



parties may not adequately represent that interest. The grounds for this Motion are set forth in the Memorandum below.

## MEMORANDUM

### **I. Background**

Plaintiff filed this action seeking a declaration that Directive 2004-48 violates the Equal Protection Clause of the Constitution of the United States and directing Defendant to issue a new Directive for the evaluation and counting of provisional ballots and to ensure that all eighty-eight counties comply in all respects with the newly issued directive. The proposed Intervenor is a “major political party” within the meaning of the law with hundreds of candidates appearing on the provisional ballots in question. Intervenor therefore has a uniquely relevant interest in the subject matter of this action.

### **II. Argument**

#### **A. The Intervenor Satisfies the Requirements for Intervention as of Right as Set Forth In Fed. R. Civ. P. 24(a)(2)**

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

Upon timely application anyone shall be permitted to intervene in any 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)(2) should be liberally construed to permit intervention.

*Grubbs v. Norris*, 870 F.2d 343 (6<sup>th</sup> Cir. 1989). Each of these requirements for intervention as of right is addressed below.

#### **1. The Intervenor Has An Interest in the Subject of the Action**

The Intervenor clearly has an interest relating to the “property or transaction which is the subject of the action,” i.e., the provisional ballots cast in the November, 2004 general election.

On election day, the day this suit was filed, Intervenor ODP deployed poll monitors and poll challengers throughout the state of Ohio. These monitors and challengers were acting to ensure that provisions of both the Ohio Revised Code and the Help America Vote Act of 2000 (HAVA), including those governing provisional voting, were followed at the polls. The activities undertaken by Intervenor also included monitoring whether individuals found not to be in the “correct” precinct were being given instructions by poll workers as to the location of their “correct” polling place. These individuals were also monitoring whether polling place officials were requiring written documentation in order to permit individuals to cast ballots when only oral identification is required by law. ODP’s monitors created and maintained detailed written reports of their observations throughout the day.

As a “major political party” within the meaning of O.R.C. §3501.01(F), ODP has both an organizational and a representative interest in participating in the litigation of the issues that are the subject of this action. From an organizational standpoint, a principle function of ODP’s existence is to engage in activity that directly promotes the election of its nominees at the general election. This necessarily involves engaging in activities, including political speech and political association, which are protected by the First Amendment of the Constitution of the United States. The goal of such activity is to secure votes,

including from provisional voters, in favor of the party's candidates. Additionally, like any association, ODP in one comprised members. Individuals who have requested a Democratic ballot in a primary within the past two calendar years are legally considered to be affiliated with, or members of, the Democratic party. R.C. §3513.05.

ODP had candidates on the ballot throughout the state, including candidates for President, Vice President, United States Senate, United States Congress and also hundreds of candidates for state and county offices. Accordingly, ODP and its constituent membership have an interest in seeing that all legitimate votes cast in the election are counted, from county to county, using consistent standards. *See Bush v. Gore*, 531 U.S. 98 (2000)(The failure to provide specific standards for counting of ballots that are sufficient to assure a uniform count statewide violates the Equal Protection Clause of the United States Constitution.).

## **2. The Intervenor's Interests Will Be Impaired If Not Permitted to Intervene**

The Intervenor's interests may not be adequately represented by Plaintiff Schering. Thus, ODP's interests, as a practical matter, may be impaired or impeded by its inability to protect these interests without participation in the action, particularly given the fact that an adverse ruling by the Court could result in thousands of votes cast by party members for party candidates not being included in the final tabulation of votes cast in the November, 2004 general election.

The Intervenor's burden for demonstrating the inadequacy of representation is minimal. Indeed, the United States Supreme Court has stated that "the Rule [24] is satisfied if the applicant shows that the representation 'may be' inadequate," so that the applicant's burden on this matter should be "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1982). This Court and the United States Court of Appeals for the Sixth Circuit have held the same. *U.S. v. Schreiber*, 150 F.R.D. 106, 109(S.D. Ohio 1993)("the . . . burden of demonstrating inadequacy [of representation] should be treated as minimal."); *Stupak-Thrall v. Gliackman*, 225 F.3d 467, 482 (6<sup>th</sup> Cir. 2000)(same); *Grutter v. Bollinger*, 188 F.3d 394, 399 (6<sup>th</sup> Cir. 1999)(same).

The issue is not whether Plaintiff Schering is represented by competent counsel; certainly she is. Rather, the issue is whether the interests of the Ohio Democratic Party in this case are the same as Plaintiff's interests. They are not.

It remains at best uncertain whether the current Plaintiff's request for relief will encompass all possible issues related to the counting of provisional ballots. It is much more likely that the current Plaintiff in this case will only develop the limited issues pertaining to her individual situation and therefore only seek the relief that would provide her individual remedy. Intervenor ODP will bring to the case a variety of fact patterns involving both provisional ballots permitted to be cast and situations where provisional ballots were denied. Allowing ODP's intervention will thus sharpen the argument on both sides and provide the Court with a more useful framework of advocacy from which to issue its decision.

### **3. The Intervenor's Application for Intervention is Timely**

The motion is timely. The Plaintiff's Complaint was filed with this Court on November 2, 2004. No answer has yet been filed and no schedule has yet been set. Accordingly, Intervention will not delay the proceedings or prejudice either the Plaintiff or the Defendant.

#### **B. In the Alternative, Intervenor Satisfies the Requirements for Permissive Intervention as Set Forth in Civ. R. 24(b)(2)**

The decision whether to allow permissive intervention is committed to the sound discretion of the trial court. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6<sup>th</sup> Cir. 1983). This rule is to be construed liberally, and excludes many of the requirements of intervention as of right. *Id.* For example, the Rule (24)(a)(2) requirement that a proposed intervenor establish inadequate representation by existing parties is not a consideration for purposes of Rule 24(b). The Intervenor clearly has an interest in the outcome of this matter. Since this case is still young and the ultimate issue has yet to be placed before this Court, the proposed intervention cannot and will not prejudice or delay the rights of any of the existing parties. The Intervenor therefore requests that the Court grant permissive intervention under Civil Rule 24(b), should the Court decide not to grant intervention as of right.

### **III. Conclusion**

For the foregoing reasons, proposed Intervenor Ohio Democratic Party respectfully requests that their motion be GRANTED and that they be permitted to intervene in the instant action.

Dated: November 15, 2004

Respectfully submitted,

s/ Donald J. McTigue

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**Certificate of Service**

I hereby certify that on November 15, 2004, a copy of the foregoing Motion to Intervene was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

s/ Donald J. McTigue

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