

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

LEAGUE OF WOMEN VOTERS	:
OF OHIO, et al,	:
	:
Plaintiffs,	: CASE NO. 2:20-CV-1638
	:
v.	: CASE NO. 2:20-CV-1638
	:
FRANK LAROSE,	:
	:
Defendant.	:

MOTION TO INTERVENE BY THE STATE OF OHIO

Ohio Attorney General Dave Yost, on behalf of the State of Ohio, moves to intervene in this case pursuant to Federal Rules of Civil Procedure 24(a) and 24(b) and 28 U.S.C. § 2403(b), in order to defend the constitutionality of House Bill 197. A Memorandum in Support of this motion is attached. Also attached is a “Proposed Notice of Defenses” setting forth the claims and defenses of the State of Ohio, as required by Rule 24(c).

Respectfully submitted,

DAVE YOST
OHIO ATTORNEY GENERAL

/s/ Julie Pfeiffer

JULIE PFEIFFER (0069762)
ANN YACKSHAW (0090623)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Tel: 614-466-2872 | Fax: 614-728-7592
Julie.Pfeiffer@OhioAttorneyGeneral.gov
Ann.Yackshaw@OhioAttorneyGeneral.gov

*Counsel for Proposed Intervenor
State of Ohio*

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Plaintiffs filed this action on March 30, 2020, in which they challenge the constitutionality of House Bill 197, the statute resetting certain absentee ballot deadlines for the March 17, 2020 presidential primary election. The Attorney General now seeks to intervene on behalf of the State of Ohio in order to fully defend the constitutionality of House Bill 197. This Court should grant this motion to intervene as the State of Ohio has interests that may differ from those of the Secretary of State, given the different roles of the Secretary and the General Assembly regarding House Bill 197. The State of Ohio has an interest in defending the constitutionality of the statutes enacted by the General Assembly, while the Secretary's primary interest is in administering these statutes and all others that apply to elections in Ohio.

Furthermore, this Court directed the Secretary of State to file his response to the Plaintiffs' Motion for Emergency Restraining Order no later than 3:00 p.m. on Thursday, April 2, 2020. This Court ordered the Secretary of State to "specifically include the State's interests that justify the burden on voting rights imposed by the establishment of an April 28, 2020 deadline for absentee voting (as opposed to Defendant's original suggestion of a June 2, 2020 deadline for absentee voting)." Doc. 14 at 2. To the extent this specific portion of the Court's order implies that the Secretary of State's and the State of Ohio's interests are or may be in conflict, the State of Ohio, through the Ohio Attorney General must intervene also to appropriately respond to the implied conflict. Thus, the State of Ohio's interest in fully defending the constitutionality of House Bill 197 may not be adequately represented by the Secretary, alone. Accordingly, the State of Ohio has a right to intervene for the purpose of defending House Bill 197.

II. STATEMENT OF FACTS

This action challenges House Bill 197, a Bill that was passed as one part of the State of Ohio's emergency response to the COVID-19 pandemic. On the night of March 16, 2020, after Ohio's absentee ballot deadline had passed and right before Ohio's March 17, 2020 Presidential Primary, Ohio Department of Health Director Dr. Amy Acton exercised her statutory authority under Ohio Revised Code § 3701.13 and closed all of the State's polling locations as follows:

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** all polling locations in the State of Ohio **closed** on March 17, 2020. This Order shall take effect immediately and remain in full force and effect until the State of Emergency declared by the Governor no longer exists, or the Director of the Ohio Department of Health rescinds or modifies this Order.

Closure of the Polling Locations in the State of Ohio on Tuesday March 17, 2020, *available at* https://coronavirus.ohio.gov/wps/wcm/connect/gov/c6a47eea-ce8a-4eff-bad3-d4141216bf9b/ODH+Director%27s+Order+Closure+of+the+Polling+Locations.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-c6a47eea-ce8a-4eff-bad3-d4141216bf9b-n3ELaWW.

Secretary LaRose issued Directive 2020-06 hours later, which prevented the boards of elections from tabulating ballots on March 17, 2020, and laid “a path forward to finish the primary election.” SOS Letter, Doc. 4-4 at PageID 90. On March 21, Secretary LaRose sent a letter to the General Assembly urging the adoption of the Ohio Voters First Act, which would “authoriz[e] [Secretary LaRose] to produce and mail a postage paid absentee ballot request form to every eligible Ohio voter who did not cast a ballot during Ohio's early voting period from February 18 through March 16 and to pay the postage for the voter to return their ballot, and [to]

hold in-person voting on June 2, 2020 if the Order by Dr. Amy Action is no longer in place by April 24.” *Id.*

The General Assembly ultimately unanimously adopted a different framework for completing voting in Ohio’s March 17, 2020 primary, House Bill 197. House Bill 197 prevents the boards of elections from tabulating votes cast before March 17, allows any voter registered as of February 19, 2020, to request and cast an absentee ballot, provides in-person voting at the boards of elections for certain categories of voters, and allows voters to cast absentee ballots by dropping them in a secured receptacle outside the boards of elections. On March 30, 2020, Plaintiffs sued Secretary LaRose, alleging that House Bill 197 (1) violates the National Voter Registration Act by setting a registration deadline more than 30 days from the date of an election and (2) violates the First and Fourteenth Amendments of the United States Constitution by unduly burdening the right to vote. Plaintiffs seek an alternative election schedule which, if adopted, would be the fourth such schedule proposed, and have requested emergency relief. Doc. 4. During a telephonic status conference on March 31, 2020, the Court specifically asked why the General Assembly, in adopting House Bill 197, departed from Secretary LaRose’s recommendations in Directive 2020-06 and his letter to the General Assembly. Doc. 14 at 2.

III. LAW AND ARGUMENT

This Court should grant this motion to intervene pursuant to Civil Rule 24, either as of right or as permissive intervention.

A. The State of Ohio Has A Right To Intervene In This Action.

The State of Ohio should be granted the right to intervene pursuant to Federal Rule of Civil Procedure 24(a) because it has a statutory right to intervene in cases in which the constitutionality of a State statute is at issue. Rule 24(a) provides that, upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United State confers

an unconditional right to intervene; or (2) when the person seeking to intervene claims an interest relating to the action and is so situated that the disposition of the action may impair that person's ability to protect that interest, unless existing parties adequately represent the applicant's interest. In this case, Federal Rule of Civil Procedure 24(a)(1) and (a)(2) support a right to intervene.

The State of Ohio has a right to intervene pursuant to Rule 24(a)(1) because a federal statute, 28 U.S.C. § 2403(b), grants the State of Ohio a right to be heard on the constitutionality of House Bill 197. That section provides that "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, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality." Although Secretary LaRose is already a party in the case, the State of Ohio invokes its independent right to intervene under 28 U.S.C. § 2403(b). The purpose of the statute is to guarantee that the State of Ohio has an opportunity to be heard when the constitutionality of a statute is at issue, and this case indisputably concerns the constitutionality of statutes that are very important to the General Assembly, and indeed to the entire State of Ohio.

Accordingly, the State of Ohio also meets the test set forth in Federal Rule of Civil Procedure 24(a)(2). The State of Ohio has an interest in the constitutionality of the statutes at issue which will be impeded by a negative disposition of this action, and no party before the Court is adequately representing that interest. Fed. R. Civ. P. 24(a)(2).

B. If This Court Does Not Find A Right To Intervene, Then It Should Permit The State Of Ohio To Intervene.

Furthermore, if this Court finds that the State does not have the right to intervene, then the Court should grant the motion pursuant to Federal Rule of Civil Procedure 24(b). Rule 24(b)(2) provides that upon timely application anyone may be permitted to intervene in an action “when an applicant’s claim or defenses and the main action have a question of law or fact in common.” The rule further provides that “[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Under these standards, the State of Ohio should be permitted to intervene.

First, this application is timely. The Complaint in this matter was filed yesterday, on March 30, 2020, and the Court set Thursday, April 2, 2020 as the deadline to respond to Plaintiffs’ Motion for Temporary Restraining Order. Under these circumstances, this motion is timely.

Second, the State of Ohio’s defenses share common questions of law and fact with Plaintiffs’ claims against House Bill 197. Plaintiffs allege that the new absentee ballot deadlines and voting procedures outlined in House Bill 197 are unconstitutional; the State of Ohio will present arguments regarding why they are constitutional, and is in a better position to make those arguments than the Secretary of State. Finally, granting the State of Ohio the opportunity to intervene at this extremely early juncture will not create any delay, nor will it prejudice any other party’s rights, given the fact that intervention is sought to present evidence and arguments on the National Voter Registration Act and the constitutionality of House Bill 197. Indeed, the intervention of the State of Ohio should be favored, because of the opportunity for the Court to hear the unique viewpoint of the State of Ohio, by and through the Attorney General, regarding the enactment of this statute.

As such, this Court should permit the Attorney General to intervene on behalf of the State of Ohio in order to defend the constitutionality of House Bill 197.

IV. CONCLUSION

For these reasons, the State of Ohio asks the Court to grant its motion to intervene in this matter.

Respectfully submitted,

DAVE YOST
OHIO ATTORNEY GENERAL

/s/ Julie Pfeiffer

JULIE PFEIFFER (0069762)
ANN YACKSHAW (0090623)
Assistant Attorneys General
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Columbus, Ohio 43215-3428
Tel: 614-466-2872 | Fax: 614-728-7592
Julie.Pfeiffer@OhioAttorneyGeneral.gov
Ann.Yackshaw@OhioAttorneyGeneral.gov

*Counsel for Proposed Intervenor
State of Ohio*

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2020, the foregoing Motion to Intervene was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

/s/ Julie Pfeiffer

JULIE PFEIFFER

Assistant AttorneysGeneral