

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**Case Nos. 06-4412 and 06-4421**

**NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.***

**Plaintiffs-Appellees,**

**v.**

**J. KENNETH BLACKWELL,**

**Defendant-Appellant (06-4412)**

**STATE OF OHIO,**

**Intervenor-Appellant (06-4421)**

**On Appeal from the United States District Court  
for the Southern District of Ohio, Eastern Division  
Case No. 2:06-cv-00896**

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**COMBINED OPPOSITION OF PLAINTIFFS-APPELLEES NORTHEAST OHIO  
COALITION FOR THE HOMELESS AND SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 1199 TO EMERGENCY MOTIONS OF “STATE OF OHIO” FOR (1)  
REVERSAL OF DENIAL OF MOTION TO INTERVENE AS OF RIGHT AND (2) TO  
INTERVENE**

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Service Employees International Union Local 1199

Plaintiffs-Appellees Northeast Ohio Coalition for the Homeless (“NEOCH”) and Service Employees International Union Local 1199 (“SEIU”) (collectively “the Voters’ Organizations”) respectfully oppose non-party Ohio Attorney General Jim Petro’s motions styled as Emergency Motion For Reversal Of Denial Of Motion To Intervene As Of Right (case no. 06-4421) and Emergency Motion to Intervene (case no 06-4421).

## **INTRODUCTION**

On October 26, 2006, the District Court entered temporary restraining orders<sup>1</sup> enjoining Secretary of State J. Kenneth Blackwell and county boards of elections from enforcing the voter-identification requirements in Ohio’s Election Code. The orders were to last fewer than six days until the preliminary-injunction hearing the court had set for November 1. The orders would simplify voting by excising just the new voter-identification requirements that boards are applying inconsistently, thus returning boards to the system that they had used for decades and with which they were familiar.

With more voting days behind him than ahead of him (voting started on October 3), facing mounting evidence that Boards of Elections were applying the requirements inconsistently everywhere, having failed to give guidance before the elections on the requirements, and then having compounded the problem on the morning of the TRO hearing by issuing a directive that was wrong on the law and more restrictive than the rules that Ohio’s 88 counties’ boards of elections had been applying to voters—Blackwell decided not to appeal the TRO.

*But he did decide to continue at the rapidly approaching preliminary injunction to fight for the constitutionality of the voter-identification scheme.*

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<sup>1</sup> Although the Court’s order in this case refers to one district court order, there are actually two comprising the TRO package.

On these facts, the Ohio Attorney General now insists the sky is falling and that no one will defend the constitutionality of the statutes. But the Secretary of State—represented by two Assistant Attorneys General and two outside law firms that the Attorney General himself hired and controls—has defended and continues to defend the statute. Moreover, the sky remains firmly in place because all that happened was that Blackwell did not think it was worth appealing a TRO. Additional interim and final adjudications about constitutionality remain available in the case.

Under the rules and statute concerning intervention, that does not entitle the Attorney General to still more (fifth and sixth?) places at the table resulting in unnecessary delay and prejudice to the Voters' Organizations and their members.

## **STATEMENT OF FACTS**

### **I. Timing of intervention.**

Absentee voting in Ohio for the November 7 general election started on October 3, 2006. In the days thereafter, evidence emerged that the statutes were causing confusion with boards of elections and voters across Ohio. The Voters' Organizations served both the Attorney General's office and the Secretary of State with the final complaint and motion for temporary restraining order in this case on October 23, 2006. These were supported by voter declarations gathered after absentee voting started.<sup>2</sup> The declarations reported how counties were disparately handling the voter-identification requirements in early voting.

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<sup>2</sup> Repeating the canard that this case was "filed inexcusably late" (Atty Gen. Emerg. Mot. for Reversal of Denial of Mot. to Intervene of Right at 4) will do nothing to persuade anyone with a calendar of the proposition. It is not possible to file an "as-applied" constitutional challenge to a statute for a statewide election until the statewide election begins. It did on October 3. The Voters' Organizations filed suit on October 24 when the crisis became clear. It gets clearer by the day. The Attorney General would be just as quick to have it both ways and insist that a facial challenge filed prior to October 3 was "premature" and mere speculation. It is hard to fathom how smaller special elections in random congressional districts or local elections where few if any Voters' Organizations members here live (how many Northeast Ohio

All of these papers were filed with the district court the next morning, October 24, with a request that the case be transferred as a related case to one pending already before U.S. District Judge Marbley, *King Lincoln Bronzeville v. Blackwell*. The reasoning for the request was the commonality between the voter-identification challenges in both sets of plaintiffs' complaints. The previous day, apparently, the Attorney General had moved to intervene on the State's behalf in the *King Lincoln case*.

The new case—this case—was randomly drawn by Judge Frost. Later on the morning of October 24, Judge Frost met with counsel and the case remained with him. Later that evening, the *King Lincoln* plaintiffs filed a motion that the cases be treated as related, or, *in the alternative*, consolidated under Fed. R. Civ. P. 42. The motion stated correctly that Plaintiffs here had already said the cases were related, given the common voter-identification issues. But the motion also stated correctly that Plaintiffs here would not oppose consolidation only if the voter-identification issues in both cases were bifurcated and handled on a track separate from all of the other issues in the *King Lincoln* complaint.

Parties served all motions in both cases upon Richard Coglianese, Assistant Attorney General, who reports immediately to Sharon Jennings, a Senior Deputy Attorney General who is the chief of his constitutional-litigation section. Jennings helped formulate the argument and strategy in this case.<sup>3</sup>

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homeless live in Dayton?) would produce the kind of hard data seen here. With all due respect, voters would be better served if the Attorney General would address what this crisis means for real voters instead of decrying those who dare to point it out and fight to protect the voters' rights.

<sup>3</sup> See Interv. Hrng. Tr. at 42:22-43:1 (attached as Exhibit 1).

On October 25, both judges held a conference in chambers with counsel. That conference led to a decision for the cases to be treated as related, in keeping with the court's practice, and for this case to move to Judge Marbley.<sup>4</sup>

Although it is true that prior to the TRO hearing Assistant Attorney General Jennings asked counsel in this case whether they would oppose intervention in the *King Lincoln Bronzeville* case, counsel had no reason to oppose that or to care. There would be no apparent prejudice to Plaintiffs in this case, especially before the TRO hearing.

Nowhere on the district court's docket in either case is an order consolidating the cases. There is an order on October 26 transferring the case to Judge Marbley that says nothing about consolidation. That order too went electronically to Assistant Attorney General Coglianese, who reports to Senior Deputy Attorney General Sharon Jennings.

## **II. The TRO briefing, hearing, and TRO.**

Blackwell, through the Attorney General's office, filed a brief in opposition to Plaintiffs' motion for TRO prior to the TRO hearing defending the constitutionality of the voter-identification statutes.

The TRO hearing in this case was on October 26. Only counsel for the Plaintiffs here were at the table traditionally reserved only for plaintiffs' counsel (that closest to the jury).<sup>5</sup> It is the common practice that in a case so intertwined in law or fact it would be consolidated under Rule 42, that all counsel in all cases would be present at the table and have the opportunity to participate. Senior Deputy Attorney General Jennings was in the courtroom and observed that

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<sup>4</sup> The district court docket will reflect these events.

<sup>5</sup> TRO Hrng. Tr. at 1:14-1:15 (previously attached as exhibit to Voters' Organizations' opposition to Blackwell's motion for stay).

only the counsel in *this* case were serving as advocates or asked any questions by the court during the TRO hearing.<sup>6</sup>

Blackwell, again through Assistant Attorney General Coglianese, offered oral argument in defense. Although Coglianese did not contest the *factual* allegations about confusion and disparate treatment of voters across Ohio, Senior Deputy Attorney General Jennings—Coglianese’s supervisor—seemed to be present throughout the proceedings as Coglianese made several other arguments. Prior to the TRO hearing and on breaks, moreover, she conferred in the hallway with Assistant Attorney General Coglianese. She and all of the other lawyers who showed up in the courtroom that day helped formulate strategy for Blackwell.<sup>7</sup>

After a hearing and several hours in chambers with all counsel—including two Assistant Attorneys General and two special counsel hired by the Attorney General (some of which went on the record)—the judge issued his TROs.

The TROs, by their nature, provided limited relief. They did not constitute a final adjudication on the merits and were expressly to last for fewer than six days. The preliminary-injunction, permanent-injunction, and declaratory-judgment stages were some time off, leaving Blackwell, through counsel, plenty of time to try to shore up his defense.

### **III. The aftermath of the TRO.**

The General Assembly is not in session. It has passed no resolution expressing its collective will to intervene. The General Assembly, as a body, cannot have been apprised of the facts adduced thus far in this case—namely, that chaos reigns supreme as boards attempt to apply the voter-identification statutes. Nevertheless, the Attorney General claims the ability to divine the General Assembly’s intentions as though they were fixed in time—that a majority of

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<sup>6</sup> *Id.* at 21:12-21:13

<sup>7</sup> *Id.* at 30:10-31:3.

members of the General Assembly would have no concerns—even after being presented evidence of chaos, confusion, and botched Blackwell non-guidance and misguidance..

Once the Attorney General realized that Blackwell did not wish to appeal the TRO, he decided to try to press intervention in this case. Blackwell did not, however, suggest in any way that he was refusing to defend the constitutionality of Ohio’s voter-identification requirements. The Attorney General’s motion papers regarding intervention failed to mention that Assistant Attorney General Coglianese stood up in the district court and acknowledged on Blackwell’s behalf that the Secretary of State is going to continue to defend the case:

THE COURT: . . . Mr. Coglianese, has the Secretary of State withdrawn from the defense of this litigation?

MR. COGLIANESE: He has not, your honor.<sup>8</sup>

There was also this exchange:

THE COURT: Mr. Coglianese, would you please stand for a moment. I may have asked you this before but I just want to close this loop: Are you, on behalf of the Secretary of State, intending to defend this case at the preliminary injunction hearing on Wednesday?

MR. COGLIANESE: Your Honor, although we have not yet seen the preliminary injunction motion, standing in front of you right now this second, yes, that is my intention.

THE COURT: Have you had any indication from your client that you were not going to defend in the event that you lost the TRO yesterday?

MR. COGLIANESE: That we would not defend the PI?

THE COURT: That’s right.

MR. COGLIANESE: No, your honor.

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<sup>8</sup> Interv. Hrng. Tr. at 12:14-12:16.

THE COURT: In fact, am I correct that the Secretary of State's position is that even if you lost the TRO yesterday, you were still going to defend the preliminary injunction hearing whenever it was set? Was that your position?

MR. COGLIANESE: That is my understanding, your Honor.

THE COURT: Thank you. At least that clarifies that.

Go ahead, Ms. Jennings.

MS. JENNINGS: I guess, your Honor, that clarifies that at this particular moment in time. Obviously, we can't say with certainty what will happen between now and next Wednesday [the date of the preliminary-injunction hearing], thus the cause for my concern.

THE COURT: If on Monday Mr. Coglianese calls and says that the Secretary has decided not to go through with the defense of the preliminary injunction hearing, if I don't grant your motion, then you should renew your motion . . . .<sup>9</sup>

The district court further noted that that Blackwell's special counsel (hired by the Attorney General), William Todd, also had expressed Blackwell's intention to defend the statutes.<sup>10</sup> The court also made a fact finding that Assistant Attorney General Coglianese did an "exemplary"<sup>11</sup> job defending the constitutionality of the statutes at the TRO phase.

The (now stayed) TROs are an interim measure and are not a final adjudication on the merits of the preliminary and permanent injunction issues still to come, and are not a declaratory judgment on the constitutionality of Ohio's voter-identification requirements either.

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<sup>9</sup> Interv. Hrng. Tr. at 27:17-28:24.

<sup>10</sup> *See id.* at 44:10-44:14.

<sup>11</sup> *Id.* at 14.

## ARGUMENT

I. **The district court did not abuse its discretion in holding that the Attorney General does not have the right to intervene because he has no civil-rule based or statutory right to do so.**

A. **The Attorney General has no right under Fed. R. Civ. P. 24(a)(1) to intervene: that rule requires a federal statutory right, and 28 U.S.C. § 2403(b) gives the right only when (unlike here) there is no other state-related party.**

Fed. R. Civ. P. 24(a)(1) provides that a party has the right to intervene “(1) when a statute of the United States confers an unconditional right to intervene.”<sup>12</sup> Although the Attorney General seeks to invoke 28 U.S.C. § 2403(b), he admits that it does not “strictly apply,”<sup>13</sup> which is a polite way of admitting that it does not apply at all:

(b) in any action, suit, or proceeding in a court of the United States *to which a State or any agency, office, 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.<sup>14</sup>

While this case does challenge the constitutionality of the muddled voter-identification language in Ohio’s Election Code, section 2403(b)’s plain language provides that the State may not intervene under this section when another state agency is already a party. Federal courts have enforced this rule. Indeed, in *Jay*, the federal court held that the State of Maine could not intervene as a party under section 2403(b) because a town already in the case would be

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<sup>12</sup> Fed. R. Civ. Pro. 24(a)(1).

<sup>13</sup> Atty Gen. Emerg. Mot. for Reversal of Denial of Mot. to Intervene of Right at 11.

<sup>14</sup> 29 U.S.C. § 2403(b) (emphasis added).

considered a state agency: “If a state or any agency thereof is already a party to a particular action, suit or proceeding, section 2403(b) intervention does not apply.”<sup>15</sup>

In this case, the Secretary of State is still a party to this action. So the Attorney General cannot intervene using 28 U.S.C. § 2403(b). If Congress had meant to give an attorney general’s office unlimited authority to intervene in a case questioning the constitutionality of a state statute, then Congress could have written that authority into the section. If Congress had wanted to create carve-outs for situations where the Attorney General was personally dissatisfied with a state actor’s positions, it could have done so. Instead, however, Congress expressly chose to condition the *right* of intervention to circumstances where the State would otherwise have no voice at all.

This legislative policy choice makes sense. By its terms, section 2403(b) is intended to permit the courts to hear the perspective of state actors whose laws are being questioned without third parties going off and eviscerating statutes on their own. But here, the courts heard that perspective at the district court. The perspective was loud and clear through the voice of the Attorney General, no less. And the district court will continue to hear that perspective through the Attorney General and/or the special counsel he hires in the proceedings that follow.

Although the Attorney General invokes *Yniguez v. Arizona*,<sup>16</sup> trying to avoid the rule, the Ninth Circuit case is not binding, is distinguishable, and did not in any case establish the sweeping right the Attorney General claims here. In that case, the State was going to be completely voiceless to make the constitutional argument. That is, the court was not going to be

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<sup>15</sup> *International Paper Co. v. Town of Jay*, 124 F.R.D. 506, 509 (D. Me. 1989) (aff’d 887 F.2d 338 on different grounds) (because town is properly a state agency, State of Maine could not intervene as a party). See also *Sovereign News Co. v. Falke*, 448 F Supp 306, n. 13 (N.D. Ohio 1977) (no right to intervene by Ohio Attorney General under 28 U.S.C. 2403(b) because the Dayton and Cuyahoga County Prosecutors were already involved in the case challenging the constitutionality of a criminal statute).

<sup>16</sup> 939 F.2d 727 (9<sup>th</sup> Cir. 1991).

able to hear the argument. That is not true here. Blackwell is still litigating the case; he just chose not to appeal one small aspect of the early part of the case. Furthermore, in *Yniguez*, the Ninth Circuit manufactured (reading the statute more broadly than its plain language provides) a novel limited right in an appeals court to make constitutional arguments—not the right *to* appeal.<sup>17</sup> There is no reason for this Court to give section 2403(b) any broader meaning than what it says, especially since the Attorney General has made every argument that can be made—and will continue to do so in the district court below on Blackwell’s behalf.

Accordingly, the Attorney General cannot intervene under 24(a)(1) as long as the Secretary of State is still a party to the action.

**B. The Attorney General does not have the right under Fed. R. Civ. P. 24(a)(2) to intervene because his motion was not timely, his interests are not impaired, and his interests are adequately represented by Blackwell.**

Fed. R. Civ. P. 24(a)(2) provides as follows:

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.<sup>18</sup>

A party moving to intervene under Rule 24(a)(2) must satisfy four requirements before intervention as of right is proper:

- (1) the motion to intervene is timely;
- (2) the proposed intervenor has a substantial legal interest in the subject matter of the case;

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<sup>17</sup> *Id.* at 738-740.

<sup>18</sup> Fed. R. Civ. P. 24(a)(2).

- (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and
- (4) the parties already before the court may not adequately represent the proposed intervenor's interest.<sup>19</sup>

In considering a district court's denial of a motion to intervene under Rule 24(a)(2), the Sixth Circuit reviews the district court's timeliness determination for abuse of discretion and review the three remaining Rule 24(a)(2) factors de novo.<sup>20</sup>

1. *The district court did not abuse its discretion in holding that the timeliness issue is in "equipoise," that is, that the Attorney General did not prevail on that factor.*

Courts considers the question of timeliness on five factors:

- (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 of his interest in the case;
- (4) the prejudice to the original parties due to the proposed intervenor's failure to apply promptly for intervention; and
- (5) the existence of unusual circumstances militating against or in favor of intervention.<sup>21</sup>

Here, as to factor (1), the suit had progressed to the point where the parties had litigated the TRO issue and the court had ruled before the Attorney General sought to enter, appeal, and perhaps re-litigate issues.

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<sup>19</sup> *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

<sup>20</sup> *Jordan v. Michigan Conference of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000).

<sup>21</sup> *See id.* (citing *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

Yet, as to timeliness factor (2), the circumstances suggest, and the Attorney General seems to admit given his complaints about Blackwell, that he sought to intervene in the district court so he could appeal. (He appealed anyway, successfully, against the Secretary of State's strategic wishes, so that issue and motion now seem moot.) The Attorney General also supposedly sought to appeal to "have a voice" in the preliminary-injunction hearing and beyond. But the Attorney General has made it abundantly clear in his motion papers that it is only his voice that matters. And it is only the Attorney General's voice that is heard anyway, ostensibly for Blackwell, but (if the Attorney General is right) free to sing whatever tune the Attorney General wishes. If that is the case, then there is no point to this Court (or any court) letting the Attorney General sing in chorus rather than solo.

As to factors (3), (4), and (5) the Attorney General participated once as counsel (surely he is not suggesting unzealously) and waited until an adverse result to move to intervene in this case. The Attorney General's designated intervenor may have "thought" that she was intervening in a consolidated case but she was not. She was also on constructive notice that it was not a consolidated case. Her immediate subordinate was receiving electronic notices from the district court and there was no notice of consolidation. She also sat in court and watched proceedings unfold in a manner that any reasonable lawyer would recognize was not a consolidated case. Lawyers for only one case were sitting at counsel table. Only they got to argue. Her subordinate got to argue her side of the argument, a strategy she helped formulate. And now, the Attorney General wants another crack at it.

Let us leave aside the issue of whether a lawyer who formulates strategy for one client should formulate adverse strategy for another, if these strategies are indeed divergent as the Attorney General claims, for after all, the Attorney General starts off under Ohio's constitution

to all state actors. Let us also leave aside the curious suggestion to the district court that these lawyers, having all worked together, have supposedly now erected a “Chinese wall,”<sup>22</sup> because perhaps the Attorney General himself and his chief counsel get to peer on both sides. The reality of what the Attorney General is seeking here is the opportunity to impose a clean-up crew of lawyers who get to ask a second set of questions—all for the same purpose—defending the constitutionality of the voter-identifications statutes.

And this will all unfold to the prejudice of the Voters’ Organizations as the Attorney General gets two sets of lawyers arguing a case with a common purpose, strategy, and arguments, while the Voters’ Organizations just get one.

2. *The Attorney General’s interests will not be impaired and he will be adequately represented.*

Although the hurdle to show inadequate representation is minimal, “applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit.”<sup>23</sup> In *Michigan*, this Court affirmed the district court’s denial of a motion to intervene, observing that “The proposed interveners have failed to articulate why [Michigan]’s legal representation concerning this issue is inadequate. The relief requested by the proposed interveners and [Michigan] in their respective pleadings is nearly identical . . . . The proposed interveners have not identified any separate arguments unique to them that they would like to make[.]”<sup>24</sup> Other courts have held similarly.

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<sup>22</sup> Interv. Hrng. Tr. at 27:2-27:13.

<sup>23</sup> *Id.* at 443-44.

<sup>24</sup> *Id.* at 444.

“The most important factor in determining the adequacy of the representation is how the interest compares with the interest of existing parties.”<sup>25</sup> In *Arakaki*, the appeals court determined that proposed intervener's rights were represented by the parties already in the case, and held, “If the applicant’s interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation.”<sup>26</sup> The court further held, “Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.”<sup>27</sup>

Thus, this is a fact-based analysis, and the facts above show that the Attorney General’s office does not suffer from inadequate representation by Blackwell:

- (1) Attorney General attorneys are already arguing the case, in an “exemplary” fashion.
- (2) The supervisor of those same attorneys, who now seeks to “intervene” worked on strategy with the attorneys before and after the TRO hearing.
- (3) The Attorney General and Blackwell have the same ultimate objectives in that they both want the voter-identification laws and their implementation held constitutional (indeed, Blackwell has far more at stake since the Voters’ Organizations are criticizing his omissions and commissions as the reason the laws as applied are unconstitutional), and

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<sup>25</sup> *Arakaki v. Cayetano* 324 F.3d 1078, 1086 (9th Cir. 2003), citing 7C WRIGHT MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE Section 1909 at 332.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; accord *Geier v. Sundquist*, 1996 U.S. App. LEXIS 22376 (6th Cir. 1996) (holding “Whether Tennessee should rely more heavily on the *Fordice* decision is simply a question of litigation strategy. Such disagreements are inadequate to form the basis of a right to intervene.”); *California v. The Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (“[Proposed intervenor’s] assertion, with the benefit of hindsight, that it would have argued its interests more vigorously than existing parties does not amount to a showing of inadequate representation of its interests.”).

- (3) the Assistant Attorney General and special counsel representing Blackwell told the district court that they were going to defend against this action at the preliminary-injunction stage.

The district court was correct in holding that Blackwell’s desire not to appeal the TRO is merely litigation strategy, especially because the whole TRO issue could be moot following the preliminary-injunction hearing on Wednesday. It does not rise to the level of inadequate representation.<sup>28</sup> And the Attorney General’s suggestion that the failure to appeal a TRO—by definition fleeting relief—“is by definition a failure to adequately represent the interests of a party who does desire to appeal”<sup>29</sup> is like telling Kenny Rogers that when he sang

*You’ve got to know when to hold ‘em, know when to fold ‘em  
Know when to walk away, and know when to run . . .*<sup>30</sup>

that he was, in the childhood vernacular, a chicken. As the district court observed, “If you can demonstrate to me how the Secretary of State’s decision not to appeal a TRO decision, but to continue to defend the same position with the production of evidence at the preliminary injunction hearing, if you can show me how that does not amount to a zealous defense, then perhaps you can persuade me to allow the Attorney General to intervene permissively.”<sup>31</sup>

Given the facts, it is hard to see how Blackwell’s representation is inadequate. Members of the Attorney General’s office and special counsel that the Attorney General hires and controls have formulated and will be formulating the arguments to be made in the November 1, 2006 preliminary-injunction hearing in defense of the constitutionality of the voter-identification

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<sup>28</sup> See *Michigan State AFL-CIO v. Miller* 103 F.3d 1240, 1248 (6<sup>th</sup> Cir. 1997) (“The decision not to appeal certain aspects of the district court’s preliminary injunction may amount to sound litigation strategy....”).

<sup>29</sup> Atty Gen. Emerg. Mot. for Reversal of Denial of Mot. to Intervene of Right at 14.

<sup>30</sup> Lyrics to Kenny Rogers, “The Gambler” (available at [http://www.lyricsfreak.com/k/kenny+rogers/the+gambler\\_20077886.html](http://www.lyricsfreak.com/k/kenny+rogers/the+gambler_20077886.html), last accessed Oct. 30, 2006).

<sup>31</sup> Interv. Hrng. Tr. at 14:5-14:11.

statutes. They have made every conceivable argument. They will make every conceivable argument. Yet it is as though the Attorney General is protesting his own inadequacy.

For these reasons, the Attorney General has no right to intervene of right under Rule 24(a)(2).

**II. The district court properly acted within its discretion when it denied the Attorney General's application for permissive intervention.**

Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely, and if the “applicant’s claim or defense and the main action have a question of law or fact in common.” It also 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.” Accordingly, the denial of a party’s motion to intervene permissively is reviewed for abuse of discretion.<sup>32</sup>

Having considered the State’s motion for intervention after oral argument on Friday, October 27, 2006, the district court, in its discretion, determined not to permit the Attorney General to intervene in the underlying suit. As shown below, this Court should affirm that decision because the court did not abuse its discretion.

The Voters’ Organizations do not contest that the constitutional defense that the State raises has a question of law or fact in common with that presented in the main action. Rather, the defenses are so substantially similar as to render them essentially identical. Thus, allowing the Attorney General to intervene in the district court or appeal would add nothing. As such, the district court was within its discretion to determine that Blackwell would adequately represent the Attorney General’s interests (especially since the Attorney General would be doing the

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<sup>32</sup> *Head v. Jellico Housing Authority*, 870 F.2d 1117, 1124 (6th Cir. 1989).

“representing” both before it and on any appeal. Other courts of appeal have found similarly that when a parties’ interests are already sufficiently represented, the district court does not abuse its discretion in refusing permissive intervention.<sup>33</sup>

Even when a district court finds a common question of law or fact, it still has discretion to deny permissive intervention when such intervention would unduly delay or prejudice the adjudication of the rights of the original parties. In this case, the district court found, within its discretion, that allowing the State to intervene at this time would only serve to add layer upon layer of attorneys to an already complex matter, and that intervention would therefore unduly delay or prejudice those already a party to the action. One factor district courts may consider in making this determination is whether the party seeking to intervene has adequate representation in terms of its interests such that allowing intervention could only cause undue delay or prejudice.<sup>34</sup> Having found that Blackwell adequately represented the State’s interests and that the State had no new issues to bring to the table, the district court properly exercised its discretion in denying permissive intervention on the ground that it would cause undue delay or prejudice to the parties already involved in the action.

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<sup>33</sup> See, e.g., *Penick v. Columbus Ed. Ass’n*, 574 F.2d 889 (6th Cir. 1978) (district court properly treated the motion of public-school teachers’ bargaining agent as a matter of permissive intervention rather than as an intervention of right, where interests of teachers in proceedings appeared to substantially coincide with interests of defendant school board and where movant failed to suggest any actual specific dispute between itself and school board or any failure on part of board to represent its interests); *South Dakota ex rel Barnett v. U.S. Dept. of Interior*, 317 F.3d 783 (8th Cir. 2003) (district court did not abuse discretion in denying permissive intervention to tribe in state’s suit seeking to prevent United States from placing a certain parcel of land into trust on behalf of tribe, since district court, in stating that state’s involvement in case adequately protected tribe’s interests, articulated legitimate reason for denying motion).

<sup>34</sup> *Ingebretsen on Behalf of Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir. 1996) (movant organization properly denied permissive intervention as party defendant in action challenging state statute permitting public-school students to initiate prayer at various compulsory and noncompulsory school events; because organization brought no new issues to the action and its efforts would duplicate those of defendant state Attorney General, intervention would serve no purpose other than delay).

Finally, even when a party meets all the requirements for permissive intervention, the court still has broad discretion in determining whether to grant intervention.<sup>35</sup> Having reviewed all the relevant facts before it, the district court determined that permitting the State to intervene is not warranted. This Court should affirm that finding.

### CONCLUSION

For the reasons stated, this Court should deny the State of Ohio's various emergency motions regarding intervention.

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<sup>35</sup> *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78 (D. Me. 1989); *Continental Cas. Co. v. ZHA, Inc.*, 154 F.R.D. 281 (M.D. Fla. 1994) (recognizing that district court has discretion to deny permissive intervention even if application to intervene is timely and even if intervenor's claim or defense and main issue of underlying cause have common question of fact).

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