

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

RHONDA J. MARTIN, DANA BOWERS,
JASMINE CLARK, SMYTHE DUVAL,
JEANNE DUFORT and THE GEORGIA
COALITION FOR THE PEOPLE’S
AGENDA, INC.,

Plaintiffs,

CAROLYN BOURDEAUX FOR
CONGRESS and FAZAL KHAN,

Proposed Plaintiff-Intervenors,

v.

BRIAN KEMP, SECRETARY OF STATE
OF GEORGIA; REBECCA N.
SULLIVAN, RALPH F. “RUSTY”
SIMPSON, DAVID J. WORLEY and
SETH HARP; STEPHEN DAY, JOHN
MANGANO, ALICE O’LENICK, BEN
SATTFIELD and BEAUTY
BALDWIN,

Defendants.

Civil Action File No.

1:18-cv-04776 LMM

BRIEF IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFFS

Pursuant to Federal Rule of Civil Procedure 24, Carolyn Bourdeaux for Congress and Fazal Khan (collectively, “Proposed Plaintiff-Intervenors”) move to

intervene as plaintiffs in the above-titled action. In this action, Plaintiffs Rhonda J. Martin, Dana Bowers, and Jasmine Clark, Smythe Du Val, Jeanne Dufort, the Georgia Coalition for the People's Agenda, Inc., and the American Advancing Justice-Atlanta (collectively, the "Plaintiffs") challenged Georgia's statutory procedures for rejecting absentee ballots due to alleged technical errors, such as missing dates of birth or addresses. Contrary to federal and state law, Gwinnett County election officials are rejecting absentee ballots which were cast by registered Georgia voters about which there is no question as to their identity or qualifications to vote based on immaterial omissions or errors on the absentee ballot oath, such as a missing date of birth or address. Proposed Plaintiff-Intervenors seek an Order requiring that these ballots be counted and that the certification, which is scheduled to occur on this coming Tuesday, November 13, 2018, be delayed until such time as this Court can consider this matter and the ballots be counted should the Court grant the relief the Proposed Plaintiff-Intervenors are seeking. Proposed Plaintiff-Intervenors also seek to require defendants to permit voters who failed to sign the Oath an opportunity to cure their ballots (during the three-day period immediately following this Court's grant of Plaintiff-Intervenors' requested relief). Counsel for the Proposed Plaintiff-Intervenors have consulted counsel for the Plaintiffs and they do not oppose the Proposed Plaintiff-Intervenors' intervention. Counsel for the Proposed Plaintiff-Intervenors have sought defendants' position, but Defendants

have not yet been able to convene their Boards to provide a response, and therefore have no position at this time.

As the principal campaign committee in support of Carolyn Bourdeaux's election to Georgia's 7th Congressional District in the United States House of Representatives, the Carolyn Bourdeaux for Congress ("the Campaign") has a keen interest in the outcome of this litigation. The Campaign's mission is for Carolyn Bourdeaux to be elected to the House, and its mission will be undermined if valid absentee ballots cast by voters who support Carolyn Bourdeaux and her election are illegally and unconstitutionally rejected based on immaterial information that is either missing from or incorrect on the absentee ballot oath. Similarly, Proposed Plaintiff-Intervenor Khan has an interest in the outcome of this litigation. If defendants are permitted to maintain their illegal policy of rejecting absentee ballots for immaterial reasons, then Plaintiff Khan will suffer irreparable harm and serious injury in the form of total disenfranchisement, despite the fact that he was an eligible voter in the November 2018 election.

Proposed Plaintiff-Intervenors' interests are not adequately represented in this litigation, because the arguments put forth and the relief requested by the Plaintiffs diverge from that of Proposed Plaintiff-Intervenors. Specifically, Proposed Plaintiff-Intervenors seek consideration of a federal Civil Rights Act claim that the current Plaintiffs did not allege and Proposed Plaintiff-Intervenors request a more narrowly

defined remedy – (1) that all unlawfully rejected absentee ballots in Gwinnett County be counted, and (2) that voters who cast absentee ballots but did not sign the oath on the ballot envelope be permitted to cure their ballots by appearing at their county elections office and signing the ballot within three days of a Court order, should this Court order the relief requested by Proposed Plaintiff-Intervenors. Proposed Plaintiff-Intervenors seek intervention as of right, or, in the alternative seek permissive intervention. Pursuant to Federal Rule of Civil Procedure 24(c), this Motion is accompanied by a proposed Complaint, which is attached hereto as Exhibit 1, and a proposed order, filed concurrently with this Motion.

ARGUMENT

This litigation will have a direct impact on the Campaign's mission to elect Carolyn Bourdeaux to Congress. It will also have a direct impact on the ability of Proposed Plaintiff-Intervenor Khan's fundamental right to vote in the November 2018 election. Given these interests, which are not adequately protected by any of the current plaintiffs, and the fact that the circumstances surrounding the litigation have changed (the election has been held and the Gwinnett County Board has continued to reject absentee ballots on illegal grounds), the motion to intervene should be granted. As set forth below, Proposed Plaintiff-Intervenors meet the requirements for intervention as a matter of right under the Federal Rule of Civil

Procedure 24(a)(2). Alternatively, this Court could and should allow the Proposed Plaintiff-Intervenors permissive intervention under Rule 24(b).

I. Proposed Plaintiff-Intervenors Are Entitled to Intervene as a Matter of Right Under 24(a)(2).

Proposed Plaintiff-Intervenors easily meet the Eleventh Circuit test for motions to intervene as of right. To qualify, upon timely application, a third party “must show that it has an interest in the subject matter of the suit, that its ability to protect that interest may be impaired by the disposition of the suit, and that existing parties in the suit cannot adequately protect that interest.” *Mt. Hawley Ins. Co. v. Sandy Lake Props, Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005).

First, there can be no dispute that the motion is timely. Proposed Plaintiff-Intervenors are seeking to intervene as soon as they learned that Gwinnett County, which is within Georgia’s 7th Congressional District, was rejecting absentee ballots in violation of federal law and U.S. Constitution, and that, despite requests that it abide by federal and state law, it would not alter this unlawful practice. The Gwinnett County Board was asked to reconsider its position and count absentee ballots that have missing or incorrect information that is immaterial to the identity of the voter, but it affirmed yesterday afternoon that it would not do so. *See* Letter from Sean Young to Lynn Ledford (Nov. 8, 2018), *available at* https://www.acluga.org/sites/default/files/field_documents/acluga-demand-ltr-absentee-ballot-missing-birthdate.pdf (attached as Exhibit 2) (demanding that

Gwinnett County elections officials count absentee ballots that have been rejected because they contain missing or incorrect birthdate information on the absentee ballot envelope); *see also* Tyler Estep, *Gwinnett Elections Board Meets in Private as Ballot Battles Continue*, Atlanta Journal-Constitution (Nov. 9, 2018), <https://www.ajc.com/news/local-govt--politics/gwinnett-elections-board-meets-private-ballot-battles-continue/7b1Im3tlGNjD3aZtIeBTUK/> (noting that the Gwinnett County Board's position with respect to rejecting absentee ballots would not change). *Compare Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1294 (11th Cir. 2017) (finding motion to intervene timely, though filed the 33 years after the district court's order, because intervenor did not know of its interest until shortly before filing its motion). Further, the Proposed Plaintiff-Intervenors are seeking to intervene after the ballots have been cast, but before the election results have been certified and before even the deadline for curing provisional ballots has lapsed (November 13, 2018). *See Martin v. Kemp*, Dkt. No. 23. Accordingly, no party can legitimately claim that intervention by Proposed Plaintiff-Intervenors at this stage would cause them any prejudicial delay. Nor have Proposed Plaintiff-Intervenors delayed in moving for intervention. Indeed, the Gwinnett Board announced its decision to reject the request that it count the ballots at issue only two days ago, on Friday, November 9. Estep, *supra*.

Second, the Proposed Plaintiff-Intervenors' interests directly relate to the subject matter of this action. This inquiry is a "flexible one." *See Chiles v. Thornburgh*, 865 F.2d 1197, 1215 (11th Cir. 1989); *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) ("[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value"). Indeed, "[t]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Worlds v. Dep't of Health & Rehab. Servs.*, 929 F.2d 591, 594 (11th Cir. 1991). Proposed Plaintiff-Intervenor Khan has a clear interest in the outcome of this litigation. If defendants are permitted to maintain their illegal policy of rejecting absentee ballots for immaterial reasons, then Plaintiff Khan will suffer irreparable harm and serious injury in the form of total disenfranchisement, despite the fact that he was an eligible voter in the November 2018 election. In addition, the Campaign has an interest in ensuring that its supporters' legally cast ballots are counted as required by federal and state law. Georgia elections are governed by Georgia's election laws, as well as the U.S. Constitution. As the principal campaign committee for a candidate in the 2018 Election for Representative of Georgia's 7th Congressional district, the Campaign has an interest in ensuring that all votes are counted. In fact, as of the date of this filing, out of the 17,809 absentee ballots

counted in the 7th Congressional District, 10,208 were for the Candidate (about 57 percent).¹ More specifically, in Gwinnett County, of the 14,298 absentee ballots counted, 8,551 (nearly 60 percent) were for the Candidate.² The Campaign certainly has a legally cognizable and indeed compelling interest in this litigation because the rejected ballots are more likely than not to be from voters in support of her candidacy. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006) (recognizing that “harm to [] election prospects” was “a concrete and particularized injury”); *Winston v. United States*, No. 14-cv-05417-MEJ, 2015 WL 9474284, *2 (N.D. Cal. Dec. 29, 2015) (recognizing a “concrete” “economic interest” that is “related to the underlying subject matter of the litigation” triggers the right to intervene) (citation omitted).

Third, Proposed Plaintiff-Intervenors will be impaired by the outcome of this case. Impairment is a “diminution, however small, in strength, value, quality, or quantity.” 6 Moore’s Fed. Practice, § 24.03(3)(a). Rule 24(a) does not require legal impairment of a movant’s interests. It is enough that a movant’s ability to protect its interests may be impaired as a practical matter. In addition, the rule’s emphasis on “practical disadvantage” was “designed to liberalize the right to intervene in federal

¹ Sec’y of State, Nov. 6, 2018 Election Day Results, *available at* <https://results.enr.clarityelections.com/GA/91639/Web02-state.220747/#/cid/30700>.

² *Id.*, *available at* <https://results.enr.clarityelections.com/GA/Gwinnett/91707/Web02.216033/#/cid/115>

actions.” *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967). As discussed, the Proposed Plaintiff-Intervenors have a significant, protectable interest, and absent intervention, the Court’s findings will place them at a practical disadvantage in protecting those interests. Moreover, absent intervention, Proposed Plaintiff-Intervenors would have no way to appeal the Court’s ruling denying the Plaintiff’s Motion for Preliminary Injunction regarding absentee ballots where the signatures match but are missing other immaterial information. *Martin v. Kemp*, Dkt. No. 41. Proposed Plaintiff-Intervenors would have no ability to vindicate their rights in a separate proceeding, following resolution of this action, because the principle of *stare decisis* may apply. Moreover, Proposed Plaintiff-Intervenors have a need for immediate relief to require Gwinnett County to count these votes before the election is certified.

Fourth, the Proposed Plaintiff-Intervenors’ interests are not adequately protected by existing parties in this litigation. The “requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). “Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action.” *Fed. Savings & Loan Ins. Co. v. Falls Chase Special Taxing Dist.*,

983 F.2d 211, 216 (11th Cir. 1993). First, Proposed Plaintiff-Intervenors seek relief from this Court on an expedited timeline. Second, the Plaintiffs do not adequately represent the Proposed Plaintiff-Intervenors' interests because they do not request the same relief as Proposed Plaintiff-Intervenors. For example, the Plaintiffs have requested that the Court enter an order requiring a "one-stop cure," which would require the county election officials to create a new procedure for curing absentee ballots missing information such as date of birth and address. *Martin v. Kemp*, Dkt. No. 41.

By contrast, Proposed Plaintiff-Intervenors maintain that the missing information is immaterial and need not be cured for the election officials to count the votes. Georgia law makes clear that this information is not necessary to verify the identity of the voter and cannot be used to automatically deny a voter's fundamental rights. *Jones v. Jessup*, 279 Ga. 531, 533 n.5 (2005). Furthermore, the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), prohibits government officials from rejecting ballots that includes errors or omissions of information immaterial to determining whether the individual is eligible to vote. Proposed Plaintiff-Intervenors assert that because voters prove age eligibility when they register, O.C.G.A. § 21-2-381 (b) (registrar sends absentee ballot once voter's eligibility is confirmed), not when they mail their absentee ballot, any information on the absentee ballot envelope, other than perhaps their signature, is immaterial to determining whether

the voter is qualified. Thus, the county election officials may not reject ballots because of those errors or omissions.

II. In the Alternative, Proposed Plaintiff-Intervenors Are Entitled to Permissible Intervention.

If the Court does not grant the Proposed Plaintiff-Intervenors' motion to intervene as a matter of right, they respectfully request that the Court exercise its discretion to allow them to intervene under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention when the Court determines that (1) the intervenor's claim or defense and the main action have a question of law or fact in common, and that (2) the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1)(B); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002) ("Permissive intervention under Fed. R. Civ. Proc. 24(b) is appropriate where a party's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties.").

The Plaintiff-Intervenors meet the requirements for permissive intervention. First, the Plaintiff-Intervenors' proposed complaint has questions of law and in common with the First Amended Complaint: both challenge the legality and constitutionality of the Gwinnett County's practice of rejecting absentee ballots, particularly those with immaterial omissions and errors, such as a date of birth or

address; and both raise claims under the Fourteenth Amendment. Second, for the reasons set forth above, the motion is timely and given the stage of the litigation and the changed circumstances underlying this litigation – i.e., the election has already taken place, but the results have yet to be certified – intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Indeed, the Plaintiff-Intervenors are able to proceed without impacting the Court’s previously issued orders.

Finally, the Plaintiff-Intervenors’ intervention will serve to contribute to an additional legal argument and alternative remedy than that proposed by the Plaintiffs. The Plaintiff-Intervenors seek an Order (1) requiring Gwinnett County to count the ballots for voters who have timely submitted their absentee ballots but whose ballots are missing information that is immaterial to verifying their identity, and (2) to provide a cure to those voters who have submitted absentee ballots but failed to sign the Oath. Accordingly, the Plaintiff-Intervenors’ intervention will contribute to the full and just adjudication of the legal questions presented.

CONCLUSION

For the reasons stated above, the Proposed Plaintiff-Intervenors respectfully request that the Court grant their motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit them to intervene under Rule 24(b). If granted permission to intervene under either provision, Proposed Plaintiff-Intervenors have

attached a proposed complaint in intervention for filing accordance with the Federal and Local Rules of Civil Procedure.

Dated: November 11, 2018

Respectfully submitted,

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*Seeking *Pro Hac Vice* Admission

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum of Law in Support of the Motion to Intervene has been prepared in accordance with the font type and margin requirements of LR 5.1, using font type of Times New Roman and a point size of 14.

Dated: November 11, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to parties in this action.

Dated: November 11, 2018

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