

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**Anita Rios, et al.,
Plaintiffs,**

v.

**J. Kenneth Blackwell,
Defendant.**

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3:04CV7724

Judge Carr

**MOTION TO INTERVENE OF
THE OHIO REPUBLICAN PARTY, BETTY JO SHERMAN,
THOMAS W. NOE, AND GLENN A. WOLFE**

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, the Ohio Republican Party (“ORP”), Betty Jo Sherman, presidential elector for George W. Bush, Thomas W. Noe, and Glenn A. Wolfe (collectively “Intervenors”), hereby move this Court for an order granting leave to intervene as Defendants in this proceeding. Intervenors have a vital interest in the subject matter of this proceeding and are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect those interests.

Intervenors seek to intervene to protect their interests, which are similar to all individual voters in Ohio who have an interest in a fair and orderly election process that complies with both state and federal law. Additionally, Intervenor Sherman, as a presidential elector for George W. Bush, has an interest in casting her electoral vote as provided under Ohio and federal law. All Intervenors, and in fact all Ohio voters, have an interest in ensuring that Ohio is not disenfranchised of its right to participate in the Electoral College.

As is set forth more fully in the attached Memorandum in Support, Intervenors are entitled to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a)(2).

Alternatively, Intervenor respectfully request that this Court permit Intervenor to intervene under Fed. R. Civ. P. 24(b)(2).

Respectfully submitted,

/s/ James P. Silk, Jr.

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

In a transparent effort to create chaos and confusion, and to keep Ohio from participating in the Electoral College on December 13, 2004, ten Plaintiffs commenced this action on November 22, 2004 seeking an expedited recount of the votes cast in the November 2, 2004 presidential election. Seven of the Plaintiffs are allegedly Ohio residents who voted in the November 2, 2004 election. Two of the Plaintiffs, David Cobb and Michael Badnarik, were candidates for the office of President of the United States, respectively for the Green Party and Libertarian Party. Common Cause Ohio is the last Plaintiff.

Plaintiffs seek declaratory relief, a temporary restraining order, and a preliminary injunction against Defendant J. Kenneth Blackwell, Ohio Secretary of State (“Secretary of State”). More specifically, Plaintiffs request that this Court order the Secretary of State to ensure that a recount of the ballots cast on November 2, 2004 be completed by December 7, 2004, the date Ohio’s electors will be certified for the Electoral College. Under Ohio law, Plaintiffs also request the extraordinary relief of requiring each county to conduct “the recount of every vote manually, by hand,”¹ and an order prohibiting the Secretary of State from mailing to Ohio’s presidential electors certificates of their election until every county has fully conducted and completed a manual recount of the votes cast for President. Complaint, p. 21. In essence, Plaintiffs seek to hold Ohio’s electoral votes hostage until every single one of the more than five million votes cast for President on November 2, 2004, is manually recounted.

This extraordinary relief is sought despite the fact that all county boards of election have not yet completed the official count of all ballots cast on November 2, 2004. Rather than

¹ Neither Ohio nor federal law provides for an original manual recount of every vote cast for President as requested by Plaintiffs.

allowing the boards of election to complete the ongoing counting of votes cast on November 2, 2004, including the provisional and absentee ballots, Plaintiffs ask this Court to order the boards of election to rush through the initial count, shift gears and start recounting votes. The effect will be costly and could potentially lead to errors and inadvertent mistakes as boards rush to complete the most critical phase of the counting process: the official canvass.

Under Ohio law, before a recount of votes can proceed for an election submitted to electors throughout the entire state, there must first be an official count of votes and a declaration by the Secretary of State of the results of such election. R.C. 3515.03 and Secretary of State Directive 2004-43 (attached as Ex. A.) (issued October 25, 2004). In the absence of such a declaration, there is nothing to which to compare the recount. Plaintiffs' claim that a "meaningful" recount cannot occur because there will not be enough time to perform a recount rings hollow when one considers that, in many counties, the initial count is not yet complete.

Noticeably absent from Plaintiffs' Complaint, however, is any allegation that Plaintiff Cobb or Plaintiff Badnarik could win the right to have Ohio's presidential electors cast their Electoral College votes for them based upon a recount. Thus, the extraordinary, labor-intensive and costly relief requested by Plaintiffs will, as Plaintiffs themselves recognize, not result in any meaningful change in the results of this election.

In its November 23, 2004 Order, this Court recognized that the only Plaintiffs in this suit who can allege injury are Plaintiff Cobb and Plaintiff Badnarik, the candidates for President, and held that neither "can credibly maintain that he possesses even a remote chance of victory through a recount." Order, p. 4. As a result, this Court appropriately denied Plaintiffs' request for immediate injunctive relief and found that the Plaintiffs here could show no irreparable harm sufficient to justify extraordinary relief.

Similarly, the Delaware County Court of Common Pleas recently *granted* a restraining order requested by the local board of elections, recognizing the irreparable harm to the boards of elections in expediting a recount that has no chance of affecting the Plaintiffs' standing in the presidential election. That Court recently issued an injunction *against* the National Voting Rights Institute (NVRI) and Candidates Cobb and Badnarik, enjoining the recount in that County. (Judgment Entry attached as Exhibit B.) Except for the county to which it is addressed, the recount request made by the NVRI in Delaware County is identical to the recount request that Plaintiffs attached to their Complaint to this Court. After examining that request for a recount, the Delaware County Court granted a preliminary injunction to the Board of Elections, finding that the issuance of an injunction would prevent irreparable harm that would be caused *to the Board* by the requested recount and concluded that such an injunction was in the public interest.

As will be set forth in the Intervenor's Motion to Dismiss, Plaintiffs' Complaint and request for a manual recount of all votes cast in the November 2, 2004 presidential election should be dismissed in its entirety.²

II. THE INTERVENORS

The ORP is a political organization, which represents all members of the ORP, and 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. United Food and Commercial Workers v. Brown Group, 517 U.S. 544 (1996); see, e.g. 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

² In the interest of expediency, the Motion to Intervene has been filed, with the Motion to Dismiss to be filed within the time period of responsive pleadings as set forth by rule or order of the Court.

members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it 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"); International Union, UAW v. Brock, 477 U.S. 274, 289 (1986)). Under these principles, the ORP has standing to intervene and defend the rights of its members who voted in the November 2004 election.

Betty Jo Sherman resides at 19380 W. Artzheim Lane, Elmore, Ohio. She is a duly registered voter in Ottawa County. Ms. Sherman voted for President on November 2, 2004 and is a presidential elector for George W. Bush.

Mr. Thomas W. Noe resides at 1676 River Road, in Maumee, Ohio. Mr. Glenn A. Wolfe resides at 4315 Mockingbird Lane, Toledo Ohio. Msrs. Noe and Wolfe are duly registered voters in Lucas County, and each voted for President on November 2, 2004.

III. ARGUMENT

A. Intervenors are Entitled To Intervene as of Right.

Federal Rule of Civil Procedure 24(a)(2) provides that upon timely application, anyone shall be permitted to intervene in an action:

“...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.”

Rule 24 intervention is designed to balance the competing interests of “judicial economy resulting from the disposition of related issues in a single lawsuit and focused litigation resulting from the need to govern the complexity of a single lawsuit.” Jansen v. Cincinnati, 904 F.2d 336, 339-340 (6th Cir. 1990). For this reason, “Rule 24 is liberally construed and doubts are resolved

in favor of the proposed intervenor.” Liberte Capital Group v. Capwill, 2002 U.S. Dist. LEXIS 25233 (D. Ohio, 2002); see also, Purnell v. City of Akron, 925 F.2d 941, 950 (6th Cir. 1991).

Rule 24(a)(2) establishes that, in order for intervention to be proper, four elements must be met:

- (1) the application must be timely;
- (2) the intervenor must have a *substantial* legal interest in the subject matter of the action;
- (3) the intervenor’s ability to protect that interest may be impaired in the absence of intervention; and
- (4) the parties already before the court may not adequately represent intervenor’s interest.

Grutter v. Bollinger, 188 F.3d 394, 397-98 (6th Cir. 1999) overruled on other grounds, 156 L. Ed. 2d 257, 123 S. Ct. 2411. See also, Grubbs v. Norris, 870 F.2d 343, 345 (6th Cir. 1989). In this case, Intervenors meet all four criteria.

1. The Motion to Intervene is Timely Filed.

In reviewing whether a motion to intervene is timely, a court must consider five factors:

- (1) the point to which the lawsuit has progressed;
- (2) the purpose for which the intervention is sought;
- (3) the length of time preceding the application during which the proposed intervener knew or reasonably should have known of the interest in the case;
- (4) the prejudice to the original parties due to the proposed intervener's failure, after he or she 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.

Jordan v. Michigan Conf. of Teamsters Welfare Fund, 207 F.3d 854, 862 (6th Cir. 2000).

In this case, the Motion to Intervene has been filed very early in this litigation -- just two days after the suit was filed. As such, the Motion is timely.

2. Intervenors Have a Significant and Recognizable Interest In the Subject Matter of This Action.

While Rule 24(a) does not specify the nature of the interest required for intervention as a matter of right, the Supreme Court held that “what is obviously meant . . . is a significantly

protectable interest.” Donaldson v. United States, 400 U.S. 517, 531 (1971). The Sixth Circuit applies “a rather expansive notion of the interest sufficient to invoke intervention of right.” Michigan State v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997). This Circuit rejects “the notion that Rule 24(a)(2) requires a specific legal or equitable interest.” Miller, 103 F.3d at 1245 (quoting Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991)).

Intervenors have a substantial interest in assuring the integrity of the Ohio election system. “[M]aintaining the election system that governed their exercise of political power” is a recognized basis for intervention as of right under Rule 24. Meek v. Metropolitan Dade County, 985 F.2d 1471, 1480 (11th Cir. 1993), cited with approval in Miller, 103 F.3d at 1246. As individual registered voters and a political party with members who are individual registered voters, Intervenors have a substantial interest in participating in a fair and orderly election system that operates in accordance with the laws.

Intervention is particularly appropriate in cases involving the public interest. For purposes of evaluating the right to intervene, “[t]he interest requirement may be judged by a more lenient standard if the case involves a public interest question” 6 Moore's Federal Practice § 24.03[2][c]. Here, whether a recount of the November 2, 2004 presidential election proceeds and the manner in which it proceeds is clearly a matter of public interest.

Moreover, Plaintiffs’ request for a manual, hand recount of every vote, regardless of when the recount occurs, is a wholesale change in the structure of Ohio’s recount process. Generally when a recount occurs, members of political parties participate as observers appointed by their parties’ candidates. Accordingly, the ORP has a particular interest in intervening to protect its interests in this process.

Accordingly, Intervenors should be permitted to intervene as of right.

3. The Disposition of This Action May As a Practical Matter Impair or Impede Intervenors' Ability to Protect Their Interests.

“To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied.” Michigan State, 103 F.3d at 1247. In weighing this prong of the Rule 24 analysis, this Court may also consider the time-sensitive nature of a case. Americans United for Separation of Church and State v. City of Grand Rapids, 922 F.2d 303 (6th Cir. 1990); Miller, supra. Whereas, here, time does not permit an intervenor to bring a separate action to protect his rights, intervention as of right is particularly appropriate.

4. Intervenors' Interests Are Not Adequately Represented.

As to the fourth element of intervention as of right, the Sixth Circuit holds that "proposed Intervenors need only show that there is a *potential* for inadequate representation." Stupak-Thrall v. Glickman, 226 F.3d 467, 472 (6th Cir. 2000), quoting Grutter, 188 F.3d at 400 (emphasis in original). The moving party carries only a “minimal burden” of showing that their interests are inadequately represented by the existing parties. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, (1972).

Based on the foregoing, Intervenors' Motion to Intervene clearly satisfies the “minimal” burden under Rule 24(a)(2) of showing that representation of Intervenors' interests by the existing parties “may be” inadequate. The Secretary of State may represent the interest of the State in conducting a recount, but he cannot represent the unique circumstances of the Intervenors, with concerns over (1) allegations that may lodged against members of the ORP in the course of this action (2) their participation as duly chosen electors for the President; (3) their participation in the recount process and (4) the integrity of the recount process system from an

individual voter's perspective. As such, the Intervenors should be permitted to intervene as a matter of right.

B. Alternatively, Intervenors Should be Permitted to Intervene Under Fed R. Civ. P. 24(b).

If intervention of right is not granted, Intervenors submit that they should be allowed to intervene permissively. With respect to permissive intervention, Rule 24 states:

(b) Permissive Intervention. 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).

“Permissive intervention under Rule 24(b) is to be liberally granted, so as to promote the convenient and prompt disposition of all claims in one litigation.” Morocco v. Nat'l Union Fire Ins. Co., 2003 U.S. Dist. LEXIS 17918 (S.D. Ohio, 2003), quoting Morelli v. Morelli, 2001 U.S. Dist. LEXIS 25457 (S.D. Ohio 2001). In this case, Intervenors intend to assert several defenses that are both legally and factually related to Plaintiffs' claims, including that several facets of Plaintiffs' requested relief are inappropriate, unnecessary, and neither required nor authorized by Ohio or federal law. These issues constitute common factual and legal questions sufficient to justify permissive intervention.

Furthermore, 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. Intervenors do not seek to expand the scope of this proceeding by incorporating new issues that are unrelated to Plaintiffs' allegations, but only to ensure that Intervenors' interests and those of similarly situated voters and presidential electors throughout Ohio are adequately protected. The participation of Intervenors would not result in an unmanageable number of parties and clearly would be

compatible with efficiency and due process. Consequently, Intervenors should be permitted to intervene under Rule 24(b) in order to facilitate the resolution of this matter in one proceeding consistent with the principles of judicial economy.

IV. CONCLUSION

For the foregoing reasons, Intervenors, the Ohio Republican Party, Betty Jo Sherman, Thomas W. Noe, and Glenn A. Wolfe, respectfully urge the Court to issue an order permitting them to intervene in this action as party Defendants.

Respectfully submitted,

/s/ James P. Silk, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2004, a copy of the foregoing was filed electronically. Notice of the 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/ James P. Silk, Jr.

James P. Silk, Jr.