

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

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

Relators-Plaintiffs,

Case No. C2:08CV-1077

Judge Algenon L. Marbley

v.

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

Respondents-Defendants.

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

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 Intervenor 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 Intervenor is 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. Intervenor’s 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 Intervenor, representing specific political and social interests, clearly have separate interests that are not adequately represented by the Secretary of State.

For these reasons, Intervenor 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 Intervenor NEOCH and ODP respectfully request that this Court enter an order granting their Motion to Intervene in this proceeding and directing that Intervenor's pleadings in intervention accordingly be filed.

Respectfully submitted,

s/ Caroline Gentry

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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

EXHIBIT A
PROVISIONAL BALLOT APPLICATION - FRANKLIN COUNTY BOARD OF ELECTIONS
WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

<p>STEP 1: VOTER INFORMATION Each blank must be completed by the Voter.</p> <p>(CLEARLY PRINT NAME-REQUIRED) I solemnly swear or affirm that I am a registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in this election, for which I am casting this provisional ballot. I am casting this provisional ballot because my name should appear on the official precinct list, but does not, my address has changed, my name has changed, I requested an absentee ballot and/or I am listed in the official precinct list as having requested an absentee ballot or for another reason. I declare under penalty of election falsification I am a citizen of the United States, who have lived in this state for 30 days immediately preceding the next election, and I will be at least 18 years of age at the time of the general election.</p> <p>CURRENT ADDRESS</p> <p>HOUSE #/STREET _____ APT # _____ CITY _____ ZIP CODE _____ FORMER ADDRESS: _____ STREET: _____ CITY: _____ COUNTY: _____ FORMER NAME (if applicable) _____ DATE OF BIRTH REQUIRED _____ (MM/DD/YYYY)</p> <p>I understand that if the information I provide on this provisional ballot application is not fully complete and correct, and/or if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, and/or if the board of elections determines that I have already voted in this election, this provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution. I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief.</p> <p style="text-align: right;">X _____ VOTER'S SIGNATURE (REQUIRED) _____ Date _____</p>	<p>STEP 2: VOTER IDENTIFICATION To be completed by the Voter.</p> <p>You must provide one of the following forms of identification documentation</p> <p>NOTE: If you are unable to provide proof of identity or if your right to vote was challenged and you were unable to provide the necessary documentation to satisfy the challenge, you may provide proof of identity at the Board of Elections within 10 days after the election.</p> <p><input type="checkbox"/> The last four digits of my Social Security Number are: _____</p> <p><input type="checkbox"/> My Ohio Driver's License Number OR State Identification Card Number is: _____</p> <p><input type="checkbox"/> Other form of photo identification displaying name and current address: (specify kind of ID) _____</p> <p><input type="checkbox"/> Other (copy of current utility bill, bank statement, government check, paycheck, or other government document that shows my name and current address) (specify kind of ID) _____</p> <p><input type="checkbox"/> No identification documentation and I have NO Social Security Number (complete Identification Affirmation below if applicable)</p> <p>IDENTIFICATION AFFIRMATION ONLY FOR VOTERS WHO CHECKED "NO ID" ABOVE RC 3595.16(A)(4)</p> <p>(CLEARLY PRINT NAME) I declare under penalty of election falsification that I cannot provide a current and valid photo identification, a utility identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing my name and current address, nor the last four digits of my social security number because I have no social security number and further declare that I am the person named on this application and that I understand I may cast a provisional ballot.</p> <p style="text-align: right;">X _____ VOTER'S SIGNATURE _____ Date _____</p>	<p>STEP 3: POLL WORKER STATEMENT To be completed by a Poll Worker</p> <p>The preceding Provisional Ballot Application was subscribed and affirmed before me. The following is true concerning the reason necessary to issue a provisional ballot:</p> <p><input type="checkbox"/> Voter's name is not in the Signature Poll Book</p> <p><input type="checkbox"/> Voter has a LEGAL NAME CHANGE</p> <p><input type="checkbox"/> Voter has an ADDRESS CHANGE</p> <p><input type="checkbox"/> Number '2' is to the left of the signature box (undeliverable 60-day election notice)</p> <p><input type="checkbox"/> Number '3' is to the left of the signature box (undeliverable registration acknowledgement notice)</p> <p><input type="checkbox"/> Number '4' is to the left of the signature box (voter requested an ABSENTEE BALLOT)</p> <p><input type="checkbox"/> "ATTORNEY IN FACT" is printed in signature box. Check here and also check the specific reason for a provisional ballot</p> <p><input type="checkbox"/> The Voter is unable to provide valid identification</p> <p><input type="checkbox"/> The Voter refuses to provide valid identification</p> <p><input type="checkbox"/> Name or address on the Valid Non Photo Identification does NOT match the Signature Poll Book</p> <p><input type="checkbox"/> Voter's name does not match the Signature Poll Book (Signature Poll Book has current legal name but ID does NOT have current legal name)</p> <p>SPL, or MPL (and Precinct): _____ (Check Location Street Guide for information)</p> <p style="text-align: right;">X _____ POLL WORKER'S SIGNATURE</p>
<p>STEP 4: VOTE! After completing this application in its entirety:</p> <p>1. POLL WORKER: Using the Precinct Street Listing, find the provisional voter's current address and write the ballot style number for the voter's address here:</p> <p style="text-align: center;">(Ballot Style Number)</p> <p>2. POLL WORKER: Locate the provisional ballot pad(s) with the same ballot style number that you wrote above.</p> <p>3. POLL WORKER: Give the provisional voter the provisional ballot and the Provisional Ballot Application envelope, and direct the provisional voter to a provisional voting booth (UNLESS THE VOTER IS DISABLED AND VOTING ON THE MACHINE) to mark the PAPER ballot.</p> <p>4. VOTER: Carefully read all of the instructions. Once you have completed voting your provisional ballot, fold it in half and place it inside this envelope. Seal the envelope and deposit the envelope in the sealed ballot box.</p> <p style="text-align: center;">THIS SPACE FOR OFFICE USE ONLY</p>		

Provisional Application Worksheet

(for official use only)

Level	ID & Date	ID & Date	ID & Date	ID & Date	ID & Date
1 Initial Review	1	1	1	1	1
2 Verification	2	2	2	2	2
3 Voter Query Look-up	3	3	3	3	3
4 SQL Look-up (restricted use)	4	4	4	4	4
5 Bad Signature Review	5	5	5	5	5
6 Rejection Review	6	6	6	6	6
7 Check Old DWP for Voting	7	7	7	7	7
8 Out of County Verification	8	8	8	8	8
9 Legal Review	9	9	9	9	9
10 Accepted	10	10	10	10	10
11 Rejected	11	11	11	11	11
Reason for Rejection/Acceptance:					

DO NOT WRITE BELOW THIS LINE: FOR FINAL REVIEW ONLY

12 Approved: Y or N Code: 001
 13 Rejected: Y or N Code: 006 200 250 300 350 400 450 500 550 600 650 700 750

Signatures of Final Reviewers:

Date:

Date:

Comments:

- | | |
|---|---|
| APPL APPLICATION
APR APPROVED
DOB DATE OF BIRTH
DWP DISTRICT/WARD/PRECINCT
FIF FOUND IN FRANKLIN CO
INC FORM INCOMPLETE
NR PRECINCT SPLIT NOT ELIGIBLE
NR NOT REGISTERED
NRRC NOT REGISTERED IN OTHER COUNTY
NS NO SIGNATURE | OOL OHIO DRIVERS LICENCE
OS ON SYSTEM
PA PROVISIONAL APPLICATION
PW PROVISIONAL WORKSHEET
RAC REGISTERED AFTER CUTOFF
SPZ SIGNATURE POLL BOOK
SSN SOCIAL SECURITY NUMBER
U UNDERAGE
YOC VOTED IN OLD COUNTY
YWP VOTED IN WRONG PRECINCT
* COURT = BALLOT ACCEPTED
NO COURT = BALLOT REJECTED |
|---|---|

- | | |
|---|---|
| 001 APPROVED
006 FORM INCOMPLETE
200 NOT REGISTERED
250 REGISTERED AFTER CUTOFF
300 NO SIGNATURE
450 VOTED ABSENTEE
500 SIGNATURE DOESN'T MATCH
506 VOTED IN WRONG PRECINCT
600 UNDERAGE
650 PRECINCT SPLIT NOT ELIGIBLE | 700 APPROVED
750 FORM INCOMPLETE
800 NOT REGISTERED
850 REGISTERED AFTER CUTOFF
900 NO SIGNATURE
950 VOTED ABSENTEE
1000 SIGNATURE DOESN'T MATCH
1006 VOTED IN WRONG PRECINCT
1100 UNDERAGE
1150 PRECINCT SPLIT NOT ELIGIBLE |
|---|---|

**IDENTIFICATION DOCUMENT
PROVISIONAL BALLOT AFFIRMATION**
R.C. 3503.16, 3505.181, 3501.182

I, _____, solemnly swear or affirm that I am a
Printed name of voter

registered voter in the precinct in which I am voting this provisional ballot and that I am eligible to vote in the election in which I am voting this provisional ballot.

Current Address

Former Address (if applicable)

Street Address

City/Zip

County

Street Address

City/Zip

County

Mailing Address if other than above

If name change, please complete line below:

Birthdate: _____

Former Name _____

Reason for voting provisional ballot:

Form of identification provided:

- My name should appear on the official precinct list, but does not
- Change of address
- Change of name
- Requested; but did not receive absent voter's ballot
- Other _____

- Ohio drivers license (provide #): _____
- Other valid photo identification (specify): _____
- I cannot or will not provide valid photo identification; the last four digits of my social security number are : _____
- Other
- None

I understand that, if the above-provided information is not fully completed and correct, if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the board of elections determines that I have already voted in this election, my provisional ballot will not be counted. I further understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution. I hereby declare, under penalty of election falsification, that the above statements are true and correct to the best of my knowledge and belief. I further declare, if the election is a primary election, by requesting a ballot for the _____ Party, I hereby state that I desire to be affiliated with and support that party.

X _____
Signature of Voter Date

X _____
Signature of Witnessing Election Official Date

WHOEVER COMMITS ELECTION FALSIFICATION IS GUILTY OF A FELONY OF THE FIFTH DEGREE.

**THE ELECTION OFFICIAL VERIFICATION STATEMENT
MUST BE COMPLETED ON BACK.**

ELECTION OFFICIAL VERIFICATION STATEMENT

The Provisional Ballot Affirmation of _____ was subscribed and
Print Voter's Name

affirmed before me this _____ day of _____,
Month Year

If applicable, the election official must check the following true statement concerning additional information needed to determine the eligibility of the provisional voter:

- The provisional voter is required to provide additional information to the board of elections
- An application or challenge hearing regarding this voter has been postponed until after the election

The election official must check the following true statement concerning identification provided by the provisional voter, if any.

- Current and valid photo identification
- Current valid photo identification other than a driver's license or state ID card, with the voter's former address instead of current address and has provided the election official both the current and former addresses.
- Military identification, copy of current utility bill, bank statement, government check, or other government document with the voter's name and current address.
- Last four digits of social security number
- Unable to provide any of the above acceptable ID but does have one of these items. Voter must provide one of the acceptable ID to the board of elections within ten days after the election.
- Unable to provide any of the above acceptable ID but does have one of these items and cannot provide the last four digits of the voter's social security number. Voter must provide one of the acceptable ID to the board of elections within ten days after the election.
- Does not have any acceptable ID, but has completed Form 10-T *Affirmation of Voter Unable to Provide Identification*.
- Does not have any acceptable ID and has declined to execute an affirmation (Form 10-T).
- Voter declined to provide any acceptable ID, but does have one of those forms of ID. Voter must provide one of the acceptable ID to the board of elections within ten days after the election.

Name of Precinct _____

X _____
Signature of Election Official