates an issue of public concern. *See, e.g., Pridemore v. Sizemore*, No. 05-cv-242, 2006 U.S. Dist. LEXIS 38758, at *4 (E.D. Ky. June 9, 2006).

Moreover, the General Assembly seeks to correct several misstatements and false assumptions made by Plaintiffs in their opposition brief. First, the General Assembly *did* dispute that this suit has progressed to a significant degree by the time its motion was filed. As the General Assembly argued, because the parties have stipulated to no witnesses at the hearing, and because the General Assembly has fully complied with the existing case schedule, this suit has not progressed to the point where the General Assembly's intervention will delay this litigation or the resolution of Plaintiffs' motion for a preliminary injunction in any way.

Second, Plaintiffs incorrectly assume that the General Assembly made a "tactical" decision to "coordinate[]" with the Ohio Secretary of State and the Ohio Attorney General on a division of labor for their briefs. It did not. The General Assembly's counsel never viewed or was permitted to view a single draft of the Secretary of State's brief that was filed, nor did the Secretary's office or his counsel confer in any detail on the arguments the Secretary would be submitting. But, common sense dictates that the Secretary of State would generally defend the directive he issued, and the General Assembly would defend the legislation it enacted. Plaintiffs' assumption, however, that this was a coordinated tactical move is unfounded. Additionally, the

General Assembly had nothing to do with the decision of the Attorney General to incorporate the General Assembly's brief by reference. To the General Assembly's knowledge, that decision was made solely by the Attorney General and his counsel.

Finally, Plaintiffs suggest, incorrectly, that following submission of their reply brief, and after depositions of their new experts disclosed at the last minute, the General Assembly may still seek to submit new evidence. But the General Assembly has, and will once again, represent to Plaintiffs and this Court that it will **not** seek any discovery of Plaintiffs (other than the depositions of Plaintiffs' two newly identified experts, which are already being scheduled and which will occur regardless of the General Assembly's intervention) and will **not** submit any additional evidence related to Plaintiffs' motion for a preliminary injunction.

Plaintiffs cite the "prospect" of delay, but the simple fact is that the General Assembly's intervention has done nothing to, and will do nothing to, delay resolution of Plaintiffs' motion for a preliminary injunction. Its intervention will add no deposition to this case, has not and will not affect the case schedule, and will not affect the parties' preparation for a hearing because the parties have agreed to no live witness – only potentially oral argument. Plaintiffs' complaints about additional discovery burdens caused by the General Assembly's intervention are a repeat of their complaints in response to the General Assembly's initial motion to intervene. Plaintiffs' predictions of prejudice did not come true the first time; the General Assembly filed its brief on-time and has participated in two expert depositions already without incident or delay, and there is no reason to believe those predictions will come true now.

It appears Plaintiffs seek to avoid the General Assembly's intervention simply because they claim it creates more work for them. For example, they argue that they must "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 submission that are due soon on August 7th." The seven different lawyers representing Plaintiffs are more than competent to handle this matter. Moreover, the General Assembly has already and will continue to make itself available on whatever dates Plaintiffs and Defendants decide for the depositions of the new experts Plaintiffs disclosed at the 11th hour. The General Assembly has done nothing to cause any discovery disputes. More importantly, Plaintiffs would still be required to prepare their submissions for the August 11th "hearing" involving no live testimony regardless of the General Assembly's intervention.

Ironically, Plaintiffs fault the alleged tactical move of the Attorney General in merely incorporating the arguments and evidence submitted by the General Assembly, but then complain that they had to respond to 80+ pages of combined briefing because of the General Assembly's attempted intervention. Presumably, the Attorney General could have submitted a brief similar, if not identical, to the General Assembly, and Plaintiffs would have been required to read and respond to even more briefing. Plaintiffs' argument that they have to work harder is not a reason to deny the General Assembly's motion to intervene to protect its constitutionally granted right to enact legislation on Ohio's election processes.

Indeed, Plaintiffs admittedly took several *months* to gather evidence that allegedly supports their motion for a preliminary injunction. (Pls' Reply in Support of Motion for P.I., Dkt. No. 52, pg. 20) Yet the General Assembly (as well as the Secretary of State and Attorney General) had just over three weeks to review Plaintiffs' motion, accompanying exhibits and expert reports, identify rebuttal experts, and prepare their oppositions – yet the General Assembly was able to do so without affecting the existing schedule issued by this Court. Thus,

to the contrary, it is Plaintiffs' delay in filing this action, and then their delay in waiting two months to file their motion for a preliminary injunction resulting in the tight schedule, that has caused prejudice to the Secretary of State, the Attorney General, and the General Assembly. And even now, just one week before evidence is due, Plaintiffs submit additional expert reports.

Moreover, in their reply brief, Plaintiffs chastise the Secretary of State and Attorney General for crying "prejudice" because they claim that they find Plaintiffs' evidence too overwhelming, yet Plaintiffs now cry "prejudice" finding that having to respond to the legitimate arguments of the General Assembly in support of the constitutionality of SB 238 are too overwhelming. The General Assembly should be permitted to intervene in this litigation and to oppose Plaintiffs' motion for a preliminary injunction. Given the utter lack of any prejudice or any sign that the General Assembly's intervention will delay a ruling on Plaintiffs' motion for a preliminary injunction, and given Plaintiffs' position that because of the denial of the General Assembly's motion to intervene there has been no defense proffered on the constitutionality of SB 238, the emergency relief requested by the General Assembly is not only appropriate, but necessary to protect the interests of the State of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record via the Court's electronic filing system on this 31st day of July, 2014.

/s/ Robert J. Tucker
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