

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

The Ohio Democratic Party,	:	
	:	
Plaintiff,	:	Case No. C2 04-1055
	:	
v.	:	Judge Marbley
	:	
J. Kenneth Blackwell, Secretary of State,	:	
in his official capacity, The Franklin County	:	
Board of Elections, Knox County Board of Elections,	:	
	:	
Defendants.	:	

MOTION OF
THE OHIO REPUBLICAN PARTY TO INTERVENE

Pursuant to Rule 24 of the Federal Rules of Civil Procedure and the Court’s order at oral argument on November 2, 2004, the Ohio Republican Party (“ORP”) hereby moves to intervene in the above-captioned action. The ORP has a vital interest in the subject matter of this proceeding and is so situated that the disposition of this action may, as a practical matter, impair or impede its ability to protect those interests.

The ORP seeks to intervene to protect its interests, which are similar to all individual voters and registered Republicans in the State of Ohio who have an interest in a fair and orderly election process that complies with both state and federal law. A Memorandum in Support of this Motion is attached hereto.

Respectfully submitted,

s/ William M. Todd

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MEMORANDUM IN SUPPORT

I. BACKGROUND

Plaintiff has requested injunctive relief asking that this Court intervene in the ongoing general election and order that the polling stations in Franklin County remain open for individuals to join the lines to vote after 7:30 p.m., which is the time that the polls are statutorily required to close in Ohio. *See* R.C. § 3501.32. That section provides that any voter who is in line to vote at the time the polls are required to close will be able to vote, and his or her vote will count. However, Plaintiff is asking this Court to subvert the express language of the statute and the intention of the General Assembly to allow additional individuals to join the lines at polling places in Franklin County *after* the time that they are statutorily required to close statewide.

The ORP seeks to intervene to protect its interests, which are similar to all individual voters and members of the Ohio Republican Party who have an interest in a fair and orderly election that complies with both federal and state law.

II. STATEMENT OF LAW AND ARGUMENT

As set forth above, the ORP demonstrates below that this Motion to Intervene should be granted in this action.

A. Intervention As Of Right

Federal Civil Rule 24(a) governs intervention of right. If a party satisfies the requirements set forth in Rule 24(a), the party has an *unconditional* right to intervene in the action. *See* Civ.R. 24(a). The "modern approach" adopted by Ohio courts, including the Ohio Supreme Court, is to construe Rule 24 broadly and liberally to permit intervention. *See State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 247; *Ohio Dept. of Adm. Serv., Office of*

Collective Bargaining v. State Emp. Relations Bd. (1990), 54 Ohio St.3d 48, 51; *Peterman v. Village of Pataskala* (1997), 122 Ohio App.3d 758, 760-61; *State ex rel. Northwood v. Wood Cty. Court of Common Pleas* (1996), 109 Ohio App.3d 487, 489-490; *Blackburn v. Hamoudi* (1986), 29 Ohio App.3d 350. See also *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1992), 63 Ohio St.3d 190; *State ex rel. Albright v. Delaware Cty. Court of Common Pleas* (1990), 54 Ohio St.3d 705; *State ex rel. Celeste v. Smith* (1985), 17 Ohio St.3d 163; *State ex rel. Henry v. Britt* (1981), 67 Ohio St.2d 71; *State ex rel. B.F. Goodrich v. Griffin* (1979), 59 Ohio St.2d 59; *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168; *State ex rel. Allied Chem. Corp. v. Earhart* (1974), 37 Ohio St.2d 153; *State ex rel. TRW, Inc. v. Jaffe* (1992), 78 Ohio App.3d 411.

Pursuant to Rule 24(a)(2), a party seeking to intervene must satisfy the following elements:

- (1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action;
- (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect its interest;
- (3) the intervenor must demonstrate that its interest is not adequately represented by the existing parties to the action; and
- (4) the motion to intervene must be timely.

Id. (citation omitted). In this case, the ORP meets all four criteria.

1. The ORP Claims an Interest Relating to the Subject of the Action.

The ORP is a political organization representing all members of the ORP, and it is vested with the charter to promote and protect all members of the voting class and its members in contention for public office in a general election who would identify themselves as Republicans in the State of Ohio. The ORP has standing to assert claims or defend actions based on injuries to itself or its members. See *United Food and Commercial Workers v. Brown Group*, 517 U.S.

544 (1996); *see also* *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977) (“we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests its seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit”); *Int’l Union, UAW v. Brock*, 477 U.S. 274, 289 (1986).

In this case, individual voters, including members of the ORP, would have standing to sue in their own right to protect their interests under state and federal election laws, the interests of the ORP’s members are germane to the organization’s purpose of promoting and protecting its members and candidates in contention for public office, and the enforcement of state and federal election laws does not require the participation of individual members of the ORP in the lawsuit. Under these principles, the ORP has standing to intervene and defend individual rights and the rights of the organization’s members, respectively, who will vote in the November 2004 election.

2. The ORP Is Situated Such That the Disposition of this Action May Impair Its Ability To Protect Its Interests.

Plaintiff argues and seeks to have this Court order that the polls remain open in Franklin County to permit individuals to join the voting lines after 7:30 p.m., the time that is statutorily mandated for the polls to close.

As a party representing registered voters, the ORP has a substantial interest in participating in a fair and orderly election system that operates in accordance with the laws. If the polls were allowed to remain open, additional persons would be permitted to cast votes who are not statutorily entitled to cast votes under Ohio’s election law. Here, in considering Plaintiff’s request for injunctive relief, it is not enough simply to protect the interests of the officials overseeing the administration of elections. This Court must also consider the divergent

interests of individual voters regardless of their political affiliation.

If Plaintiff is permitted to proceed in this action without the ORP as an intervening party, the ability of the ORP to protect its interests will be significantly impaired.

3. The ORP's Interests Are Inadequately Represented By Existing Parties.

The Court should grant this Motion to Intervene because the existing parties to this action do not adequately protect the ORP's interests. Clearly, Plaintiff does not adequately represent the ORP's interests. Also, the interest of Defendant Franklin County Board of Elections is to protect the interests of the individuals overseeing the administration of the elections at the polling places; its interest is not protecting the rights of the ORP.

Accordingly, because the other defendants do not adequately represent the interests of the ORP, intervention is warranted.

4. The ORP's Motion To Intervene Is Timely.

The ORP's Motion to Intervene is timely. On the timeliness of a motion to intervene, the Ohio Supreme Court has held as follows:

Whether a Civ.R. 24 motion to intervene is timely depends on the facts and circumstances of the case. *Norton v. Sanders* (1989), 62 Ohio App.3d 39, 42; *NAACP v. New York* (1973), 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648, 663. The following factors are considered in determining timeliness: "(1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention." *Triax Co. v. TRW, Inc.* (C.A. 6, 1984), 724 F.2d 1224, 1228.

State ex rel. First New Shiloh Baptist Church v. Meagher (1998), 82 Ohio St.3d 501, 503. Each of the factors enumerated by the Ohio Supreme Court weigh in favor of allowing intervention in this case. With respect to the factors related to timeliness, this action is still in its very initial

stages. This action was commenced today and no discovery has occurred. Additionally, no motions have been filed in this matter. As a result, the parties will not suffer prejudice or delay if the Court grants the Motion to Intervene.

With respect to the second factor related to timeliness, as set forth above, the ORP seeks intervention in order to protect its legitimate interests, interests that the Defendants cannot adequately protect. Thus, absent the requested intervention, the ORP's interests will go unprotected.

The ORP also satisfies the third timeliness factor because, as set forth above, very little time has passed from the commencement of this action to the date intervention was requested. Only hours have passed since this action was commenced and the ORP learned about this action.

When applied to the facts of this case, the fourth factor set forth by the Ohio Supreme Court also favors intervention. The parties to this action will suffer no prejudice as a result of the requested intervention. The intervention does not raise new claims and the parties will not have to redo any discovery. It is anticipated that, with the exception of allowing the ORP to participate to protect its legitimate interests, this action will maintain its current posture.

Finally, there are no unusual circumstances that militate against allowing intervention as timely in this case.

Accordingly, under the factors set forth by the Ohio Supreme Court in *First Shiloh Baptist Church*, this Motion to Intervene is timely.

B. Permissive Intervention

In addition to allowing intervention as a matter of right, Federal Rule of Civil Procedure 24 also allows permissive intervention. *See* Fed.R.Civ.P. 24(b). In pertinent part, Rule 24(b)(2) provides that “[u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant’s claim or defense and the main action have a question of law or fact in common.” In addition, Rule 24(b) requires the Court to consider “whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

In addition to meeting the criteria for intervention as a matter of right, the ORP also satisfies the test for permissive intervention as its “defense” and the main action share, at a minimum, a common question of law – the interpretation of certain provisions of the State of Ohio’s election law, specifically R.C. § 3501.32, which requires the polls to open at 6:30 a.m. and close at 7:30 p.m., with any persons waiting in line at 7:30 p.m. being permitted to cast their ballots. As previously set forth herein, Plaintiff seeks to hold the polls open beyond the statutorily mandated closing time to all *additional* individuals to join the lines to vote. The ORP believes the interpretation advanced by Plaintiff is contrary to the intent, spirit and express language of R.C. § 3501.32. Thus, the applicant’s defense and the main action have a common question of law.

With respect to the second factor that the Court is to consider under Rule 24(B), intervention in this action at this early stage would not unduly delay or prejudice the adjudication of the rights of the original parties in any way. The ORP does not seek to expand the scope of this proceeding by incorporating new issues that are unrelated to Plaintiff’s allegations, but only to ensure that the ORP’s interests and those of similarly situated voters throughout Ohio are adequately protected. The participation of ORP would not result in an unmanageable number of

parties and clearly would be compatible with efficiency and due process. If anything, intervention would promote judicial efficiency by diminishing the prospect of future litigation by ORP and would ensure the adequate representation of others who have similar interests. Consequently, ORP should be permitted to intervene under Rule 24(b) in order to facilitate the resolution of its common claims of law and fact in one proceeding consistent with the principles of judicial economy. Thus, permissive intervention is appropriate in this case.

III. CONCLUSION

Based on the foregoing, the Ohio Republican Party satisfies all of the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and, as a result, may intervene in this action as a matter of right. In addition (or in the alternative), the Ohio Republican Party also meets the criteria for permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure. As such, the Ohio Republican Party respectfully requests that this Court grant this Motion to Intervene.

Respectfully submitted,

s/ William M. Todd

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2004 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ William M. Todd

William M. Todd