

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

LIBERTARIAN PARTY OF OHIO, <i>et al.</i>	:	
	:	
Plaintiffs,	:	CASE NO. 2:13-cv-00953
v.	:	
	:	JUDGE WATSON
JON A. HUSTED,	:	
OHIO SECRETARY OF STATE,	:	
	:	
Defendant.	:	

MOTION TO INTERVENE BY THE STATE OF OHIO

Ohio Attorney General Mike DeWine, on behalf of the State of Ohio, moves to intervene in this case pursuant to Civ. R. 24(a), Civ. R. 24(b), and 28 U.S.C. Section 2403(b), in order to defend the constitutionality of R.C. 3503.06(C)(1)(a), a provision of Ohio’s election law. A Memorandum in Support of this motion is attached. Also attached is a “Notice of Proposed Defenses” setting forth the proposed defenses of the State of Ohio, as required by Civ. R. 24(c).

Respectfully submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Kristopher J. Armstrong

KRISTOPHER J. ARMSTRONG (0077799)

Trial Attorney
ERIN BUTCHER-LYDEN (0087278)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2872
(614) 728-7592 (fax)

*Counsel for Proposed Intervenor
State of Ohio*

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This action was filed on September 25, 2013 against Secretary of State Jon Husted, and concerns the constitutionality of R.C. 3503(C)(1)(a). In the event that Secretary Husted elects not to present a comprehensive defense of the challenged statute on the merits, the Attorney General now seeks to intervene on behalf of the State of Ohio in order to defend the constitutionality of R.C. 3503(C)(1)(a). This Court should grant this motion to intervene as the State of Ohio has interests that differ from those of the Secretary of State, given the different roles of the Secretary and the General Assembly regarding the election laws. 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 the statutes. Accordingly, the State of Ohio has a right to intervene for the purpose of defending the challenged statutory provision.

II. STATEMENT OF FACTS

Plaintiffs filed this action on September 25, 2013, challenging the constitutionality of R.C. 3503.06(C)(1)(a), which became effective on June 21, 2013, and which states, “[e]xcept for a nominating petition for presidential electors, no person shall be entitled to circulate any petition unless the person is a resident of this state and is at least eighteen years of age.” R.C. 3503.06(C)(1)(a).

The State of Ohio asserts that this statute is constitutional. While the State is aware of *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), a split among the circuits of the United States Courts of Appeals exists. In *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) (hereinafter, “*IRI*”), the Eighth Circuit found a North Dakota statute

materially identical to R.C. 3503.06(C)(1)(a) to be constitutional because it was narrowly tailored to allow the state to locate and subpoena petition circulators, serving the compelling governmental interest of preventing fraud. A petition for a writ of certiorari is currently pending before the U.S. Supreme Court in the case of *Judd v. Libertarian Party of Virginia*, U.S. Supreme Court Case No. 13-231, asking the Court to resolve the circuit split in favor of the Eighth Circuit's decision in *IRI*. The State of Ohio has joined that petition as amicus curiae. The State urges this Court to refrain from ruling on the constitutionality of R.C. 3503.06(C)(1)(a) until the Supreme Court issues a ruling in the *Judd* case, which could have the effect of overruling *Nader v. Blackwell*. The State also asserts that preliminary injunctive relief is not appropriate as to either statute at this time as the requirements for an injunction are not met. The State of Ohio urges the Court to grant this motion to intervene so that the constitutionality of R.C. 3503(C)(1)(a) will receive the most comprehensive briefing possible.

III. LAW AND ARGUMENT

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

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

The Court should grant the State of Ohio the right to intervene under Civil Rule 24(a) because the State has a statutory right to intervene in cases in which the constitutionality of a State statute is at issue. Civil 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, Civil Rule 24(a)(1) and (a)(2) support a right to intervene.

The State of Ohio has a right to intervene pursuant to Civil 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 the challenged provision of Ohio's election law. Section 2403(b) 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. . . ." 28 U.S.C. § 2403(b). While this is not a case in which the duty to certify arises or the statute strictly applies because there is a State officer, the Secretary of State, who is already a party in the case, nevertheless the State of Ohio invokes its independent right to intervene under 28 U.S.C. § 2403(b), given the fact that the Secretary may elect not to fully litigate the constitutionality of the challenged statutes.

The purpose of Section 2403(b) is to guarantee that the State of Ohio has an opportunity to be heard when the constitutionality of a state statute is at issue, and this case indisputably concerns the constitutionality of a statute very important to the State of Ohio. Accordingly, the State of Ohio also meets the test set forth in Civil Rule 24(a)(2). The State of Ohio has an interest in the constitutionality of the statute at issue, which will be impeded by a negative disposition of this action. Civ. R. 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 Civil Rule 24(b). Civil 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 was filed on September 25, 2013, and a Fed. R. Civ. P. 65.1 conference is set for the afternoon of October 3, 2013. Under these circumstances, this motion is timely, particularly where the court and the parties have yet to address the merits.

Second, the State of Ohio’s defenses share common questions of law and fact with Plaintiffs’ claims. Plaintiffs allege that R.C. 3503(C)(1)(a) is unconstitutional; the State of Ohio will present argument regarding why the statute is 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 solely to present evidence and arguments on the constitutionality of the challenged provision. 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 regarding the enactment of this statute.

IV. CONCLUSION

For these reasons, the State of Ohio asks the Court to permit the Attorney General to intervene on behalf of the State of Ohio in order to defend the constitutionality of the challenged provision of Ohio's elections law.

Respectfully submitted,

MIKE DEWINE
OHIO ATTORNEY GENERAL

/s/ Kristopher J. Armstrong

KRISTOPHER J. ARMSTRONG (0077799)

Trial Attorney

ERIN BUTCHER-LYDEN (0087278)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

(614) 466-2872

(614) 728-7592 (fax)

*Counsel for Proposed Intervenor
State of Ohio*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2013, 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. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Kristopher J. Armstrong

Kristopher J. Armstrong
Assistant Attorney General