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

NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*, Plaintiffs, v. FRANK LAROSE, in his official capacity as Ohio Secretary of State, Defendant.	Civil Action No. 1:23-cv-26 District Judge: Judge Donald C. Nugent

REPLY IN SUPPORT OF MOTION TO INTERVENE BY
SANDRA FEIX, MICHELE LAMBO, AND THE OHIO REPUBLICAN PARTY

Sandra Feix, Michele Lambo (together, the "Election Workers"), and the Ohio Republican Party (collectively, the "Proposed Intervenors") satisfy the requirements of Rule 24 for intervention as of right and for permissive intervention. The Court should grant the motion to intervene.

First, Proposed Intervenors' motion is timely. It was filed in the beginning stages of the case, before the case-management conference, before discovery began, and before any dispositive motions were filed. Plaintiffs' main assertion is that intervention will disrupt the discovery plan negotiated between Plaintiffs and Secretary LaRose. While Secretary LaRose has voiced no such concern, Proposed Intervenors will abide by the discovery plan and the schedule entered by the Court. Granting intervention therefore will not disrupt the discovery plan or otherwise prejudice any existing party.

Second, Proposed Intervenors have a sufficient interest in the litigation to support intervention. As courts have repeatedly held in similar cases, the Ohio Republican Party has undeniable interests in preserving a competitive electoral environment and in supporting laws that

ensure free, fair, and trusted elections for its candidates and voters. The Election Workers likewise have undeniable interests in administering rules that promote election integrity and in avoiding dilution of their own votes. Plaintiffs' contrary argument relies on an incorrect reading of Sixth Circuit precedent and on conflating the interest required for intervention with the injury-in-fact requirement of Article III standing—a legal error the Sixth Circuit has correctly and explicitly rejected. The Court should decline Plaintiffs' invitation to disregard the law-of-the-circuit doctrine and to rely on out-of-circuit cases in direct conflict with binding Sixth Circuit precedent.

Third, Plaintiffs do not contest that the action "may as a practical matter impair or impede [Proposed Intervenors'] ability to protect" their interests. Fed. R. Civ. P. 24(a)(2).

Fourth, the mere potential for inadequate representation suffices under the Sixth Circuit's generous standard. That potential exists here. Secretary LaRose did not file a motion to dismiss and has yet to provide a full defense on the merits of the constitutional questions at issue. And there are good reasons why his views may diverge from those of Proposed Intervenors. For example, Secretary LaRose must consider the resources available to him in light of the other litigation his office faces, as well as public opinion on House Bill 458. Meanwhile, Proposed Intervenors have an interest, which Secretary LaRose does not share, in the election of their candidates via free, fair, and trusted elections. Plaintiffs argue that Proposed Intervenors must show substantive disagreement with Secretary LaRose—but that is not a requirement for intervention and is impractical at this early stage of the lawsuit.

The Court should grant intervention as of right or, at minimum, permissive intervention.

ARGUMENT

Whether as of right or as a matter of discretion, this Court should grant intervention.

I. The Proposed Intervenors Have a Right to Intervene Under Rule 24(a).

Timeliness. This motion is timely. Proposed Intervenors moved to intervene while the case was in its infancy—before the start of discovery, before the case was even assigned to a case-management track, before any dispositive motions were filed, and soon after Secretary LaRose gave Proposed Intervenors all the more reason to intervene by filing an answer rather than moving to dismiss. In similar circumstances, when a lawsuit was expedited but was "still in its preliminary stages, as discovery [was] ongoing" and the court had "not yet issued any dispositive rulings," timeliness "weigh[ed] in favor of the proposed intervenors." *Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18-cv-357, 2018 WL 8805953, at *1 (S.D. Ohio Aug. 16, 2018). So too here.

Plaintiffs disagree, citing (at 4) two inapposite cases in which intervention was denied. The intervention motions in those cases came long after the litigation began, and discovery had substantially progressed or had closed. In *Blount-Hill v. Zelman*, 636 F.3d 278, 285 (6th Cir. 2011), intervention was untimely when the district court had partially granted a motion to dismiss, the complaint had been amended several times, a second motion to dismiss had been briefed, and discovery was well underway. And in *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000), intervention was untimely "when the appellants moved to intervene, discovery was closed, the experts were producing their reports, and the . . . final disposition . . . was fast approaching."

Plaintiffs primarily argue (at 1–5, 15) that they will be prejudiced if Proposed Intervenors disturb the discovery plan negotiated with Secretary LaRose and the schedule entered by the Court. Secretary LaRose has not opposed intervention or raised this concern. In all events, Plaintiffs can rest easy: Proposed Intervenors will abide by the Court's schedule and the discovery agreement. Accordingly, granting intervention will result in no prejudice to Plaintiffs.[1]

[1] Plaintiffs do not consistently embrace the position that the negotiated discovery plan is immutable because they ask (at 15 n.3) that the deposition limit "be modified" if intervention is

Plaintiffs also suggest (at 5) that the Court should deny intervention because adding more parties will multiply and prolong proceedings. Plaintiffs point to Proposed Intervenors' proposed motion to dismiss, but, of course, if the Court grants the motion, intervention will have saved substantial time. And regardless, Plaintiffs' argument flies in the face of the intervention rule. The whole point of Rule 24(a) is to add parties who contribute their views and strategies to the lawsuit, even if they marginally increase the complexity of the proceedings, because a person should not "be deprived of his or her legal rights in a proceeding to which such person is neither a party nor summoned to appear," *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

Interest. The Proposed Intervenors also have a substantial legal interest in this case. Plaintiffs attempt to set a very high bar that distorts the law, but Proposed Intervenors clear it in any event.

Plaintiffs contend (at 6) that interests for intervention must meet a "high mark." The Sixth Circuit says otherwise. Far from imposing a high bar, the Sixth Circuit subscribes to an "expansive notion of the interest sufficient to invoke intervention of right." *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (citation omitted). Indeed, in the Sixth Circuit, "an intervenor need not have the same standing necessary to initiate a lawsuit." *See Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). Yet Plaintiffs repeatedly rely (at 6, 10–12 & n.2) on cases about Article III standing, apparently seeking to avoid binding precedent on intervention. *See, e.g.*, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) ("[Plaintiffs] lack standing to bring their Elections Clause claim."); *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020)

granted. Proposed Intervenors do not believe that the limit needs to be modified if intervention is granted. Nonetheless, Proposed Intervenors believe that any modification to the discovery plan should apply to the discovery limits on both sides of the case, not only the discovery limits on Plaintiffs.

("[P]laintiffs have no standing to sue."); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) ("Wood lacks standing."). Indeed, every case in Plaintiffs' footnote 2 addresses standing. *See, e.g.*, *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-cv-3747, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) ("veritable tsunami of decisions *finding no Article III standing*" (emphasis added)). And as for Plaintiffs' concern (at 10–11) that the Sixth Circuit's lenient standard for the interest requirement will unduly expand intervention, the Sixth Circuit has already put it to rest on the ground that "the Supreme Court has recently considered and rejected a similar floodgate argument." *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula*, 41 F.4th 767, 777 (6th Cir. 2022).

To be sure, some jurisdictions require intervenors to establish independent Article III standing or more. For example, the Seventh Circuit requires "*more* than the minimum Article III interest for intervention." *Planned Parenthood of Wisc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (internal quotation marks omitted) (emphasis added). That is presumably why Plaintiffs' authorities for such overly robust intervention requirements come from other circuits, which apply a souped-up test that the Sixth Circuit has rejected. *See, e.g.*, Opp. at 10 (citing *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013)). The Court should decline to follow out-of-circuit decisions applying a standard that contradicts controlling Sixth Circuit precedent.

Regardless, Proposed Intervenors do have concrete interests at stake, as multiple courts have held for similar intervenors in similar circumstances. *See* Intervention Mem., Dkt. No. 20-1 at 1, 5–8. A political party has obvious interests in ensuring that its candidates' elections are governed by rules that promote free, fair, and trustworthy elections. Moreover, the Ohio Republican Party has largely mirror-image interests to Plaintiffs, some of whom plead that House Bill 458 "threaten[s] the electoral prospects of the candidates [they] endors[e]." Am. Complaint,

Dkt. No. 13, ¶¶ 15, 17; *see Payne v. City of New York*, 27 F.4th 792, 802 (2d Cir. 2022). The Ohio Republican Party, like Plaintiffs, supports the election of its own preferred and endorsed candidates. If Plaintiffs have standing, the Ohio Republican Party easily has sufficient interest to intervene.

Election workers likewise have straightforward interests in ensuring that they are permitted to enforce rules that reduce the likelihood of voter fraud or and increase public confidence in elections they administer. Even setting that aside, it would be passing strange to conclude that Plaintiffs, a set of special interest groups, have a greater interest in this case about the rules governing Ohio's elections than do the Election Workers, who administer and vote in elections in Ohio.

For these reasons, it is not surprising that the Sixth Circuit cases on which Plaintiffs primarily rely, *Coalition to Defend Affirmative Action* and *Northland Family Planning Clinic*, actually support Proposed Intervenors. In those decisions, courts denied intervention to groups who supported the enactment of a law and later sought to intervene to defend the law when challenged. That situation prompted the remark Plaintiffs excerpt (at 7): "[I]n a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 345 (6th Cir. 2007). But that is not the end of the analysis. As the Sixth Circuit has explained, "a group [that] is 'regulated by the [challenged] law, or . . . whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted.'" *Coal. to Defend Aff. Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (quoting *Northland Family Planning*, 487 F.3d at 345); *see Wineries*, 41 F.4th at 773.

The latter rule is the relevant one here. Unlike proposed intervenors in *Northland Family Planning Clinic*, Proposed Intervenors here are not seeking to defend a legal interest in the legislative process. Rather, they are entities whose interest in endorsing and voting for candidates are undoubtedly "affected by the law" they wish to defend. *Coal. to Defend Aff. Action*, 501 F.3d at 782; *see Shays v. FEC*, 414 F.3d 76, 85–87 (D.C. Cir. 2005). Moreover, of course, the Election Workers' interests in administering efficient and fair elections are also "affected by the law" governing those elections. The Ohio Republican Party and the Election Workers therefore each satisfy Rule 24(a)'s interest requirement.

Adequacy of Representation. The existing parties do not adequately represent the Proposed Intervenors' interests. As with the previous requirement, the burden to show inadequate representation "should be treated as minimal," *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), and the mere "potential for inadequate representation" is enough, *Grutter*, 188 F.3d at 400; *see Trbovich*, 404 U.S. at 538 n.10.

At the very least, the potential for inadequate representation exists here. Indeed, the Sixth Circuit has previously found inadequate representation in a similar case because the Secretary's "primary interest . . . in ensuring the smooth administration of the election" is distinct from other interests in "defending the validity of Ohio laws and ensuring that those laws are enforced." *Ne. Ohio Coal. for Homeless v. Blackwell*, 467 F.3d 999, 1008 (6th Cir. 2006). Those divergent interests and priorities may lead the Secretary to inadequately represent Proposed Intervenors' during this case. In fact, Proposed Intervenors have already diverged from Secretary LaRose, who declined to move to dismiss. Proposed Intervenors' and Secretary LaRose's interests may diverge even further in the future on such matters as summary judgment, trial, settlement, and appellate strategy.

Plaintiffs argue (at 13–14) that the crux of the adequacy inquiry is whether there will be a substantive disagreement between the intervenor and an existing party on the merits. But their only support for that rule is a decision by an out-of-circuit district court. That decision, moreover, likely has not survived a recent Supreme Court ruling. *Compare Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 273–74 (D. Ariz. 2020), *with Berger v. N.C. St. Conf. of the NAACP*, 142 S. Ct. 2191, 2203–05 (2022). And it applied a Ninth Circuit rule about adequacy that conflicts with the Sixth Circuit's rule. *Compare Perry v. Prop. 8 Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (requiring a "compelling showing"), *with Wineries*, 41 F.4th at 774 (6th Cir.) (characterizing the required "showing" as "minimal"). To be sure, one treatise opines that a mere difference in litigation tactics may not suffice when the intervenor's interests are *identical* with those of an existing party. *See* 7C Charles Alan Wright, et al., *Federal Practice and Procedure* § 1909 (3d ed.). But even if that academic opinion were the law, it is entirely irrelevant here where the interests are not identical at all. As the Supreme Court recently held, "[w]here the absentee's interest is similar to, but not identical with, that of one of the parties, that normally is not enough to trigger a presumption of adequate representation." *Berger*, 142 S. Ct. at 2204 (internal quotation marks omitted). Just so here, where Proposed Intervenors' interests diverge from the Secretary's as described above.

Moreover, Plaintiffs' proposed substantive-disagreement requirement merely creates a level-of-generality problem and is entirely impractical to administer. A would-be intervenor will typically seek the same judgment as an existing party, especially in the very early stages of litigation. On Plaintiffs view, that alignment disqualifies Proposed Intervenors from participation as parties in this case. But that initial alignment can masks a tremendous amount of difference on specifics both at the outset of the case and as it progresses. Initial alignment as to the desired

judgment is not the crux of the adequacy injury. If it were, it would raise serious administrability questions. Take the timeliness issue. Plaintiffs contend both that Proposed Intervenors are both too aligned with Secretary LaRose because they currently seek the same ultimate outcome and too unaligned with Secretary Rose because they have allegedly waited too long to intervene. The argument is wrong as a factual matter, as Secretary LaRose has not indicated his full and specific views on the constitutional merits and, unlike Proposed Intervenors, has not moved to dismiss. And it is wrong as a legal matter. Plaintiffs' aggressive positions on timeliness and adequacy combine to ask the Court to develop a legal Catch-22 for would-be intervenors: those who move too early would be pressed to prove inadequate representation, while those who move too late would be pressed to prove timeliness. Merely to point out that conundrum is to prove that Plaintiffs' position is not the law.

Finally, Plaintiffs urge (at 1, 15) that Proposed Intervenors should simply file an amicus brief. But Proposed Intervenors could not seek dismissal under Rule 12(b)(6) via an amicus brief when Secretary LaRose declined to move to dismiss. Nor can Proposed Intervenors participate in discovery or appeal an adverse judgment via amicus brief. *See Buck v. Gordon*, 959 F.3d 219, 225–26 (6th Cir. 2020). With all of the requirements of Rule 24(a) mandatory intervention met, this Court should grant the Proposed Intervenors' motion.

II. Alternatively, the Court Should Grant the Proposed Intervenors Permissive Intervention.

Rule 24(b) authorizes courts to "permit anyone to intervene who, [o]n timely motion . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). As explained already, Proposed Intervenors' motion was timely. And Plaintiffs do not contest that Proposed Intervenors' defense will overlap with the questions of law and fact already before the Court (nor could they). Nor will intervention "unduly delay or

prejudice" the existing parties or the proceedings. Fed. R. Civ. P. 24(b)(3). Proposed Intervenors will abide by the discovery agreement, as well as all deadlines set by the Court, nullifying Plaintiffs' prejudice concerns. And as for multiplying proceedings, intervention may in fact expedite resolution of this case, since the Court could grant Proposed Intervenors' motion to dismiss. The Court should at minimum grant permissive intervention, as it did when the Ohio Republican Party sought to defend the precursor drop-box rule. *See A. Phillip Randolph Inst. v. LaRose*, No. 1:20-cv-1908, 2020 WL 5524842, at *1 (N.D. Ohio Sept. 15, 2020).

Plaintiffs (at 14) incorrectly collapse the standards for permissive intervention and intervention as of right. If they were correct, there would be no reason for the separate and differently phrased provisions in Rule 24(a) and (b), and courts would never grant permissive intervention after denying intervention as of right. Contrary to Plaintiffs' assertion, the Court can and should grant permissive intervention even if it were to deny intervention as of right, and courts regularly take that course. *See, e.g.*, *Driftless Area Land Conservancy v. Pub. Serv. Comm'n.*, No. 19-cv-1007, 2020 WL 7186150, at *2–3 (W.D. Wisc. Dec. 7, 2020); *Libertarian Party of Pa. v. Wolf*, No. 20-2299, 2020 WL 6580739, at *1 n.1 (E.D. Pa. July 8, 2020); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 1505640, at *5 (W.D. Wisc. Mar. 28, 2020); *Oneida Grp. Inc. v. Steelite Int'l U.S.A., Inc.*, No. 17-cv-957, 2017 WL 6459464, at *11–13 (E.D.N.Y. Dec. 15, 2017); *Allco Fin. Ltd. v. Etsy*, 300 F.R.D. 83, 87–88 (D. Conn. 2014).

Alternatively, the Court could exercise its discretion to grant permissive intervention without deciding the contested issues regarding intervention as of right, especially since Plaintiffs present no independent reason to deny permissive intervention. *See, e.g.*, *Buck*, 959 F.3d at 223; *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018); *Seneca Re-Ad Indus., Inc. v. Sec'y of Dep't of Lab.*, No. 3:20-cv-2325, 2021 WL 4441710, at *2 (N.D. Ohio Sept.

28, 2021); *A. Phillip Randolph Inst.*, 2020 WL 5524842, at *1; *Ohio A. Philip Randolph Inst.*, 2018 WL 8805953, at *1; *Pub. Int. Legal Found. v. Winfrey*, 463 F. Supp. 3d 795, 799 (E.D. Mich. 2020).

CONCLUSION

For these reasons, the Proposed Intervenors respectfully ask the Court to grant their motion to intervene as defendants in this case.

Dated: April 11, 2023

Respectfully submitted,

/s/ John M. Gore

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CERTIFICATE OF SERVICE

I certify that on April 11, 2023, a copy of the foregoing Reply in Support of Motion to Intervene 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/ John M. Gore

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