UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

INTERNATIONAL ALLIANCE OF THEATER STAGE EMPLOYEES LOCAL 927, *Plaintiff*, v. MATTHEW MASHBURN, EDWARD LINDSEY, JANICE W. JOHNSTON, and SARA TINDALL GHAZAL, *in their official capacities as members of the Georgia State Election Board*; and PATRISE PERKINS-HOOKER, AARON V. JOHNSON, MICHAEL HEEKIN, and TERESA K. CRAWFORD, *in their official capacities as members of the Fulton County Registration and Elections Board*, *Defendants*.	No. 1:23-cv-04929-AT

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE

The State does not oppose Movants' intervention. The Plaintiff does, but it concedes nearly all of the elements. It does not dispute that Movants have interests at stake in this case. It does not dispute that those interests will be impaired by an adverse judgment. And it does not dispute that the current Defendants may not adequately represent those interests.

Add up those concessions, and the Plaintiff is left with one argument: timeliness. It claims that Movants filed too late. But under the caselaw, the motion is timely: the Plaintiff amended its complaint just last week, Movants

intervened just four days after learning their interests were at stake and not adequately represented, no substantive proceedings have taken place, and no party has suffered harm by the alleged delay.

Any concerns of future delay also need not trouble the Court. After all, the Court, not the Plaintiff, sets the timeline of this case. Republican committees have participated in dozens of cases across the country, including several in this Court.[1] Those cases often involve expedited timelines and emergency motions. Yet the Plaintiff does not cite a single instance of Republican intervenors delaying proceedings. It has no evidence supporting its speculations of delay and prejudice. Movants will abide by whatever deadlines the Court sets. The motion is timely.

That the Plaintiff amended its complaint last week should quash any lingering doubts about intervention. The amendment resets the response deadlines in this case, further undermining the Plaintiff's fears of delay. And as the amended complaint demonstrates, Movants' arguments on the merits have already cleaned up this case: as a result of Movants' proposed motion to dismiss (Doc. 52), the Plaintiff backed off its overbroad demand to enjoin the eleven-day deadline as to all voters. Now, it demands an injunction only as to those who "may be absent on election day." Doc. 62 at 13. Movants' participation has already helped the Court narrow the issues, and it will continue to help the Court if the motion to intervene is granted.

[1] *See* Doc. 51-1 at 2 n.2.

I. The motion is timely.

A. Movants intervened just four days after they learned their interests were at stake.

The Plaintiff insists that the Court must measure the intervention motion from the time the complaint was filed, but "mere knowledge of the pendency of an action" does not put prospective intervenors on notice that their interests are at stake. *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1516 (11th Cir. 1983). Rather, "the timeliness of [the] motion should be assessed in relation to that point in time" when the "need to seek intervention" arose. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 280 (2022). And the relevant point when Movants "knew or should have known of [their] interest in the action" was when the State filed a pleading demonstrating it "will not argue" in favor of Movants' interests. *Reassure Am. Life Ins. v. Shomers*, 265 F.R.D. 672, 675 (S.D. Fla. 2010); *see also W. Watersheds Project v. Haaland*, 22 F.4th 828, 836 (9th Cir. 2022) ("[T]he crucial date for assessing the timeliness of a motion to intervene is when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties.").

When the State filed its motion to dismiss on January 8, it demonstrated that its "interests diverge" from Movants because "[t]he State and its officials would prefer to not resolve this case on the merits at all" and instead contend that the case "should be dismissed on … standing grounds." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 308 (5th Cir. 2022). That the constitutional infirmity in the Plaintiff's case is "not raised by any of the existing parties" only underscores why Movants' involvement is critical to defending their

interests. Doc. 61 at 3. Movants are the only party defending the Georgia law on the merits, and they moved to intervene just four days after learning that fact.

The Plaintiff's interpretation of the rule would put all intervenors in a Catch-22. On one hand, parties could rush to intervene before the existing defendants stake out their interests. That might put the timeliness arguments to rest, but it means that all parties lack key information on the defendants' interests and adequacy of representation, and it would require the courts to address potentially unnecessary intervention motions. On the other hand, intervenors could wait for the defendants to make their positions and interests known. If those interests diverge or the defendants show they may not adequately represent the intervenors' interests, the intervenors then have stronger reasons to participate in the case. That is precisely why courts have held that "a potential party could not be said to have unduly delayed in moving to intervene if its interests had been adequately represented until shortly before the motion to intervene." *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010) (collecting cases from the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits). And it's why "mere knowledge of the pendency of an action" does not start the clock on intervention. *Jefferson Cnty.*, 720 F.2d at 1516; *see also Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1294 (11th Cir. 2017) (holding that the district court abused its discretion by denying intervention motion as untimely when "[t]he reason for … intervention … arose only two weeks before [the intervenor] sought to intervene").

The Plaintiff ignores other key holdings of the Eleventh Circuit and this Court indicating that the motion is timely. The Court has not yet taken "significant action," *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1259-60 (11th Cir. 2002), and "no substantive proceedings have taken place," *Ga. Aquarium, Inc. v. Pritzker*, 309 F.R.D. 680, 684 n.6 (N.D. Ga. 2014) (Totenberg, J.). Both facts hollow out any claims of delay and prejudice, but the Plaintiff ignores them. Indeed, the Plaintiff admits that its amended complaint resets the response deadlines in this case, providing all parties with plenty of time to brief the dispositive motions. *See* Doc. 61 at 2 n.1.

B. Even if measured from the filing of the initial complaint, the motion is timely.

Even if the State were defending the law on the merits, and even if the Plaintiff had not amended its complaint just last week, the intervention motion would be timely. As Movants pointed out, this Court and the Eleventh Circuit have found intervention motions timely when filed much later than three months after the lawsuit began. *See* Doc. 51-1 at 5 (collecting cases). The Plaintiff has no response to these cases.

Instead, the Plaintiff points to a single case in which a court found that moving to intervene two months after the complaint was untimely. *See* Doc. 61 at 5 (citing *Weltner v. Raffensperger*, No. 1:20-cv-1407, 2020 WL 8116172 (N.D. Ga. June 26, 2020)). *Weltner* doesn't apply here for at least two reasons. First, the intervenor in that case sought to intervene as a *plaintiff*, not a defendant. *See Weltner*, 2020 WL 8116172, at *5. That meant he was on notice of his interests at the time the complaint was filed, rather than at the time the defendants answered the complaint. Comparing apples to apples, the *two-month* wait

in *Weltner* is unlike the *four-day* wait here and thus can't support a finding of delay. Second, because the intervenor in *Weltner* was a plaintiff, he could file his own lawsuit to defend his interests. Indeed, he had already filed a state court lawsuit that nearly precluded his federal intervention. *See id.* at *3-4. Movants are intervening as defendants, however, and will likely have no other opportunity to defend the merits of the Georgia law that the Plaintiff attempts to undermine. Their motion is timely.

C. In the unlikely event this case is delayed, the Plaintiff has not shown evidence of prejudice.

The Plaintiff repeatedly asserts that it will suffer prejudice if the case is delayed. It has no evidence or support for those assertions. The Plaintiff ignores that Movants guarantee they will abide by whatever deadlines the Court imposes, which "weakens any claims of undue delay." *Mont. Pub. Int. Rsch. Grp. v. Jacobsen*, No. 6:23-cv-70, 2024 WL 197364, at *4-5 (D. Mont. Jan. 18, 2024) (granting intervention to the Republican National Committee and the Montana Republican Party). Movants' arguments don't require discovery or factual development. Their motion to dismiss demonstrates their commitment to reduce duplicative briefing, as it exclusively raises arguments that the State did not make. Movants and other Republican committees have participated in countless similar lawsuits across the country on compressed timelines, and the Plaintiff can't point to a single instance of the Republican intervenors holding up proceedings. All of these considerations outweigh the Plaintiff's evidence-less claims of prejudice and delay.

Rule 5.1 also provides no basis for denying intervention. The Plaintiff cites no case denying intervention because of a commonplace Rule 5.1 certifi-

cation. That's unsurprising, since Rule 5.1 will not stay the case or move deadlines. Immediately after being allowed in the case, Movants will serve a notice on the Attorney General, and the Court can file the Rule 5.1 certification—that's it. The Plaintiff doesn't do anything. And there's no need to move any deadlines when waiting for the Attorney General to respond; the parties can continue the case as scheduled while that clock runs. The sixty-day deadline matters *only* if the Court were to grant judgment in Movants' favor on the constitutional argument. *See* Fed. R. Civ. P. 5.1(c) ("Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional."). Finally, in the unlikely event the Attorney General takes an interest and intervenes in this case, that still would not require moving any deadlines.[2] Either way, the Rule 5.1 process will aid the Court, not hinder it. And in all events the Court retains power over the schedule of this case.

II. The Plaintiff amended its complaint in response to Movants' proposed motion to dismiss.

Movants' arguments have already cleaned up this case. The Plaintiff amended its complaint at least in part to address the deficiencies that Movants pointed out in their proposed motion to dismiss. That amendment supports intervention for at least three reasons.

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[2] The Justice Department has other ways to express its views in this case without intervening. The Attorney General, for example, can "attend to the interests of the United States" by filing amicus briefs in federal cases (sometimes called "statements of interest"). 28 U.S.C. §517. Indeed, the Justice Department has recently filed those briefs in response to arguments made by Republican intervenors. *E.g.*, *In re Ga. Senate Bill 202*, Doc. 834, No. 1:21-mi-55555 (Jan. 31, 2024); *Vote.org v. Byrd*, Doc. 118, No. 4:23-cv-111 (N.D. Fla. July 10, 2023); *Pa. State Conf. of the NAACP v. Schmidt*, Doc. 229, No. 1:22-cv-339 (W.D. Pa. Feb. 3, 2023). The Plaintiff provides no reason why the Justice Department would intervene under Rule 5.1 as opposed to its typical practice of filing a §517 brief.

First, to the extent the Plaintiff had any valid claims of delay, the amended complaint dissolves them. The Plaintiff amended its complaint just last week. Any delay in the proceedings thus far is the result of the Plaintiff's deficient pleading, not Movants' intervention. *See Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) ("[The plaintiff] can hardly be said to be prejudiced by having to prove a lawsuit it chose to initiate."). To the extent Movants' proposed motion to dismiss prompted that amendment, that kind of prejudice is not "undu[e]" under Rule 24; it's just the normal course of litigation. And because the amended complaint restarts the clock on the responsive pleadings, the Plaintiff has no ground to complain that Movants' motion to dismiss is untimely.[3]

Second, the amended complaint proves that Movants' participation has already benefited the Court. The purpose of amending pleadings in response to a motion to dismiss is to "avoid the need to decide the motion or reduce the number of issues to be decided," to "expedite determination of issues that otherwise might be raised seriatim," and to "advance other pretrial proceedings." Fed. R. Civ. P. 15 (Committee Notes, 2009 Amendment). Movants' arguments have, for example, already forced the Plaintiff to clarify its position on the breadth of the Voting Rights Act. In its initial complaint, the Plaintiff asked the Court to enjoin Georgia's eleven-day absentee-ballot deadline for *all voters* voting for President or Vice President. *See* Doc. 1 at 10-11. But as Movants pointed out, the seven-day deadline in the Voting Rights Act "applies only to

[3] Movants are also filing a proposed motion to dismiss the amended complaint. The motion is substantively identical to their first motion to dismiss, except that it removes the section on facial relief that the Plaintiff addressed in its amended complaint.

'duly qualified residents … who may be absent from their election district' on election day." Doc. 52 at 18 (quoting 52 U.S.C. §10502(d)). In response, the Plaintiff amended its complaint and now asks the Court to enjoin enforcement of the eleven-day deadline only against voters "who may be absent from their election district on election day." Doc. 62 at 12. That amendment effectively concedes that the request to enjoin the Georgia law across the board was improper. Movants' arguments have already helped the Court and the parties avoid that fatal legal error.

Third, the amended complaint narrowed the issues, but it did not resolve them. To start, the amended complaint does not resolve the constitutional issue. The Plaintiff misstates Movants' constitutional argument, claiming that Movants "disput[e] the holding of *Oregon v. Mitchell*." Doc. 61 at 6. Not so. The Plaintiff just doesn't understand the holding. If the Plaintiff had to respond to Movants' arguments, it would have to show why its interpretation of *Oregon v. Mitchell* is correct. It can't, which is why it doesn't want to respond. Regardless of what the Court thinks about the merits of those arguments at this stage—or even later in the litigation—Movants' participation is essential to a full hearing on these critical issues.

The parties' disagreements about *Oregon v. Mitchell* aside, the Plaintiff overlooks other key issues that will arise in this litigation. For one, the *Purcell* doctrine will apply as soon as the Plaintiff demands immediate relief. The *Purcell* doctrine instructs federal courts to refrain from "ordering … relief" that "alter[s] the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell v.*

Gonzalez, 549 U.S. 1 (2006)). That is, although "*Purcell* alone" does not "provide a reason to dismiss Plaintiffs' claims," the doctrine would come into play once the Plaintiff moves for a judgment in its favor. *Clark v. Edwards*, 468 F. Supp. 3d 725, 737 (M.D. La. 2020). Advance voting for the general election begins in just eight months. *See* 2024 Election Calendar and Highlights, Ga. Off. of the Sec'y of State, Elections Div., https://perma.cc/M62S-9RAJ. Georgia voters will begin requesting absentee ballots on August 19. *See id.* at 10. Election officials must print those applications well in advance of that date, along with instructions about how and when to submit those applications. Meanwhile, the parties will not complete summary judgment until March 27 at the earliest, which means the Court would not be poised to enter judgment until this spring—just a few months or even weeks ahead of the August date. *See* Doc. 35 at 16. The Eleventh Circuit has held that four months "easily falls within" *Purcell*'s reach. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 n.6 (11th Cir. 2022). If this case moves forward, it will run squarely into *Purcell*.

Moreover, if the case even gets that far, the scope of relief will also cause problems. The Plaintiff now concedes that the Court can't enjoin the Defendants from giving "any effect" to the Georgia law, Doc. 1 at 10, and instead requests that the Court enjoin the law only as to voters who "may be absent on election day," Doc. 61 at 13. But election officials don't know who "may be" absent on election day. Some States require voters to show that they may be absent in order to vote by absentee ballot. Georgia does not. But without that advance determination, it is impossible for election officials to distinguish be-

tween the application of a voter who "may be" absent on election day and the application of a voter who will be present. The eleven-day deadline is indisputably valid as applied to the latter ballot, *see* Doc. 61 at 12-13, and any relief in the Plaintiff's favor must account for that reality.

The *Purcell* and relief problems with this case are particularly important to Movants, who must inform their voters on when and how to vote, print mailers, and run campaigns in accordance with the law. Movants detailed these interests in their motion to intervene, *see* Doc. 51-1 at 6-12, and the Plaintiff doesn't dispute them. That *Purcell* and other issues are not yet ripe does not mean Movants have any less an interest in this case. In short, Movants' interests do not begin and end at the pleading stage.

* * *

In sum, the caselaw forecloses the Plaintiff's claims of delay. Timeliness under both Rule 24(a) and 24(b) is not an "equities" analysis. Doc. 61 at 7. It's a "delay or prejudice" analysis. Fed. R. Civ. P. 24(b)(3). And the Plaintiff has no evidence that intervention will delay or prejudice the adjudication of this case, let alone "unduly" so. *Id.* The Plaintiff concedes every other element of intervention as of right and permissive intervention. The State doesn't oppose intervention, and this Court has never denied intervention to a political committee. This is not the case to start.

CONCLUSION

The Court should grant the motion to intervene.

Dated: February 9, 2024

Respectfully submitted,

/s/ Alex Kaufman

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CERTIFICATE OF COMPLIANCE

This document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ Alex Kaufman

CERTIFICATE OF SERVICE

On February 9, 2024, I e-filed this document on ECF, which will email everyone requiring service.

/s/ Alex Kaufman