

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX RE. DANA SKAGGS, ET AL.,

Case No.: 08-2206

RELATORSS,

VS.

JENNIFER L. BRUNER, SECRETARY OF STATE, ET AL.,

RESPONDENTS

AND

OHIO DEMOCRATIC PARTY  
341 FULTON STREET  
COLUMBUS, OHIO 43215

INTERVENOR-  
RESPONDENT

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MOTION OF OHIO DEMOCRATIC PARTY TO INTERVENE

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MOTION TO INTERVENE

Now comes the Ohio Democratic Party and hereby moves the Court to issue an order granting it leave to intervene as a party respondent. This motion is made pursuant to Civ. R. 24(A)(2) and Civ. R. 24(B)(2). A Memorandum in Support is attached hereto.

Respectfully submitted,

  
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Donald J. McTigue (0022849)

*Counsel for Proposed Intervenor  
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MEMORANDUM IN SUPPORT

Pursuant to Ohio R. Civ. P. 24(A)(2), the Proposed Intervenor, Ohio Democratic Party, hereby moves this Court for leave to intervene in this action as of right, as a third party respondent. The current parties will not be prejudiced by this intervention as no answer, briefs or evidence have yet to be filed. All are due December 1, 2008 pursuant to the Court's Order of November 25, 2008. ODP has a direct interest with respect to the issues raised by Relators' Complaint and ODP can not expect that its interest will necessarily be fully represented by the existing parties. In the alternative, ODP seeks permissive intervention under Ohio R. Civ. P. 24(B)(2). The grounds for this motion are discussed in detail below.

## MEMORANDUM

### I. **Argument**

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

Ohio R. Civ. P. 24(A) provides:

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.

R. Civ. P. 24(A)(2) should be liberally construed to permit intervention. *Ohio Dept. Admin. Svcs. v. State Employee Relations Board* (1990), 54 Ohio St.3d 48. Each of these requirements for intervention as of right is addressed below.

#### **1. The Ohio Democratic Party Has An Interest in the Subject of the Action**

Proposed Intervenor, the Ohio Democratic Party, has a direct and clear interest relating to the "property or transaction which is the subject of the action," i.e., the counting of the provisional ballots cast in the November 4, 2008 general election.

ODP is a state political party organized under Chapter 3517 of the Ohio Revised Code, recognized by the State of Ohio as an official political party with the right to nominate candidates for election to public office at primary elections and to have its nominees designated by their political party on the general election ballot. ODP's nominees appeared on the November 4, 2008 general election ballot for all offices, including President and Vice President of the United States, Representative to Congress, State Senator, State Representative, county offices and judicial offices. The Party's

interest in this case is in ensuring uniform, lawful and fair criteria with respect to the determination of the eligibility of provisional ballots to be counted. The Party represents hundreds of thousands of electors throughout the State of Ohio, including many who have cast provisional ballots and whose ballots will be affected by a ruling in this case. The Ohio Democratic Party has a direct interest in this case as well based on its status as a party The Northeast Ohio Coalition for the Homeless, et al v. Jennifer Brunner, Case No. 2:06-CV-896 ("NEOCH") and *Ohio Republican Party, et al v. Jennifer Brunner*, Case No. 2:08-CV-913 ("ORP"), pending in the District Court for the Southern District of Ohio.

On election day, November 4, 2008, the Plaintiffs in ORP, a case originally filed shortly before the election, moved to amend their complaint to include additional claims that went directly to the counting of provisional ballots. The motion to amend was granted by Judge Smith. The amended complaint alleged that by virtue of various acts and omissions of Secretary Brunner, there would not be uniform procedures or standards for determining the eligibility of provisional ballots to be counted or in the counting of such ballots. The amended complaint sought affirmative preliminary and permanent injunctions to enjoin Secretary Brunner to promulgate uniform standards for the determination of the eligibility of provisional ballots to be counted and for the counting of the same.

The same day, the Secretary and the Plaintiffs in NEOCH filed motions to consolidate the ORP case with the NEOCH case given that the amended claims in the ORP case were now intertwined with the claims in the NEOCH case and directly affected by the prior two Orders by Judge Marbley in that case governing provisional voting. Also

that day, ODP filed a motion to intervene in the NEOCH case because of its interest in insuring uniform, lawful and fair application of criteria in determining the eligibility of provisional ballots to be counted. The Party also filed a Motion to Consolidate the ORP case with the NEOCH case. On November 5, 2008, the Court granted the Ohio Democratic Party's motion to intervene and on November 6, 2008, granted all the parties' motions to consolidate the ORP case with the NEOCH case. The ORP case has since been voluntarily dismissed, but the NEOCH case is still pending.

**2. The Disposition of the Action May as A Practical Matter Impair or Impede the Ohio Democratic Party's Ability to Protect Its Interest**

ODP's interest, as a practical matter, may be impaired or impeded by its inability to protect these interests without participation in the action, particularly given that an adverse ruling by the Court could result in votes cast by electors for the nominees of the Ohio Democratic Party not being counted and affecting the ultimate outcome of some races. Further, given the exigency of time for certification of the results of the November 4, 2008 general election and, in particular the December 9, 2008 safe harbor date for certifying the persons elected to the electoral college, a decision by this Court in favor of Relators could impair or impede ODP's ability to seek review of the decision or the ability to vindicate rights of voters protected under federal law. The final disposition, therefore, could adversely affect ODP's interest in seeing that all eligible provisional ballots cast at the election are counted.

**3. The Ohio Democratic Party' Interests May Not Be Adequately Represented by the Existing Parties**

An 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).

The issue is not whether the existing Respondents are represented by competent counsel. Rather, the issue is whether the interests of the Proposed Intervenor in this case are the same as the existing Respondents interests. Clearly, they are not necessarily the same. In the federal district court, after this case was removed, ODP filed a Memorandum in Opposition to Relators' Motion for TRO and a Motion for Summary Judgment. In the Sixth Circuit, ODP filed an Amicus Brief on the merits. In these filings ODP has made legal arguments that the Ohio Secretary of State did not. These arguments related to the not only the proper construction of the Ohio Statutes governing counting of provisional ballots, but also application of the First Amendment, Equal Protection, the Voting Rights Act of 1964 and the Help America Vote Act of 2002 to the Ohio law. ODP intends to raise these arguments before this Court in order that it will be able to consider all constitutional and statutory provisions necessary to a full resolution of Relators' claims.

Accordingly, the interests of Proposed Intervenor can only be protected by permitting their intervention in the instant action.

#### **4. Proposed Intervenor's Application for Intervention is Timely**

The motion is timely. Relators' Complaint was filed with this Court on November 13, 2008. However, the case was immediately removed to federal court. After proceedings in the District Court and a decision by the Sixth Circuit Court of Appeals the case was returned to this Court on November 25, 2008, yesterday.

No answer, briefs or evidence has yet been filed. They are due on December 1, 2008. Proposed Intervenor would comply with this date in submitting its Answer, brief and evidence if intervention is granted. Accordingly, intervention will not delay the proceedings or prejudice any party.

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

Permissive intervention is to be granted liberally, and excludes many of the requirements of intervention as of right. 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). As discussed above, the proposed Intervenor clearly has an interest in the outcome of this matter. Since this case is still recent 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 Ohio Democratic Party therefore requests that the Court grant permissive intervention under Civil Rule 24(B), should the Court decide not to grant intervention as of right.

**II. Conclusion**

WHEREFORE, for the above reasons, Proposed Intervenor, Ohio Democratic Party, hereby requests that the Court issue an order granting it leave to intervene and to be made a party-respondent. Simultaneously with the filing of this Motion, Proposed Intervenor is filing an Answer to the Complaint in compliance with Ohio R. Civ. P. 24(C).

Respectfully submitted,

  
Donald J. McTigue (0022849)

*Counsel for Proposed Intervenor  
Ohio Democratic Party*

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion to Intervene and Memorandum in Support was served upon all parties in the case via electronic mail and/or facsimile machine this 26th day of November 2008.

  
Donald J. McTigue