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

THE SANDUSKY COUNTY DEMOCRATIC PARTY, et al.,	)	
Plaintiff,	)	
vs.	)	Case No. 3:04 CV 7585
J. KENNETH BLACKWELL, Secretary of State,	)	Judge Carr
Defendant.	)	

MOTION TO INTERVENE OF
THOMAS W. NOE , GLENN A. WOLFE, AND GREGORY L. ARNOLD

Pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure, Thomas W. Noe, Glenn A. Wolfe, and Gregory L. Arnold (hereinafter, "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. Long ago, Ohio adopted a precinct-based system of elections. Numerous local issues and candidates will appear on the ballot in November based upon precinct-specific jurisdictions. In this litigation commenced one month prior to the November 2004 election, Plaintiffs ask this Court eliminate Ohio's long-standing precinct-based system and replace it with a sweeping reform of county-wide balloting, which is neither required by federal law nor consistent with Ohio law.

Such a sweeping reform eliminates a traditional method of reducing voter fraud and increasing the integrity of Ohio elections. The last-minute nature of the requested change could create chaos in Ohio's election system. If the remedy sought by Plaintiffs is granted, Intervenors stand to have their votes diluted by other voters who will be permitted to cast a ballot at any precinct in the county, whether or not the voter lives in that precinct. No other party to this litigation is an individual with a vested interest in the integrity of his vote and the election process, thus no other party is poised to adequately argue the significant impact that Plaintiffs' proposed remedy will have on an individual voter.

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, Intervenors respectfully request that this Court permit Intervenors to intervene under Fed. R. Civ. P. 24(b)(2). Counsel for the Ohio Secretary of State has advised that he will not object to Intervenors' participation in this lawsuit as Defendants.

In accordance with Fed. R. Civ. P. 24(c), Intervenors' proposed Motion to Dismiss and Memorandum Contra Motion for Preliminary Injunction are attached hereto as Exhibit "A."

Respectfully Submitted,

/s/ Truman A. Greenwood
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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

I. INTRODUCTION

The Ohio Democratic Party and Sandusky County Democratic Party and other organizations (hereinafter "Plaintiffs") seek injunctive and declaratory relief to enjoin Defendant Blackwell's Directive 2004-33 (hereinafter "Directive"). The Directive provides much needed guidance to Ohio's eighty-eight boards of elections and countless poll workers who will be faced with what is expected to be one of the most contentious and contested elections ever seen in Ohio.

In this action, Plaintiffs ask this Court to toss out Ohio's long-standing precinct-based system of voting and replace it with a county-based system that is contrary to Ohio law and the administrative structure already actively engaged in this election cycle. Such a change could cause chaos on Election Day and potentially disenfranchise some of the vast majority of voters who will appear at their assigned precincts, as required by law, to cast their ballots. The legitimate votes of those who will cast their ballots in their assigned precincts on Election Day are jeopardized if a last-minute system-wide change is implemented that will allow others, who do not even live in the precinct in which they appear, to cast a vote wherever they chose.

Numerous candidates, school levies, bond issues, and other local issues that are based on precinct-specific jurisdictions will appear on ballots across the state on November 2, 2004. Likewise, federal congressional candidates are elected to represent districts that often follow precinct boundaries, not county borders. Ohio law establishes and Ohio has long utilized a precinct-based election system and local boards of elections are prepared to implement it. Requiring local boards to create, adopt and implement an entirely new system by November 2, 2004 will not only create confusion and delay, but and will jeopardize the integrity of Ohio's election process. Neither state law nor the federal Help America Vote Act of 2002 ("HAVA")

requires that possible errors by elections officials can only be remedied by instituting a county-based system of voting. Plaintiffs' interpretation of HAVA, and their argument that HAVA requires that votes be cast and counted on a county-wide basis, is entirely incorrect.

Unfortunately, some voters may be impacted by clerical or administrative errors by boards of elections. Such errors must be redressed, and Intervenors do not in any way suggest that elections officials should deny any voter the ability to vote because of such errors. However, the manner in which those errors are corrected is a matter of state law.

Local elected officials are prepared to administer an election that comports with state and federal law; an election based upon the precinct as the appropriate place where a valid vote is to be cast. A last-minute change to a broader-based system could cause chaos on Election Day and afterward as votes are being counted. Such changes are significant to individual voters who, like Intervenors, have a fundamental interest in a fair and orderly election. Moreover, Intervenors have a significant interest in assuring that their votes are not potentially diluted by individuals who cast votes in areas where they do not reside. While clerical errors may result and must be addressed, a complete abandonment of Ohio's precinct-based system is not required and will potentially lead to chaos and the irreparable dilution of Intervenors' vote.

II. BACKGROUND

The Directive contains a number of valuable provisions that will assist poll workers in applying Ohio law and Ohio's long-standing, precinct voting system on Election Day. Although the Directive mentions "federal law" it does not reference the Help America Vote Act of 2002, 42 U.S.C. Sections 15201 et seq. ("HAVA"), being applied for the first time in a major election in Ohio. Instead, the Directive focuses almost exclusively on state laws and the traditional method of provisional balloting adopted in Ohio.

It is important to note that there are arguably two types of "provisional balloting" in Ohio. The first is the traditional type of provisional balloting that has been in existence in Ohio long before HAVA was enacted. The second is created by HAVA and, while overlapping to a degree, is more expansive than Ohio's traditional provisional balloting.

Ohio Provisional Balloting. Ohio Revised Code Section 3503.16 and has been used in Ohio since at least 1953 and allows a voter who has recently moved or changed his name to cast a ballot in the precinct in which he lives and to contemporaneously report a change of address or name to the local board of elections. R.C. 3503.16(B) and (C) applies to any registered elector who: moves within a precinct, moves from one precinct to another, moves from one county to another; or changes his or her name. Such a registered voter may vote on election day with a "provisional ballot" if he:

> Completes and signs, under penalty of election falsification, a statement attesting that that registered elector moved or had a change of name, whichever is appropriate, on or prior to the day of the election, has voted at the polling place in the precinct in which that registered elector resides, at the office of the board of elections, or at the site designated by the board, whichever is appropriate, and will not vote or attempt to vote at any other location for that particular election.

R.C. 3503.16(B)(2)(d) and (C)(4). Thus Ohio law applies to a registered voter who moves or changes name. Ohio law allows such a voter to cast a ballot and change his registration at the same time on election day.

HAVA Provisional Balloting. The second type of provisional balloting was recently established by HAVA. Coincidentally, when HAVA was enacted in 2002, it adopted the same term that has been used in Ohio for the past fifty years: "provisional balloting." But HAVA is broader: HAVA applies to any person, whether they are registered or not, and applies regardless of the reason why the person's name does not appear on the voter registration rolls.

Ohio statutes providing for provisional ballots were enacted long before HAVA. Plaintiffs acknowledge that Ohio has a long-standing system of provisional balloting which "has remained the same since well before the enactment of HAVA." (Memorandum in Support of Plaintiffs' Application for Preliminary Injunction, hereinafter "Memorandum", p. 10.) Because HAVA uses the term "provisional balloting," Plaintiffs presume that Ohio's system of provisional balloting was somehow completely engulfed by HAVA and that every reference to "provisional balloting" can only be made in the context of HAVA. However, nothing in state law or, to the best of Intervenors' knowledge, any other Directive, has ever addressed or defined *HAVA* provisional balloting.

Defendant Blackwell's Directive: Plaintiffs' apparent presumption that the Directive applies to HAVA provisional balloting is not supported by a plain reading of the Directive itself. The Directive sets forth its purpose and scope in bold letters:

> **State Law: Provisional voting eligibility based on elector moving from one Ohio precinct to another.**

The Directive cites only state laws, including the statutory provision making it a criminal violation, under Ohio law, to: "Vote or attempt to vote in any primary, special, or general election *in a precinct* in which that person is not a legally qualified elector." R.C. 3599.12(A)(1), emphasis added. Yet, Plaintiffs bring their challenge on the basis of a federal law that is not cited in the Directive nor, potentially, applicable to it.

Simply put, it is unclear whether or not the Directive applies to only the traditional Ohio provisional balloting, or to both Ohio and HAVA provisional balloting jointly.

Plaintiffs' Argument. Regardless of the scope of the Directive, Plaintiffs challenge to Ohio's precinct-based system of voting is misplaced under both state and federal law. While acknowledging that HAVA does not define jurisdiction, Plaintiffs argue that county-wide voting

is required. As is set forth more fully in the accompanying Motion to Dismiss and Memorandum Contra Motion for Preliminary Injunction, Ohio law establishes a precinct-based system of elections. HAVA does not establish jurisdiction, but leaves this matter to state law. Thus, no matter how broad the interpretation of the Directive, any argument that county-wide jurisdiction is required under either state or federal law is simply unfounded.

On the contrary, HAVA very clearly and repeatedly defers to state law, providing, for example, that "the individual's provisional ballot shall be counted as a vote in that election in accordance with State law." (See, eg., 42 U.S.C. §15482(a)(4), emphasis added.) Plaintiffs argue that HAVA references the National Voter Rights Act, which, in turn, adopts a definition of jurisdiction for the purposes of keeping voter-registration rolls, and, in turn, suggests that a county-wide jurisdiction is appropriate for voter registration purposes. Yet HAVA itself, very directly and unambiguously, stresses that State law governs how votes are counted. In Ohio, state law provides a precinct-based system. Any wholesale changes to that system are best left to the Ohio General Assembly.

Nor can such a challenge to Ohio's precinct-based election laws be raised through the action Plaintiffs bring before this Court. To the extent that any directive of the Secretary of State might violate HAVA, any such purported violation can only be addressed through the administrative procedures established under HAVA itself. HAVA does not permit the private right of action that Plaintiffs seek to create by bringing this case. (Those issues are more thoroughly addressed in the accompanying Motion to Dismiss and Memorandum Contra Motion for Preliminary Injunction.)

III. THE INTERVENORS

Mr. Thomas W. Noe resides at 1676 River Road, in Maumee, Ohio, Lucas County. Mr. Noe is a duly registered voter who has regularly exercised his right to vote by appearing at his assigned precinct as required by Ohio law.

Mr. Glenn A. Wolfe resides at 4315 Mockingbird Lane, Toledo Ohio, also in Lucas County. Mr. Wolfe is also a registered voter who also regularly casts his ballot at the precinct in which he resides.

Mr. Gregory L. Arnold of 4830 Country Walk Lane in Sylvania, Ohio, Lucas County, is also a duly registered voter. Like the other Intervenors and the majority of Ohio voters, Mr. Arnold votes on federal state and local issues at his assigned precinct.

IV. ARGUMENT

Under the system proposed by Plaintiffs, individual voters like Intervenors stand to have their votes diluted by other voters who could walk into any precinct in the county and cast a vote on a local school levy or congressional district, for example, even though they do not reside in the school district. Plaintiffs advocate abandoning Ohio's election laws in favor of a judicially-imposed system which would allow individuals to engage in "stop-and-shop voting" whereby an individual can go to any precinct and polling place in a particular county and cast a provisional ballot, notwithstanding Ohio law to the contrary.

The invalidation of the precinct system of voting would eliminate the method by which Ohio election officials assure that individuals cast only one ballot and that the ballot is counted for only those races in which the individual is eligible to vote. Elimination of the precinct voting system also creates opportunity for casting of multiple votes and casting of votes by those not legally entitled to vote, and will otherwise create confusion and disorder in the administration of

the election. Intervenors, and all Ohio voters, have a significant interest in a smooth and orderly election.

Finally, the vast majority of individual voters, like Intervenors, will pass by half a dozen more "convenient" polling locations on their way home from work on Election Day before diligently appearing at their assigned precincts, only to wait in line behind other voters who improperly show up at their polling place, perhaps as a matter of convenience to that voter. While clerical errors must be addressed, requiring a wide-scale, last minute remedy of instituting a county-wide system of voting is not appropriate and will impact individual voters in ways which the other parties to this action cannot address before this Court.

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 the instance case, Intervenors meet all four criteria.

1. The Motion to Intervene is Timely filed.

In considering 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 in accordance with this Court's established schedule, even before any responsive pleading is required from Defendant Blackwell. As such, the Motion is timely and meets the first requirement for Intervention under Rule 24.

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*, supra, 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 *Michigan State v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997). As individual registered voters, Intervenors have a substantial interest in participating in a fair and orderly election system that operates in accordance with the laws. As individual voters, Intervenors are subject to criminal penalties for voting outside their assigned precinct, although Plaintiffs seek a judicial remedy that would allow such voting to take place.

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]. This is because, "[i]n such cases, the representation of divergent interests is extremely important." *Id*. Here, it is not enough to simply 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 the Plaintiffs' suggested remedy is adopted, anyone may be permitted to cast a ballot in any precinct, whether they reside in the precinct or not. Such a remedy violates the concept of proportional representation which is fundamental to our system of government. Federal courts have repeatedly held that issues related to the creation of voting boundaries are reserved to the states. See, for example, *Chapman* v. *Meier*, 420 U.S. 1, 27, 42 L. Ed. 2d 766, 95 S. Ct. 751

(1975), holding that reapportionment "is primarily the duty and responsibility of the State." See also, *Reynolds* v. *Sims*, 377 U.S. 533, 586, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964). In *Reynolds* v. *Sims*, the Supreme Court applied the Equal Protection Clause and concluded that every qualified resident had the right to cast a ballot that was equal in weight to the vote of every other resident. The Court concluded that a voter's rights are infringed when state legislators are elected from districts of substantially unequal population. The Court reached a similar conclusion when examining an election for local government officials and reiterated that the Fourteenth Amendment forbids districts of disparate population. *Avery v. Midland County*, 390 U.S. 474, 478 (1968).

Allowing voters to essentially reapportion themselves anywhere throughout a county potentially violates this important provision. Thus, Intervenors clearly have a sufficient interest in the subject matter of this proceeding for intervention as of right under Rule 24(a)(2).

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*, supra 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. Where, as 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*, supra 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. Defendant Blackwell may represent the interest of the boards of elections in ensuring the enforcement of the election laws. But he cannot represent the unique circumstances of the Intervenors, with concerns over vote dilution and the integrity of the system from an individual voter's perspective. As such, Mr. Noe, Mr. Wolfe and Mr. Arnold 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 and unnecessary, and are neither required nor authorized by HAVA and state 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 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. If anything, intervention would promote judicial efficiency by diminishing the prospects of future litigation by Intervenors and would ensure the adequate representation of others who have similar interests. Consequently, Intervenors 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.

CONCLUSION

For the foregoing reasons, Intervenors Noe, Wolfe and Arnold respectfully urge the Court to issue an order permitting them to intervene in this action as a party defendants.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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/ Truman A. Greenwood