

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

AMERICAN ASSOCIATION OF PEOPLE)	
WITH DISABILITIES, FEDERATION OF)	
WOMEN’S CLUBS OVERSEAS, INC., NEW)	
MEXICO PUBLIC INTEREST RESEARCH)	
GROUP EDUCATION FUND, and)	
SOUTHWEST ORGANIZING PROJECT,)	
Plaintiffs,)	No. CV-08-702 JOB/WDS
v.)	
)	
MARY HERRERA, in her capacity as)	
Secretary of State,)	
Defendant.)	
)	

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE
BY NAZARENA “NINA” MARTINEZ, ET AL.

Nazarena (“Nina”) Martinez, Justine Fox-Young, Rhoda Coakley (Chaves County Clerk), and the Republican Party of New Mexico by their attorneys, Patrick J. Rogers, Modrall, Sperling, Roehl, Harris & Sisk, P.A., Jason Bowles and B. J. Crow, Bowles & Crow, submit this Reply Brief in support of the Motion to Intervene.

I. The Motion to Intervene is timely.

Plaintiffs waited more than three (3) years to challenge the laws at issue, and chose not to file a request for a temporary restraining order. Plaintiffs waited many weeks to file a Motion for Preliminary Injunction and now argue that a Motion to Intervene is untimely although the motion was filed on August 18, 2008, only one week after Plaintiffs’ Motion for Preliminary Injunction was filed. The proposed Interveners and their counsel have acted promptly. Exhibit 1, Affidavit of Patrick J. Rogers. The proposed Interveners will not be requesting the delay of any presently scheduled matters.

Initially, any suggestion that extraordinary relief is needed immediately, particularly the relief Plaintiff's request herein, is very questionable. While Plaintiffs insist that the challenged laws have caused Plaintiffs to curtail their registration practices, others in the same business have reached a record number of registrations. Exhibit 2, Albuquerque Journal article of August 21, 2008, "Voter ID Paints an Odd Picture" ("historic number of new registrants").

In contrast with Plaintiffs' untested allegations that Plaintiffs have decided not to register voters because of the 2005 statute, today's news illustrates the continuing failures of the existing system to address fraud in the registration and voting process. Id. Exhibit 2. ("This is a fraud on the voter and if it could happen to me, a former election official, a Judge, I wonder how many others there were"). Today the Acorn's New Mexico field director acknowledged the most recent example of fraud in the system which escaped Acorn's "quality control staff". This fraud by another Acorn employee is, according to the Acorn office, somehow evidence that the "system works excellently". Id. Interveners are opposed to Plaintiffs efforts to further dilute the existing restrictions.

In addition, Plaintiffs' preliminary injunction requests *inter alia* that the identities of the persons registering voters should be secret. Good cause exists to require the identification of persons employed by Acorn who are unregistered, convicted sex offenders because they may be young voters. Persons who will receive Social Security and other identifying information should not be able to hide identify theft felonies, Exhibit 3, Albuquerque Journal ("Voter Registration Workers Unchecked") dated Saturday, August 9, 2008.

Plaintiffs' complaint is very lengthy and complex. The relief requested should be carefully considered. The cases cited by Plaintiffs do not assist Plaintiffs' untimeliness argument. One case does not address the timeliness issue. Coalition of Arizona / New Mexico Counties for Stable Economic Growth v. Dept's of Interior, 100 F.3d 837, 840 (10th Cir. 1996). The additional cases cited are not compelling:

1) The Plaintiffs in Forest Guardians v. U.S. Dep't of interior, No. CIV-02-1003, Memorandum Opinion and Order, at 8 (D.N.M. Jan. 12, 2004) filed a Complaint on August 13, 2002, and sought injunctive relief in the form of a disclosure of lien holder agreements (but did not appear to seek a preliminary injunction). A Motion to Intervene was filed August 11, 2003, almost one (1) year later. The Court allowed the intervention: "The timeliness of a motion to intervene is assessed in light of all of the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." The analysis is contextual and "absolute measures of timeliness should be ignored." "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervener, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained." (quoting Utah Assoc of Counties v. Clinton, 255 F.3d 1246, 1250 (10th Cir. 2001)).

Noting that "the Court has not addressed any substantive issues" (a pending motion to summary judgment had yet to be ruled upon) and the fact that the interveners had complied with the briefing schedule the Court had previously established, the Court found

that the requested intervention would not prejudice the parties. (p. 9). Without any showing of prejudice to Plaintiffs, intervention is appropriate in this pending case.

2) Utah Assoc of Counties v. Clinton, 255 F.3d 1246, 1250 (10th Cir. 2001) does not support Plaintiffs' arguments, either. On September 18, 1996, President Clinton issued a Presidential Proclamation establishing the Grand Staircase-Escalante National Monument and reserving approximately 1.7 million acres of federal land in Utah from public entry. On June 23, 1997, the Utah Association of Counties filed a lawsuit for injunctive and declaratory relief against the President, seeking to have the Proclamation set aside. On March 21, 2000, a motion to intervene was filed.

The District Court noted that the application to intervene was filed more than two and a half years after the case was filed and denied the motion. The 10th Circuit reversed, noting that the case was "far from ready for final disposition" because no scheduling order was issued, no trial date set, and no cut-off dates for motions set. Only discovery, discovery disputes, and motions seeking dismissal on jurisdictional grounds had been filed. The Tenth Circuit stated "in view of the relatively early stage of the litigation and the lack of prejudice to plaintiffs flowing from the length of time between the initiation of the proceedings and the motion to intervene, we conclude the request for intervention is timely." 255 F.3d 1246, 1251.

Plaintiffs in this case, should not be allowed to wait three (3) years and more than four (4) weeks to file a Motion for Preliminary Injunction and then be heard to complain that someone else is untimely when a Motion to Intervene is filed one week after the filing of the Motion for Preliminary Injunction. The Court has set no discovery deadlines, motions deadlines, expert witness deadlines or any other scheduling that would prejudice

Plaintiffs. The Martinez et al., potential interveners will file a draft Answer tomorrow and will request permission to file a proposed response to the Motion for Preliminary Injunction on August 25, 2008 (with a copy of the proposed Response). Monday, August 25, 2008 would be the due date under the existing rules, for a Response to Plaintiffs Motion for a Preliminary Injunction. The proposed intervention is not untimely and it will not delay any proceedings, or any schedule.

II. The Proposed Martinez et al. Intervenors have Legally Protectable Interests that are not Adequately Represented.

Justine Fox-Young is a candidate and has an interest in communicating on a timely basis with newly registered voters. Ms. Fox-Young has an interest in reducing the opportunities for fraud and errors in the election. Exhibit 4, Affidavit of Justine Fox-Young. The Republican Party of New Mexico has an interest in reducing the opportunities for fraud and errors in the election process. The Republican Party of New Mexico has an interest in enforcing the 48-hour time period. The Republican Party of New Mexico has a specific and individualized interest in obtaining timely voter registration information with newly registered voters. Exhibit 5, Affidavit of Nazarena (“Nina”) Martinez.

Rhoda Coakley, Chaves County Clerk has statutory obligations concerning the voter registration forms. See e.g. 1-4-8 and 1-4-11 NMSA 1978. All county clerks have an interest in an efficient and effective, honest and open process to encourage a fraud-free system of registration and voting.

The Republican Party of New Mexico and Nina Martinez as Secretary, as well as Representative Justine Fox-Young have a specific First Amendment interest in access, on a timely basis, to the contact information for newly registered voters. The “burden” asserted by Plaintiffs of delivery or mailing the information concerning newly registered voters is

insignificant, if it exists at all. The 48-hour limit reduces the opportunities for theft, fraud or “mistakes” that might deter delivery of the registrations to the proper county clerk or secretary of state. Plaintiffs have no First Amendment or other constitutional right or statutory basis to hide, or hold, registrations of newly registered voters and increase the opportunities for theft. Turning in the registration property increases the flow of information between individuals, parties, campaigns and candidates on one hand and newly registered voters on the other.

The cases cited by Plaintiffs do not compel or suggest a denial of the Motion to Intervene. Moreover, the cases cited by Plaintiffs do not support Plaintiffs’ arguments and efforts to prevent intervention. Plaintiffs argue that Justine Fox-Young as a current legislator has “no standing to intervene.” They are wrong. Even as a general proposition, Representative Fox-Young’s interests would be injured under the test the Supreme Court set forth in *Coleman v. Miller*, 307 U.S. 433 (1939). In *Coleman*, the Supreme Court held twenty legislators suffered an institutional injury and therefore had standing to challenge the State Lieutenant Governor’s authority to cast a deciding vote in favor of a proposed child labor amendment to the federal constitution. *Coleman*, 307 U.S. at 438, 446. The Supreme Court reasoned that the twenty legislators had voted against the amendment and concluded that the “senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.” *Coleman*, 307 U.S. at 428.

In addition, this case is not similar to the cases cited by Plaintiffs, *Tarsney v. O’Keefe*, 225 F.3d 919 (9th Cir. 2000) or *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d, 573 (8th Cir. 2998). As an initial point, Plaintiffs obscure the difference between “standing” and the parameters of intervention under Rule

24. In *Tarsney*, the court did not address the parameters of Rule 24 intervention. In *Planned Parenthood*, the court held that the ten legislators did not meet the requirement of Rule 24 and possess standing. Specifically, the Eighth Circuit Court reasoned that the “Missouri executive branch did not nullify the ten legislators’ votes. 1998 U.S. App. LEXIS at ** 13. In this case, in addition to her direct and immediate First Amendment interests in promptly obtaining the information about newly registered voters, the interests of Justine Fox-Young would constitute an institutional injury under the *Coleman* test.

WHEREFORE, proposed Defendants-in-Intervention request the Court enter an Order permitting their intervention in this matter.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of August 2008 we filed the foregoing electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

_____/s/
Patrick J. Rogers

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