UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LIBERTARIAN PARTY OF OHIO,
KEVIN KNEDLER, and
MICHAEL JOHNSTON,

Plaintiffs,

v.

JON HUSTED,
in his Official Capacity as Ohio
Secretary of State,

Defendant.
_____/

Case No. 2:11-cv-722

JUDGE MARBLEY

MAGISTRATE JUDGE KING

PLAINTIFFS' RESPONSE TO OHIO GENERAL ASSEMBLY'S MOTION TO INTERVENE

The Sixth Circuit ruled in *Northeast Ohio Coalition for Homeless and Service Employees International Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1007 (6th Cir. 2006), that although the Ohio General Assembly has the authority to intervene in election matters under Federal Rule of Civil Procedure 24(a)(2), its intervention must be timely:[1]

> Under this court's interpretation of Rule 24(a)(2), a third party may qualify for intervention of right in the absence of a statute if the third party can satisfy four elements: (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.

[1] The General Assembly argues that it has a statutory right to intervene under 28 U.S.C. § 2403(b) and therefore "must" be allowed to participate in this proceeding. The Sixth Circuit in *Northeast Ohio Coalition*, 467 F.3d at 1007, expressly rejected this argument. The General Assembly's intervention is governed by Rule 24, which requires that intervention be timely.

See generally 7C C. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1902 (2011) ("an absentee who has failed to move promptly to protect that interest may be denied the opportunity to intervene and participate in the action"). According to one leading authority, "the court must consider whether the applicant was in a position to seek intervention at an earlier stage in the case. When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention." *Id.* § 1916. "The most important consideration in deciding whether a motion for intervention is untimely," moreover, "is whether the delay in moving for intervention will prejudice the existing parties to the case." *Id.* "If prejudice is found, the motion will be denied as untimely." *Id.*[2] Timeliness is required whether the intervention sought is mandatory under Rule 24(a) or permissive under Rule 24(b). *Id.*

The Sixth Circuit in *Northeast Ohio Coalition* concluded that the General Assembly's motion to intervene was clearly timely, since the Attorney General had moved to intervene in the District Court on behalf of the General Assembly the day after (October 27) the District Court issued preliminary relief (October 26). *Id*. at 1004-05. An *immediate* interlocutory appeal[3] was taken by the Attorney General in the name of the Secretary of State,[4] and the Attorney General then moved to intervene in that appeal on behalf of the General Assembly "within hours of the

[2] The Court in *Northeast Ohio* stated that the timeliness determination by a District Court is reviewed by an appellate court only for an abuse of discretion. *Id*. at 1007 n.2.

[3] This is reflected in the fact that the Sixth Circuit's judgment was entered on October 31, 2006, just five days after the award of preliminary relief.

[4] Whether the Attorney General had authority under Ohio to appeal in the name of the Secretary of State against its wishes was not decided by the Sixth Circuit. *Id.* at 1008. In the present case, the Attorney General did not attempt to take an interlocutory appeal in the name of the Secretary of State.

appeal by the defendant." *Id*. at 1007. The motion to intervene was therefore clearly timely on both levels—in the District Court because it followed the challenged preliminary order by only *one day*, and in the Sixth Circuit because it followed the appeal by only a *few hours*.

The present case is a far cry from that in *Northeast Ohio Coalition*. Rather than move to intervene on the day after this Court issued its preliminary injunction, the General Assembly has waited a *full month*. Compounding the exigency created by this delay, the Ohio General Assembly has in the thirty days since the preliminary injunction was issued changed Ohio law to require that Plaintiff-LPO and its candidates qualify sixty days sooner than what was deemed unconstitutional by this Court. [5]

After this Court issued its preliminary injunction on September 7, 2011, rather than attempt to correct the deficiencies this Court found in Ohio's ballot access laws or challenge this Court's ruling through direct appeal, the General Assembly passed a law that made them worse. On September 21, 2011, the General Assembly passed a law that moved the 2012 primaries, which had been scheduled for early May of 2012, to March 6, 2012. *See* Ohio Legis. Serv. 49 (2011) (stating that it became effective on 9/26/2011). *See also* Marc Kovac, Ohio's primary will

[5] Of course, because this Court has already enjoined Ohio's February 8, 2012 qualification date for new parties, the General Assembly's new, earlier deadline clearly violates this Court's order. However, because Ohio law independently requires that primary *candidates* also qualify ninety days before the primaries, *see* O.R.C. § 3513.05(A), Plaintiff-LPO's primary candidates are now also required to qualify by December 7, 2011 in order to participate in the March 6, 2012 primary. This Court's preliminary injunction did not explicitly address this facet of Ohio's access laws because it was not challenged by Plaintiffs. Plaintiff did not challenge O.R.C. § 3513.05(A) because at the time suit was filed in this case Ohio's primary was set for early May of 2012 and Plaintiff-LPO's candidates, like the major-party candidates, had enough time to qualify for the May primary (assuming the LPO was on the ballot--which is the focus of this suit) by submitting petitions in early February. That has changed now because of the General Assembly's moving the primary forward. Now the Plaintiff-LPO's candidates are quickly running out of time to qualify, and the longer Ohio delays the worse this problem will be.

be in March, THE DAILY RECORD, September 22, 2011 (http://www.the-daily-record.com/news/article/5099384) (reporting that Ohio's primary was moved to March 6, 2012). Because Ohio's law at the time this statute was passed required that new parties, including Plaintiff-LPO, qualify ninety days before Ohio's primaries,[6] this change on September 21, 2011 moved Plaintiff's qualification date for the 2012 election primary forward sixty days to approximately December 7, 2011.

Thus, the General Assembly's motion to intervene comes to this Court two months after Plaintiffs filed their Complaint; one full month after the Court issued its preliminary injunction; and less than two months before the Plaintiff-LPO and its candidates must qualify with Ohio's election officials for the 2012 ballot. The Ohio General Assembly obviously has not complied with the expedited schedule established by this Court, notwithstanding actual notice on the part of its attorney, the Ohio Attorney General's Office. This Court has gone to great lengths to expedite these proceedings in order to provide a timely answer to Ohio's election quandary. Allowing the Ohio General Assembly to intervene one month after this Court enjoined its ballot access law not only ignores the exigency recognized by this Court, it is an affront to orderly judicial processes.

Five factors are generally used to assess the timeliness of a motion to intervene:

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[6] This ninety-day requirement may have been suspended by a proposed Referendum that was submitted on September 29, 2011. *See* Joe Hallet, HB194 foes turn in signatures, COLUMBUS DISPATCH, Sept. 30, 2011 (http://www.dispatch.com/content/stories/local/2011/09/30/hb-194-foes-turn-in-signatures.html). Assuming that the Referendum has enough signatures, Ohio's old 120-day requirement will once again become the law in Ohio, and will require that Plaintiff qualify as a party for the 2012 election by approximately November 7, 2011. Of course, this precise result was deemed unconstitutional in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 569 (6th Cir. 2006).

> (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). "No one factor is dispositive, but rather the 'determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.'" *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (citation omitted).

Generally, motions to intervene that are filed during a case's "initial stage" are timely. In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), for example, the court granted a motion to intervene under Rule 24(a)(2) because it "was filed just two weeks after the complaint, and the case was obviously in its initial stage."

However, in the context of emergency challenges to election laws, even moving to intervene in the first two weeks is not enough. Election challenges have short shelf-lives; they must be resolved quickly. Waiting weeks (or even days) to intervene threatens to disrupt closely-approaching election deadlines and wastes valuable judicial resources. The Court here, for example, expedited these proceedings in order to provide both sides time to properly exhaust their judicial remedies before the expiration of deadlines tied to Ohio's election. The General Assembly's belated motion to intervene flaunts this Court's efforts.

Courts in emergency election proceedings commonly consider the doctrine of *laches* in deciding whether to award relief. A delay of two weeks in an election setting has been held by the Sixth Circuit to render a challenge untimely and bar relief. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (holding that because candidate "waited until nearly two weeks after he knew

the choice of the candidates would be made" he was barred by *laches* from obtaining relief). *See also McClafferty v. Portage County Board of Elections*, 661 F. Supp. 2d 826 (N.D. Ohio 2009) (observing that *laches* might defeat claim in election contest); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) ("*Laches* arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously.")

What is good for the goose is good for the gander. Just as those seeking to challenge election laws must act expeditiously, those seeking to defend ballot access laws should act in a timely fashion. *See Northeast Ohio Coalition*, 467 F.3d at 1007. Unnecessary and unexplained delay should not be tolerated. This Court in *Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 918 (S.D. Ohio 2004), for example, allowed parties to intervene to defend Ohio's removal of Ralph Nader from the 2004 election ballot because "[t]he motion was filed *only one day* after this action was commenced." (Emphasis added). "Furthermore," the *Blankenship* Court noted, "no party is prejudiced by the motion and the proposed intervenors have complied with the expedited schedule established by the Court." *Id.* *See also American Association of People with Disabilities v. Herrer*a, 257 F.R.D. 236, 245 (D.N.M. 2008) ("Intervention is properly denied where, for example, a case is near its end stage, and allowing a party to intervene would cause undue prejudice and delay in the proceeding.").

The General Assembly cannot seek shelter by pointing to a "belated refusal" to appeal on Defendant's part. Defendant announced immediately after this Court's September 7, 2011 Order that he would comply. *See* Joe Vardon, Judge stops signature rule for minor parties, COLUMBUS DISPATCH, Sept. 9, 2011 (http://www.dispatch.com/content/stories/local/2011/09/09/judge-stops-signature-rule-for-minor-parties.html) ("'Secretary Husted will follow the court's ruling,' said

Matthew McClellan, a spokesman for Husted."). Thus, the Attorney General and General Assembly knew just two days after this Court's Order that intervention was needed if they wanted to pursue an appeal. Rather than immediately seek to intervene, the General Assembly waited—not only did it sleep on its right to intervene, it affirmatively acted to increase the case's exigency by moving Ohio's deadlines forward sixty days. Its duplicity should not be rewarded.

CONCLUSION

Notwithstanding this Court's September 7, 2011 Order, neither Defendant[7] nor the General Assembly has taken any steps to address Plaintiff-LPO's access to the 2012 primary and general election ballots. Defendant has not issued a Directive or put anything in writing stating that Plaintiff-LPO and its candidates are qualified for the 2012 primary and general election ballots in Ohio. Defendant has completely ignored Plaintiffs' and Plaintiffs' counsel's repeated requests over the past thirty days to do something to insure that Plaintiff-LPO and its candidates have access to the 2012 primary election ballot.

Instead, Defendant and the General Assembly have done their utmost to prevent Plaintiff-LPO from gaining access to the 2012 ballot. Rather than immediately appealing, the General Assembly has waited until the last possible moment to move to intervene in order to take a

[7] On October 7, 2011, Defendant filed with the Court a copy of its September 21, 2011 letter to the General Assembly asking the Assembly to take action. Defendant apparently believes this letter sufficient to comply with the Court's order. However, Defendant did not issue any Directive addressing the Court's concerns. Following this Court's ruling in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006 (S.D. Ohio 2008), Defendant issued Directive 2009-21, which clearly delineated the minor parties' rights to Ohio's ballot. This Directive and its direct descendant (Directive 2011-01) were in force for two years before being repealed by H.B. 194 in July of this year. Defendant offers no explanation for why it cannot again issue a Directive clarifying Plaintiff-LPO's ballot rights. Had it wanted to comply with this Court's order, that is what it would have done. Its failure to do so, in light of its failure to appeal, is inexcusable.

belated appeal.[8] The General Assembly has compounded the difficult problems already presented to this Court by moving Ohio's election deadlines forward sixty days. These combined actions are clearly designed to prejudice Plaintiffs' First Amendment rights. *See Cuyahoga Valley Ry. Co. v. Tracy,* 6 F.3d 389, 396 (6th Cir. 1993) (noting that prejudice to the non-moving party is a significant consideration in the timeliness formula). Ohio wants to squeeze the Plaintiff-LPO out of its election by moving its election deadlines forward while prolonging its challenge to this Court's order. Not only is it duplicitous, it is in direct defiance of this Court's September 7, 2011 Order that "requires [the State] to take steps to enact ballot access laws that address the constitutional deficiencies identified here, in *Brunner,* and in *Blackwell.*" *See* Opinion and Order, dated Sept. 7, 2011, (Docket No. 13) at 12. The motion to intervene is not timely.

Respectfully submitted,

s/*Mark R. Brown*

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[8] Defendant has not taken a timely appeal from this Court's preliminary injunction, and therefore has no grounds for ignoring the Court's Order.

Certificate of Service

I certify that the foregoing document was filed electronically with the Court and thereby transmitted to all counsel of record through the Court's CM/ECF system.

/s/ Mark R. Brown
Mark R. Brown