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

STATE EX REL. SKAGGS, *et al.*,

Relators-Plaintiffs,

v.

JENNIFER BRUNNER, OHIO SECRETARY OF STATE, *et al.*,

Respondents-Defendants.

Case No. C2:08CV-1077

Judge Algenon L. Marbley

JOINT MOTION OF THE NORTHEAST OHIO COALITION FOR THE HOMELESS AND THE OHIO DEMOCRATIC PARTY TO INTERVENE

The Northeast Ohio Coalition for the Homeless and the Ohio Democratic Party ("Proposed Intervenors") hereby move, pursuant to Fed. R. Civ. P. 24, to intervene in the above-captioned matter. Pursuant to Fed. R. Civ. P. 24(c), this Motion states the grounds for intervention and is accompanied by pleadings that set out the claims for which intervention is sought. *See* Proposed Intervenors' Pleadings (attached hereto).

The Complaint herein was first filed in the Ohio Supreme Court on November 13, 2008. A Notice of Removal was filed on November 14, 2008 (*See* Doc. #2.), which was opposed by Relators-Plaintiffs (*See* Docs. 11, 12, *Motion to Remand.*) This Court held a hearing and denied the Motion to Remand on November 17, 2008. (*See* Doc. 20, *Order on Motion to Remand.*) Also on November 17, 2008, Relators-Plaintiffs withdrew their Motion for TRO filed on

November 14, 2008. (*See* Doc. 5.) Accordingly, none of the substantive claims raised by Relators-Plaintiffs have yet been addressed by the parties or determined by the Court.

The issues raised by the Relators-Plaintiffs herein flow from previous challenges raised in two other cases pending before this Court. A Complaint filed in October, 2006 by Proposed Intervenors Northeast Ohio Coalition for the Homeless ("NEOCH") and others in Case No. C02:06CV-896 challenged Ohio's provisional voter rules as unlawful. As a result of the Complaint in the NEOCH case, the Secretary of State issued two Directives pertaining to the counting of provisional ballots. On election day, the Ohio Republican Party ("ORP") filed a Complaint alleging that these Directives violate federal statutes as well as constitutional provisions. (*See Ohio Republican Party v. Brunner*, Case No. C02:08CV-913.) Now, the Complaint in the instant case pertains to the implementation of the Secretary's Directives. Absent the NEOCH case, the Directives at issue in this case and in the ORP case may never have been issued.

Proposed Intervenors are both parties in the NEOCH case. Indeed, the NEOCH Plaintiffs participated directly in reaching a series of agreements that became the basis for the Directives. Simply reviewing the prayers for relief in the three cases makes it clear that there are a number of common factual and legal questions in the three cases, particularly pertaining to provisional ballot issues. As this Court has observed, the claims in NEOCH and ORP are "inextricably related;" so too are the claims raised herein. Intervenors' interest in the promulgation and application of fair standards for the validation and counting of regular and provisional ballots are clear. The standards for intervention under Fed. R. Civ. P. 24 are therefore satisfied.

ARGUMENT

I. PROPOSED INTERVENOR IS ENTITLED TO INTERVENE AS OF RIGHT.

The purpose of Rule 24 is to involve "as many apparently concerned persons as is compatible with efficiency and due process." *Coalition of Arizona/New Mexico Counties v. Department of the Interior*, 100 F.3d 837, 841 (10th Cir. 1996). For this reason, the Sixth Circuit has explained that "Rule 24 should be broadly construed in favor of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (internal quotation marks and citation omitted); *Midwest Realty Management Co. v. City of Beavercreek*, 93 F. App'x 782, 784 (6th Cir. 2004); *see also* 6 James W. Moore *et al.*, Moore's Federal Practice ¶ 24.03[1][a] (3d ed. 2004) ("Rule 24 is to be construed liberally . . . and doubts resolved in favor of the proposed intervenor."); *FSLIC v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993) ("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.").

The rule, by its terms, provides that:

> Upon timely application anyone shall be permitted to intervene in an action . . . (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.

Fed. R. Civ. P. 24(a)

In considering a motion to intervene, courts "accept as true all well-pleaded, nonconclusory allegations in the motion to intervene, [and] in the proposed complaint . . . in intervention." Moore's Federal Practice ¶ 24.03[1][a].

As the Sixth Circuit explained in *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999), intervenors are required to establish four elements in order to intervene as of right:

(1) that the motion to intervene was timely;

(2) that they have a substantial legal interest in the subject matter of the case;

(3) that their ability to protect that interest may be impaired in the absence of intervention; and

(4) that the parties already before the court may not adequately represent their interest.

See id.; *see also Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

A. Intervenor's Application Is Timely.

This motion to intervene is being filed less than 24 hours after the Court's decision to keep jurisdiction of this case. No proceedings have yet begun in response to the substantive issues raised in the Complaint, and no party will be prejudiced in any way by permitting the intervention. Counsel for Proposed Intervenors have been present at the proceedings that have occurred. Further, if granted intervention, Proposed Intervenors will adhere to the deadline set by the Court for the filing of motions for summary judgment. Accordingly, the timeliness element is clearly satisfied.

B. Intervenors Have a Cognizable Interest that May Be Impaired by the Disposition of This Action.

As the Sixth Circuit has held, Rule 24(a) incorporates a "'rather expansive notion of the interest sufficient to invoke intervention as of right.'" *Grutter*, 188 F.3d at 398 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). Intervenors here more than satisfy that standard. Intervenors need not show that its interests actually will be impaired by the disposition of this adversary proceeding, but need only show that their interests "'may be' so impaired." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304, 1308 (8th Cir. 1995); *see also Commercial Cas. Ins. Co. v. Haeger (In re Haeger)*, 221

B.R. 548, 550 (Bankr. M.D. Fla. 1998) ("The 'interest test' has been characterized as 'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'") (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), for example, the Sixth Circuit held that the Michigan Chamber of Commerce, which supported in the legislative and political process the enactment of a law that extended to labor unions restrictions on corporate political expenditures, was entitled to intervene in a lawsuit involving a challenge to that law brought by labor unions. And in *Grutter*, the Sixth Circuit permitted minority students to intervene in a lawsuit to defend the University of Michigan's wholly voluntary decision to consider race as a factor in its admissions process. 188 F.3d at 399.

Intervenors' interest here is far more concrete and direct than the interests that supported intervention in *Miller* and *Grutter*. As discussed above, Proposed Intervenor NEOCH brought the lawsuit that was the basis for the Directives whose implementation is challenged herein. Certainly, NEOCH has a direct and concrete interest in any action relating to the enforcement of the Directives promulgated as a result of its lawsuit. As the representative organ of the Democratic Party in Ohio, Proposed Intervenor Ohio Democratic Party ("ODP") has an interest in protecting the legitimacy and integrity of the electoral process by seeking—in this litigation—the enforcement of uniform and nondiscriminatory standards for validating and counting regular and provisional ballots. The Court has already recognized ODP's interest in granting the Party's Motion to Intervene in the NEOCH case. ODP is the political party of hundreds of thousands of self-identified Democratic voters who are voting in the November 4, 2008 General Election. The Party has invested hundreds of thousands of dollars in voter education and voter protection

efforts with respect to such election, both for its own members and the general voting public. ODP has an interest in ensuring that votes cast by its members for its candidates are fully counted by election authorities in accordance with all statutory and constitutional provisions.

C. Intervenor's Interests May Not Be Adequately Protected by the Existing Parties.

"The requirement of . . . Rule [24] 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) (citing 3B James W. Moore *et al.*, Moore's Federal Practice ¶ 24.09--1(4) (1969)). This requirement is easily met.

Proposed Intervenor ODP, as a political organization dedicated to the election of Democratic candidates for office, plainly has separate interests not adequately represented by Relators-Plaintiffs who are not members of its organization. NEOCH is a nonprofit organization representing a segment of voters not otherwise represented. Similarly, Respondent-Defendant is the elected Ohio official responsible for the administration of the State's election laws. Proposed Intervenors, representing specific political and social interests, clearly have separate interests that are not adequately represented by the Secretary of State.

For these reasons, Intervenors more than meet the "minimal" burden of showing that representation of its interests by the existing parties to this adversary proceeding "may be" inadequate. *See Trbovich*, 404 U.S. at 538 n.10.

II. IN THE ALTERNATIVE, INTERVENORS SHOULD BE PERMITTED TO INTERVENE BASED ON COMMON QUESTIONS OF LAW AND FACT.

In addition, permissive intervention under Fed. R. Civ. P. 24(b) is also appropriate here. That rules provides that:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In

> exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b); *see also New York News, Inc. v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992). "Substantially the same factors [that are considered with respect to intervention of right] are considered in determining whether to grant an application for permissive intervention . . . ." *Kaliski*, at 300 n.5.

As is evident from the pleading attached to this Motion pursuant to Rule 24(c), Intervenors' defenses with respect to both questions of law and of fact, are substantially in common with the Secretary of State, making permissive intervention appropriate.

CONCLUSION

For the reasons set forth above, proposed Intervenors NEOCH and ODP respectfully request that this Court enter an order granting their Motion to Intervene in this proceeding and directing that Intervenors' pleadings in intervention accordingly be filed.

Respectfully submitted,

s/ Caroline Gentry

Caroline Gentry, Trial Counsel
PORTER WRIGHT MORRIS & ARTHUR
One Dayton Centre
One South Main Street
Dayton, OH 45402
Tel: (937) 449-6748
cgentry@porterwright.com

Counsel for Proposed Intervenor
Northeast Ohio Coalition for the Homeless

s/ Donald J. McTigue

Donald J. McTigue (OH 0022849), Trial Counsel
Mark A. McGinnis (OH 0076275)
MCTIGUE LAW GROUP
550 East Walnut Street
Columbus, OH 43215
Tel: (614) 263-7000
Fax: (614) 263-7078
mctiguelaw@rrohio.com

Counsel for Proposed Intervenor
Ohio Democratic Party

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 17th day of November, 2008.

/s Mark A. McGinnis
Mark A. McGinnis (OH 0076275)
Attorney at Law

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

STATE EX REL. SKAGGS, *et al.*,

Relators-Plaintiffs,

v.

JENNIFER BRUNNER, OHIO SECRETARY OF STATE, *et al.*,

Respondents-Defendants.

Case No. C2:08CV-1077

Judge Algenon L. Marbley

JOINT ANSWER OF THE NORTHEAST OHIO COALITION FOR THE HOMELESS AND THE OHIO DEMOCRATIC PARTY

Proposed Intervenors the Northeast Ohio Coalition for the Homeless and the Ohio Democratic Party ("Proposed Intervenors") for their Answer to Relators-Plaintiffs Complaint, admit, deny, and aver as follows:

1. Admit the allegations contained in paragraphs 6, 7.
2. Deny the allegations contained in paragraphs 30, 31, 32, 33, 34, 35, 37, 38, 39.
3. Deny for want of knowledge the allegations contained in paragraphs 4, 5, 8, 11, 12, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28.
4. Paragraphs 1, 2, 10, 13, 16, 25 are in the nature of arguments or statements of law that do not require admission or denial.
5. Deny all statements not specifically admitted or denied herein.

6. Deny the statement that over 27,000 provisional ballots were cast in Franklin County in the Election in Paragraph 9 for want of knowledge and assert that the remainder of paragraph as a statement of law that does not require admission or denial.

Proposed Intervenors further state the following affirmative defenses:

1. The Complaint fails to state a claim upon which relief can be granted.
2. Relators-Plaintiffs lack standing to assert the claims set forth in the Complaint.
3. Relators-Plaintiffs claims are barred by the doctrine of laches.
4. Proposed Intervenors reserve the right to raise any other defenses that may become known.

Respectfully submitted,

s/ Caroline Gentry

Caroline Gentry, Trial Counsel
PORTER WRIGHT MORRIS & ARTHUR
One Dayton Centre
One South Main Street
Dayton, OH 45402
Tel: (937) 449-6748
cgentry@porterwright.com

Counsel for Proposed Intervenor
Northeast Ohio Coalition for the Homeless

s/ Donald J. McTigue

Donald J. McTigue (OH 0022849), Trial Counsel
Mark A. McGinnis (OH 0076275)
MCTIGUE LAW GROUP
550 East Walnut Street
Columbus, OH 43215
Tel: (614) 263-7000
Fax: (614) 263-7078

mctiguelaw@rrohio.com

Counsel for Proposed Intervenor
Ohio Democratic Party

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 17th day of November, 2008.

/s Mark A. McGinnis
Mark A. McGinnis (OH 0076275)
Attorney at Law