

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

THE OHIO DEMOCRATIC PARTY	:	
	:	
Plaintiff,	:	CASE NO. 1:06-CV-02692
	:	
v.	:	JUDGE WELLS
	:	
THE CUYAHOGA COUNTY BOARD OF :	:	
ELECTIONS,	:	
	:	
Defendant.	:	

**MOTION OF OHIO SECRETARY OF STATE,
J. KENNETH BLACKWELL, TO INTERVENE**

The Ohio Secretary of State, J. Kenneth Blackwell respectfully requests that he be permitted to intervene in this cause of action as a party. This motion is made pursuant to R.C. 3501.05(AA) and Fed. R. Civ. P. 24. A memorandum in support is attached hereto and incorporated by reference.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General of Ohio

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MEMORANDUM IN SUPPORT

Not only has Plaintiff waited until the last minute to file this challenge, but it is trying to get an Ohio law interpreted by a federal court, which is a violation of the Eleventh Amendment of the U.S. Constitution. Even more disturbingly, the filing of this lawsuit at this time may provide voters with the false hope that they can arrive at the polls after they close at 7:30 p.m. And any voter that arrives later or attempt to cast a vote, should this Court extend the hours, face the possibility of not having their vote counted if a Court of Appeals reverses this Court's decision. For these reasons, the Court should deny Plaintiff's request for relief.

LAW AND ARGUMENT

R.C. 3501.05(AA) provides that:

In any action involving the laws in Title XXXV of the Revised Code wherein the interpretation of those laws is in issue in such a manner that the result of the action will affect the lawful duties of the secretary of state or any board of elections, the secretary of state may, on the secretary of state's motion, be made a party.

This statute, accordingly, provides that the chief elections officer of the State of Ohio may become involved in any election case where a court's interpretation of election law will affect the duties of the secretary or any board of elections. The instant case involves a challenge to keep the polls open past 7:30 p.m. this evening. Because keeping the polls open is in violation of Ohio law because Ohio law already allows voters in line to cast their votes, the Secretary of State seeks to intervene.

The participation of the Secretary of State in an elections matter is critically important. The Supreme Court has consistently held that when an elections statute is subject to two different, but equally reasonable interpretations, the interpretation of the Secretary of State, the

State's chief elections officer, is entitled to more weight. *State ex rel. Oster v. Lorain Cty. Bd. of Elections* (2001), 93 Ohio St.3d 480, 486; *State ex rel. Sinay v. Soddors* (1997), 80 Ohio St.3d 224, 228-229. Therefore, it is important that this Court have the opportunity to hear the opinion of the Secretary of State on the matters at issue.

In addition to the statutory authorization for the Secretary's right to intervene, the Federal Rules of Civil Procedure expressly permit intervention on the facts of this case. Rule 24(a) provides for intervention as of right, when either a statute of the State confers an unconditional right to intervene or when the applicant claims an interest in the matter that is the subject of the action. In this case, the Secretary undeniably has an interest in ensuring that the polls are operated consistently with Ohio law. Accordingly, the Secretary has the right to intervene in this action to protect his interest of Ohio's election statutes.

Alternatively, this Court should grant the Secretary permission to intervene under Civ. R. 24(b). An applicant may be permitted to intervene when a statute of the State confers a conditional right to intervene or when the applicant's claim is interrelated to the main action with a common question of law or fact. In exercising its discretion under Civil Rule 24(b), a Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. In addition, the proposed intervenor must demonstrate that his interests are not adequately represented, although the burden of making this showing is minimal, and it is satisfied merely by indicating that the proposed intervenor would make arguments that have not been made. *State ex rel. Superamerica Group v. Licking Cty. Bd. of Elections* (1997), 80 Ohio St.3d 182; *State ex rel. Smith v. Frost* (1995), 74 Ohio St.3d 107, 108; *Dept. of Adm Serv., Office of Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St.3d 48, 51. *See, also, McCormac, Ohio Civil Rules Practice* (1970), at 81, §4.36.

The Secretary has legal arguments to make that do not appear to have been made in this instance, given the shortness of time involved in responding to the motion for TRO. Thus the Secretary's interests have not been fully represented in the action.

Based on the foregoing, this motion to intervene should be granted.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General of Ohio

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion of Ohio Secretary of State, J. Kenneth Blackwell, to Intervene* has been served pursuant to the Court's electronic system and by facsimile, this 7th day of November, 2006, upon Christopher P. Thorman, The Bradley Building 1220 West 6th Street Suite 307, Cleveland OH 44113, Facsimile no. 216-621-3422

/s/Richard N. Coglianesse
RICHARD N. COGLIANESE