SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

HARRY WINGO, *Plaintiff*, v. DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, *Defendant*.	No. 2015 CA 6487 B Judge Maurice Ross

THE DISTRICT OF COLUMBIA'S MOTION FOR INTERVENTION AS OF RIGHT

D.C. Code § 1-301.81(a)(1) permits the Attorney General for the District of Columbia "to intervene in legal proceedings on behalf of th[e] public interest." Without question, the instant lawsuit challenging the legality of the Board of Elections' actions regarding Initiative Measure No. 76, which would raise the minimum raise for workers in the private sector, and the composition of the Board's members is of critical importance to the District of Columbia and its citizens. The District of Columbia, through its Attorney General, therefore moves under Super. Ct. R. Civ. P. 24(a) to intervene as of right. If granted, the District intends to seek reconsideration of the Court's oral orders granting plaintiff's motion for summary judgment and denying the Board of Elections' motion for summary judgment.

A Memorandum of Points and Authorities, a proposed Order, and the proposed pleading required by Super. Ct. R. Civ. P. 24(c) are attached. In accordance with Super. Ct. R. Civ. P. 12-I, undersigned counsel has conferred with

all parties regarding this request. The Board of Elections and the current Intervenors, Matthew Hanson and Raise the Wage, do not object to this request. Plaintiff does not consent to the District's intervention request.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

ELIZABETH SARAH GERE
Deputy Attorney General
Public Interest Division

/s/ Toni Michelle Jackson
TONI MICHELLE JACKSON, Bar No. 453765
Chief, Equity Section

/s/ Bradford C. Patrick
BRADFORD C. PATRICK, Bar No. 1004979
Assistant Attorney General
441 Fourth Street, N.W.
Sixth Floor South
Washington, DC 20001
Telephone: (202) 724-6627
Facsimile: (202) 741-0599
Email: bradford.patrick@dc.gov

/s/ CALIANDRA BURSTEIN
CALIANDRA BURSTEIN, Bar No. 1014852
Assistant Attorney General
441 Fourth Street, N.W.
Sixth Floor South
Washington, DC 20001
Telephone: (202) 727-6247
Facsimile: (202) 741-0579
Email: caliandra.burstein@dc.gov

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2016, I have caused to be served, by electronic filing, a true copy of this document on:

Mark London, Esq.
D. Bradley Clements, Esq.
London & Mead
1225 19th Street NW, Suite 320
Washington, DC 20036

Craig C. Reilly, Esq.
111 Oronoco Street
Alexandria, VA 22314

Attorneys for Plaintiff

Rudolph M. D. McGann, Esq.
D.C. Board of Elections and Ethics
441 4th Street, NW, Suite 270
Washington, DC 20001

Attorney for District of Columbia Board of Elections

Joseph E. Sandler, Esq.
Jessica N. Krupke, Esq.
Sandler Reiff Lamb Rosenstein & Birkenstock P.C.
1025 Vermont Ave. NW, Suite 300
Washington, DC 20005

Attorneys for Intervenors Matthew Hanson and Raise the Wage

/s/Bradford C. Patrick
Bradford C. Patrick
Bar No. 1004979

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DISTRICT OF COLUMBIA'S MOTION FOR INTERVENTION AS OF RIGHT

INTRODUCTION

Through his lawsuit, plaintiff attacked the composition of the District of Columbia Board of Elections (Board) and challenged the legality of the Board's acceptance of Initiative Measure No. 76, which would raise minimum wages incrementally over several years for most of the private sector. The citizens of the District of Columbia have an undeniable interest in the disposition of this dispute, not only for the opportunity to vote on the Initiative Measure but to ensure that the Board's business may continue uninterrupted and without the cloud of doubt a ruling in plaintiff's favor might create. And a ruling that the Board was improperly constituted when it accepted Initiative Measure No. 76 has potential to ripple far beyond this lawsuit.

The Office of the Attorney General for the District of Columbia is vested with

the authority to intervene in lawsuits affecting the public interest and seeks to exercise that authority here. *See* D.C. Code § 1-301.81(a)(1). The Attorney General did not know of this lawsuit until counsel for the Board made the Office of the Attorney General aware of it for the first time on Friday, January 28, 2016, after this Court held a hearing in which it orally granted plaintiff's motion for summary judgment. After learning of the issue before the Court, the District took swift action to move to intervene, which would cause no prejudice to the existing parties. The District wishes not only to be heard concerning the interplay between D.C. Code §§ 1-1001.03(c) and 1-523.01(c), but also on arguments that have gone unaddressed by the parties, including the *de facto* officer doctrine. *See Ryder v. United States*, 515 U.S. 177, 180-81 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient.") (citing *Norton v. Shelby County*, 118 U.S. 425, 440 (1886)); *see also* D.C. Code § 16-3521, *et seq.* (prescribing procedure for filing *quo warranto* action to challenge the lawfulness of an individual holding office). The District therefore moves for intervention as of right under Super. Ct. R. Civ. P. 24(a).

STANDARD OF REVIEW

Rule 24(a) of the Superior Court Rules of Civil Procedure provides that

> Upon timely application anyone shall be permitted to intervene in an action: (1) When applicable law confers an unconditional right to intervene; or (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.

The District of Columbia Court of Appeals has instructed repeatedly that "Rule 24(a) should be liberally interpreted." *Robinson v. First Nat'l Bank of Chicago*, 765 A.2d 543, 544 (D.C. 2001) (quoting *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 (D.C. 1981)) (internal quotation marks omitted); *accord McPherson v. District of Columbia Housing Auth.*, 933 A.2d 991, 994 (D.C. 2003). Indeed, the intervention rules are to be interpreted "with the broad goal 'to facilitate a proper disposition on the merits.'" *Jones v. Fondufe*, 908 A.2d 1161, 1162 (D.C. 2006) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (overruled on other grounds by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007))). "In other words, '[a]ny 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.'" *HSBC Bank USA, N.A. v. Mendoza*, 11 A.3d 229, 233 (D.C. 2010) (quoting *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993)).

Where the first clause of Rule 24(a) is satisfied, courts need only address whether the motion for intervention is filed timely. *See, e.g.*, *United States v. Bank of America*, 303 F.R.D. 114, 118 (D.D.C. 2014).[1] If a party seeks intervention as of

[1] Because "Super. Ct. Civ. R. 24 is identical in all relevant respects to Fed. R. Civ. P. 24," courts within the District of Columbia "look to federal court decisions as persuasive authority in interpreting it." *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 n.3 (D.C. 1981).

right under Super. Ct. R. Civ. P. 24(a)(2), courts examine three elements in addition to the timeliness of the request for intervention:

> (1) whether the person seeking to intervene has an interest in the transaction which is the subject matter of the suit; (2) whether the disposition of the suit may as a practical matter impair his [or her] ability to protect that interest; and (3) whether his or her interest is adequately represented by existing parties.

McPherson, 833 A.2d at 994 (quoting *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 798 (D.C. 1975)) (internal quotation marks and brackets omitted); *see also HSBC Bank USA, N.A. v. Mendoza*, 11 A.3d at 234. The Court should grant the motion for intervention as of right under either test.

ARGUMENT

I. The Office of the Attorney General Is Permitted to Intervene as of Right Because It Is Empowered by Statute to Intervene to Protect the Public Interest and the Motion Was Made Swiftly After Learning of the Litigation

The Attorney General for the District of Columbia has a broad mandate to protect the public interest in courts of law. The Attorney General is responsible for the "charge and conduct of all law business of the [ ] District … and shall be responsible for upholding the public interest." D.C. Code § 1-301.81(a)(1). Accordingly, the Attorney General is vested with "the power to intervene in legal proceedings on behalf of this public interest." *Id.*; *see also Crockett v. District of Columbia*, 95 A.3d 601, 605 (D.C. 2014); *District of Columbia Bd. of Elections and Ethics v. Jones*, 481 A.2d 456, 460-61 (D.C. 1984) (trial court erred in denying District of Columbia's motion to intervene as of right in suit regarding proposed ballot initiative). Section 1-301.81(a)(1) grants the Attorney General "an

unconditional right to intervene" where he deems it necessary to preserve the public interest in litigation. *See* Super. Ct. Civ. R. P. 24(a)(1).

Because the District is entitled by statute to intervene, the only remaining question is whether this motion to intervene is filed timely. *United States v. Bank of America*, 303 F.R.D. at 118. It is.

"Timeliness of intervention is a matter for the sound discretion of the trial court, but a court should be more reluctant to refuse when intervention is sought of right, as here." *Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd.*, 840 F.2d 72, 74-75 (D.C. Cir. 1988) (citing *NAACP v. New York*, 413 U.S. 345, 365-66 (1973) and *United States v. Am. Telephone & Telegraph Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). "[I]t is settled—particularly where intervention is sought as of right—that the amount of time which has elapsed since the litigation began is not in itself the determinative test of timeliness." *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972). Courts consider several factors in determining whether intervention is sought timely:

> (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial.

Mokhiber v. Davis, 537 A.2d 1100, 1104 (D.C. 1988) (citing *Emmco Ins. Co. v. White Motor Corp.*, 429 A.2d 1385, 1387 (D.C. 1981)).

These factors strongly weigh in the District's favor. Regarding the first factor, the inquiry is not the time this case has been pending. Rather, "the length of delay

is to be measured from the time that the applicant actually knew or reasonably should have known of its interest in the main action." *Anderson v. District of Columbia Housing Auth.*, 923 A.2d 853, 866 (D.C. 2007). And precious little time has expired since the Office of the Attorney General learned of this action and its potential effect on the validity of the Board's actions. Neither the District of Columbia nor the Office of the Attorney General was served with a summons or complaint. Indeed, the Board, an independent agency, *see* D.C. Code § 1-1001.06, was served with process directly through its General Counsel. (*See* Complaint.) The instant motion was filed expeditiously after the Office of the Attorney General first learned of this litigation on Friday, January 28, 2016, following the Court's status hearing. The Court should thus weigh the first factor to support a finding of timeliness. *Robinson v. First Nat'l Bank of Chicago*, 765 A.2d at 545 (motion for intervention as of right was timely where "there [was] no suggestion in the record that Robinson slept on her rights before asserting her interest"); *contra Emmco Ins. Co.*, 429 A.2d at 1388 (motion was untimely where movant knew of its interest in the lawsuit for nearly four years).

Consideration of the second factor, the reason for the delay, goes hand in hand with the first. The District, through its Attorney General, did not seek intervention at an earlier stage of these proceedings because of its lack of knowledge of this matter and the implications a ruling in plaintiff's favor might have for the legitimacy of the Board's actions or composition.

Third, although the Court has heard oral argument and issued oral rulings

concerning the Parties' summary judgment motions,[2] the case has not advanced to such a stage that intervention should be denied. Counsel for the Board advises that it will move for reconsideration of the Court's summary judgment rulings. The District's forthcoming motion for reconsideration may be decided alongside it. Courts have permitted intervention even where final judgment has been entered where a proposed intervenor has an important interest to assert. *See, e.g.*, *Acree v. Republic of Iraq*, 370 F.3d 41, 43, 49-51 (D.C. Cir. 2004) (reversing trial court's denial of intervention sought by United States two weeks after final judgment was entered and two months after the United States should have known of the need to intervene), *abrogated on other grounds sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009); *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. 1986) (intervention was appropriate where movant did not learn of the need to intervene until after the trial court clarified the scope of its summary judgment ruling).

The fourth factor the Court must consider is the respective prejudice to the District, as the proposed intervenor, and to the existing parties. This factor also weighs heavily in the District's favor. The prejudice to the District of Columbia caused by a denial of this motion cannot be understated. The District has a vital interest in preserving the legitimacy of the Board's actions. A ruling for plaintiff would call into question the composition of the Board and could erode public trust in government. That result can only be avoided if the District is permitted to intervene

[2] The Court's electronic docket reflects that the Court issued written rulings denying the motions filed by the Board and Intervenors Matthew Hanson and Raise the Wage Committee on February 1, 2016. The Court has not issued a written ruling concerning plaintiff's motion for summary judgment.

and given the opportunity to demonstrate that the *de facto* officer doctrine bars plaintiff's challenge to the Board's composition. *See Ryder v. United States*, 515 U.S. at 180-81.

Acree v. Republic of Iraq is particularly instructive. There, the United States sought to intervene in a matter two weeks after the trial court entered final judgment to the plaintiffs. 370 F.3d at 412. As here, the United States sought to present a new argument that went unaddressed by the parties, but the trial court denied the motion as untimely. *Id.* The D.C. Circuit reversed, finding that "the District Court failed to weigh the importance of this case to the United States' foreign policy interests and the purposes for which the Government sought to intervene." *Id.* It held that, notwithstanding the entry of final judgment, the United States should have been permitted to intervene to raise its "highly tenable challenge … in a case with undeniable impact on the Government's conduct of foreign policy." *Id.* at 50.

Conversely, there will be no prejudice to the existing parties. *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) ("[E]ven where a would-be intervenor could have intervened sooner, in assessing timeliness a court must weigh whether any delay in seeking intervention unfairly disadvantaged the original parties.") (citations and quotation marks omitted). While additional briefing may be necessary on limited issues, the parties will not have to conduct discovery, nor would the intervention upset weeks of trial preparation. *See Roane*, 741 F.3d at 152 (affirming denial of intervention where discovery would be needed to resolve additional issues

caused by intervention); *Emmco Ins. Co.*, 429 A.2d at 1387 (denial warranted where intervention would have required substantial continuance of trial date).

Regarding plaintiff, the minimal delay occasioned by additional briefing in this matter will not cause him harm. Plaintiff seeks an Order mandating the Board to reject Initiative Measure No. 76 to prevent it from appearing on ballots. If the Court permits intervention, final resolution of this action will be reached prior to any vote on the measure. Whether that resolution comes now or later should make no difference to plaintiff; he will not have to conform his actions differently depending on its outcome. And as for the Board and the current intervonors, they will benefit from the District's intervention because the District is prepared to raise an additional argument that will defeat plaintiff's challenge to the composition of the Board.

The Court therefore should grant the District's timely motion to intervene under Super. Ct. Civ. P. 24(a)(1).

II. The District Is Entitled to Intervene as of Right to Protect Its Interests

Rule 24(a)(2) also provides authority for the District to intervene as of right. In addition to the timeliness of this motion, addressed above, the District meets each of the elements identified in Super Ct. R. Civ. P. 24(a)(2). *See McPherson*, 833 A.2d at 994. First, the District has an undeniable interest in the disposition of a lawsuit concerning the validity of the Board's composition and Initiative Measure No. 76. *See District of Columbia Bd. of Elections and Ethics v. Jones*, 481 A.2d at 460-61 ("Because the District government has a vital interest in continued freedom from interference in the management of its financial affairs, the trial court erred in

denying its motion to intervene as a matter of right.").

The second element is also satisfied easily. "[A] would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *HSBC Bank USA, N.A. v. Mendoza*, 11 A.3d at 25 (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)). A ruling for plaintiff in this case would deprive the District's citizens of the opportunity to vote on Initiative Measure No. 76 and cast considerable doubt on the legality of numerous actions by the Board. Simply because challenges to other Board actions could be addressed in future litigation is not a ground to deny intervention. *See Jones v. Fondufe*, 908 A.2d at 1165 (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003)).

Third, the District's interests are not adequately represented. "This burden, however, is not onerous. The applicant need only show that representation of his interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d at 192 (citations omitted). Here, the District wishes to raise issues that the existing parties have not addressed: the applicability of the *de facto* officers doctrine and the power of a third party to assert that a person holds office unlawfully under D.C. Code § 16-3521.[3] These issues will only be addressed if the District may present its arguments independently.

The District is entitled to intervention as of right under Super. Ct. R. Civ. P. 24(a)(2).

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[3] As noted above, the District also intends to clarify the relationship between Code §§ 1-1001.03(c) and 1-523.01(c)

CONCLUSION

The Court should grant the District intervention as a matter of right to permit it to protect the public interest in the disposition of this case.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

ELIZABETH SARAH GERE
Deputy Attorney General
Public Interest Division

/s/ Toni Michelle Jackson
TONI MICHELLE JACKSON, Bar No. 453765
Chief, Equity Section

/s/ Bradford C. Patrick
BRADFORD C. PATRICK, Bar No. 1004979
Assistant Attorney General
441 Fourth Street, N.W.
Sixth Floor South
Washington, DC 20001
Telephone: (202) 724-6627
Facsimile: (202) 741-0599
Email: bradford.patrick@dc.gov

/s/ CALIANDRA BURSTEIN
CALIANDRA BURSTEIN, Bar No. 1014852
Assistant Attorney General
441 Fourth Street, N.W.
Sixth Floor South
Washington, DC 20001
Telephone: (202) 727-6247
Facsimile: (202) 741-0579
Email: caliandra.burstein@dc.gov

Attorneys for the District of Columbia

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ORDER

Upon consideration of the District of Columbia's Motion for Intervention as of Right and the entire record, it is

ORDERED that the Motion is **GRANTED**.

Dated: February __, 2016

_____
Hon. Maurice Ross
Superior Court of the District of Columbia

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THE DISTRICT OF COLUMBIA'S ANSWER

The District of Columbia (District), responds to the Complaint. The District asserts that anything not specifically admitted is denied, and answers the Complaint as follows:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

In response to the enumerated paragraphs in the Complaint, the District responds as follows:

1. The District lacks sufficient information to admit or deny the allegations in this paragraph.

2. The District admits the factual allegations in this paragraph.

3. The District acknowledges the statute cited by plaintiff but does not admit that it necessarily applies to this action. To the extent that this paragraph contains factual allegations, they are denied.

4. The District admits the factual allegations in this paragraph.

5. The District admits the factual allegations in this paragraph.

6. The District admits the factual allegations in this paragraph.

7. The District denies the factual allegations in this paragraph.

8. The District denies the factual allegations in this paragraph.

9. The District denies the factual allegations in this paragraph.

10. The District denies the factual allegations in this paragraph.

11. The District denies the factual allegations in this paragraph.

12. The District denies the factual allegations in this paragraph.

13. The District denies the factual allegations in this paragraph.

14. The District is not required to respond to the legal conclusions in this paragraph.

15. The District is not required to respond to the legal conclusions in this paragraph. To the extent that this paragraph contains factual allegations, they are denied.

Third Defense

Plaintiff's challenge to the composition of the Board of Elections is barred by the *de facto* officer doctrine.

Fourth Defense

Plaintiff did not comply with D.C. Code §§ 16-3522 and 16-3523 before initiating this action.

Fifth Defense

The District of Columbia reserves the right to amend its Answer and to raise any defense that new evidence may reveal.

Dated: February 2, 2016.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

ELIZABETH SARAH GERE
Deputy Attorney General
Public Interest Division

/s/ Toni Michelle Jackson
TONI MICHELLE JACKSON, Bar No. 453765
Chief, Equity Section

/s/ Bradford C. Patrick
BRADFORD C. PATRICK, Bar No. 1004979
Assistant Attorney General
441 Fourth Street, N.W.
Sixth Floor South
Washington, DC 20001
Telephone: (202) 724-6627
Facsimile: (202) 741-0599
Email: bradford.patrick@dc.gov

/s/ CALIANDRA BURSTEIN
CALIANDRA BURSTEIN, Bar No. 1014852
Assistant Attorney General
441 Fourth Street, N.W.
Sixth Floor South
Washington, DC 20001
Telephone: (202) 727-6247
Facsimile: (202) 741-0579
Email: caliandra.burstein@dc.gov

Attorneys for the District of Columbia

CERTIFICATE OF SERVICE

I certify that on this 2nd day of February, 2016, I served, by electronic filing, a true copy of this document on:

Mark London, Esq.
1225 19th Street, Suite 320
Washington, D.C. 20036
Counsel for Plaintiff

D. Bradley Clements, Esq.
1225 19th Street, Suite 320
Washington, D.C. 20036
Counsel for Plaintiff

Craig C. Reilly, Esq.
111 Oronoco Street
Alexandria, VA 22314
Counsel for Plaintiff

Joseph E. Sandler, Esq.
1025 Vermont Ave., NW, Suite 300
Washington, D.C. 20005
Counsel for Intervenors

Jessica N. Krupke, Esq.
1025 Vermont Ave., NW, Suite 300
Washington, D.C. 20005
Counsel for Intervenors

Rudolph M.D. McGann, Esq.
District of Columbia Board of Elections
441 Fourth Street, NW, Suite 270 N
Washington, DC 20001
Counsel for the Board of Elections

/s/Bradford C. Patrick
Bradford C. Patrick
Bar No. 1004979