IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*,

Plaintiffs,

OHIO DEMOCRATIC PARTY,

Intervenor-Plaintiff

v.

JENNIFER BRUNNER, OHIO SECRETARY OF STATE

Defendant.

Case No. C2-06-896

Judge Algenon L. Marbley

OHIO DEMOCRATIC PARTY'S MOTION TO INTERVENE AND SUPPORTING MEMORANDUM

The Ohio Democratic Party ("Proposed Intervenor") hereby moves, pursuant to Fed. R. Civ. P. 24, to intervene in the above-captioned matter. Pursuant to Fed. R. Civ. P. 24(c), this Motion states the grounds for intervention and is accompanied by pleadings that set out the claims for which intervention is sought. *See* Proposed Intervenor's Pleadings (attached hereto).

The Complaint in *Northeast Ohio Coalition for the Homeless ("NEOCH")* was filed on October 24, 2006. The Amended and Supplemental Complaint in *Ohio Republican Party ("ORP")* was filed on November 4, 2008. The *NEOCH* Complaint challenges Ohio's provisional voter rules as unlawful. The *ORP* Amended and Supplemental Complaint alleges that certain directives issued by Ohio Secretary of State Jennifer Brunner violate federal statutes

as well as constitutional provisions. *NEOCH* was brought by the Northeast Ohio Coalition for the Homeless *et al. ORP* was brought by the Ohio Republican Party. The *NEOCH* Plaintiffs allege a series of thirteen statutory and constitutional violations. The *ORP* Plaintiffs assert six counts in their Amended and Supplemental Complaint under U.S. Const. art. II, § 1, Help America Vote Act, 42 U.S.C. § 15301, Voting Rights Act § 2, National Voter Registration Act § 1973gg, and U.S. Const. amends. V, XIV, against Jennifer Brunner in her official capacity as Ohio Secretary of State.

Proposed Intervenor is the Ohio Democratic Party. Intervenor's interest in the promulgation and application of fair standards for the validation and counting of regular and provisional ballots could hardly be clearer. The standards for intervention under Fed. R. Civ. P. 24 are therefore easily satisfied.[1]

ARGUMENT

I. PROPOSED INTERVENOR IS ENTITLED TO INTERVENE AS OF RIGHT.

The purpose of Rule 24 is to involve "as many apparently concerned persons as is compatible with efficiency and due process." *Coalition of Arizona/New Mexico Counties v. Department of the Interior*, 100 F.3d 837, 841 (10th Cir. 1996). For this reason, the Sixth Circuit has explained that "Rule 24 should be broadly construed in favor of potential intervenors." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (internal quotation marks and citation omitted); *Midwest Realty Management Co. v. City of Beavercreek*, 93 F. App'x 782, 784 (6th Cir. 2004); *see also* 6 James W. Moore *et al.*, Moore's Federal Practice ¶ 24.03[1][a] (3d ed. 2004) ("Rule 24 is to be construed liberally . . . and doubts resolved in favor of the proposed intervenor."); *FSLIC v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993)

[1] The Plaintiffs and the Secretary of State have consented to the filing of this motion.

("Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action.").

The rule, by its terms, provides that:

> 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.

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

In considering a motion to intervene, courts "accept as true all well-pleaded, nonconclusory allegations in the motion to intervene, [and] in the proposed complaint . . . in intervention." Moore's Federal Practice ¶ 24.03[1][a].

As the Sixth Circuit explained in *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999), intervenors are required to establish four elements in order to intervene as of right:

(1) that the motion to intervene was timely;

(2) that they have a substantial legal interest in the subject matter of the case;

(3) that their ability to protect that interest may be impaired in the absence of intervention; and

(4) that the parties already before the court may not adequately represent their interest.

See id.; *see also Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

A. Intervenor's Application Is Timely.

This motion to intervene is being filed less than 24 hours after the filing of the Amended and Supplemental Complaint in *ORP*. No proceedings, of course, have yet begun in response to this Amended and Supplemental Complaint, and no party will be prejudiced in any way by permitting the intervention. Similarly, *NEOCH* is undeniably at a stage at which intervention

would be timely and would not impair the existing parties' interests. The timeliness element is clearly satisfied.

B. Intervenor Has a Cognizable Interest that May Be Impaired by the Disposition of This Action.

As the Sixth Circuit has held, Rule 24(a) incorporates a "'rather expansive notion of the interest sufficient to invoke intervention as of right.'" *Grutter*, 188 F.3d at 398 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). Intervenor here more than satisfies that standard. Intervenor need not show that its interests actually will be impaired by the disposition of this adversary proceeding, but need only show that its interests "'may be' so impaired." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304, 1308 (8th Cir. 1995); *see also Commercial Cas. Ins. Co. v. Haeger (In re Haeger)*, 221 B.R. 548, 550 (Bankr. M.D. Fla. 1998) ("The 'interest test' has been characterized as 'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'") (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

In *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), for example, the Sixth Circuit held that the Michigan Chamber of Commerce, which supported in the legislative and political process the enactment of a law that extended to labor unions restrictions on corporate political expenditures, was entitled to intervene in a lawsuit involving a challenge to that law brought by labor unions. And in *Grutter*, the Sixth Circuit permitted minority students to intervene in a lawsuit to defend the University of Michigan's wholly voluntary decision to consider race as a factor in its admissions process. 188 F.3d at 399.

Intervenor's interest here is far more concrete and direct than the interests that supported intervention in *Miller* and *Grutter*. As the representative organ of the Democratic Party in Ohio,

Intervenor certainly has an interest in protecting the legitimacy and integrity of the electoral process by seeking—in this litigation—the enforcement of uniform and nondiscriminatory standards for validating and counting regular and provisional ballots. The Ohio Democratic Party is the political party of hundreds of thousands of self-identified Democratic voters who are voting in the November 4, 2008 General Election. The Party has invested hundreds of thousands of dollars in voter education and voter protection efforts with respect to such election, both for its own members and the general voting public. The Party has an interest in ensuring that votes cast by its members for its candidates are fully counted by election authorities in accordance with all statutory and constitutional provisions.

C. Intervenor's Interests May Not Be Adequately Protected by the Existing Parties.

"The requirement of . . . Rule [24] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (citing 3B James W. Moore *et al.*, Moore's Federal Practice ¶ 24.09--1(4) (1969)). This requirement is easily met.

The Plaintiff in *NEOCH* is the Northeast Ohio Coalition for the Homeless, a nonprofit group devoted to issues of concern to the homeless. The Ohio Democratic Party, as a political organization dedicated to the election of Democratic candidates for office, plainly has separate interests not adequately represented by NEOCH. Similarly, the Defendant in *ORP* is the elected Ohio official responsible for the administration of the State's election laws. The Ohio Democratic Party, as a political party, clearly has separate interests that are not adequately represented by the Secretary of State.

It is also impossible to determine from the face of the *NEOCH* Complaint and the *ORP* Amended and Supplemental Complaint whether NEOCH and the Secretary's interests are

completely aligned with—or in some cases may be adverse to—those of Intervenor. In any event, even if NEOCH and the Secretary's interests were aligned with those of Intervenor, the nature of a political party's interest in the manner for counting ballots surely differs from that of a homeless advocacy group or government official. Intervenor is thus entitled to participate in this litigation to protect its rights in this regard.

For these reasons, Intervenor more than meets its "minimal" burden of showing that representation of its interests by the existing parties to this adversary proceeding "may be" inadequate. *See Trbovich*, 404 U.S. at 538 n.10.

II. IN THE ALTERNATIVE, INTERVENOR SHOULD BE PERMITTED TO INTERVENE BASED ON COMMON QUESTIONS OF LAW AND FACT.

In addition, permissive intervention under Fed. R. Civ. P. 24(b) is also appropriate here. That rules provides that:

> 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); *see also New York News, Inc. v. Kheel*, 972 F.2d 482, 487 (2d Cir. 1992). "Substantially the same factors [that are considered with respect to intervention of right] are considered in determining whether to grant an application for permissive intervention . . . ." *Kaliski*, at 300 n.5.

As is evident from the pleading attached to this Motion pursuant to Rule 24(c), Intervenor's claims and defenses cover much of the same ground with respect to both questions of law and of fact, making permissive intervention appropriate.

CONCLUSION

For the reasons set forth above, the Ohio Democratic Party respectfully requests that this Court enter an order granting its Motion to Intervene in this proceeding and directing that Intervenor's pleadings in intervention accordingly be filed.

Respectfully submitted,

s/ Donald J. McTigue

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 4th day of November, 2008.

/s Mark A. McGinnis
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