

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)**

TRACIE HUNTER,	:	Case No. 1:10-CV-820
Plaintiff,	:	Judge Susan J. Dlott
vs.	:	
HAMILTON COUNTY BOARD OF ELECTIONS, et al.,	:	MOTION OF PROPOSED INTERVENORS NORTHEAST OHIO COALITION FOR THE HOMELESS AND OHIO DEMOCRATIC PARTY TO INTERVENE
Defendants.	:	
	:	

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the Northeast Ohio Coalition for the Homeless (“NEOCH”) and Ohio Democratic Party (“ODP”) (collectively “Intervenor-Plaintiffs”) hereby move for an order permitting them to intervene in this action. Intervenor-Plaintiffs are entitled to intervene as of right under Rule 24(a)(2) because they have a substantial interest in the subject of this case and the disposition of this case may impair or impede their ability to protect that interest. Alternatively, Intervenor-Plaintiffs should be permitted to intervene under Rule 24(b)(1)(B) because their claims and the main action have questions of law and fact in common. A memorandum in support and proposed complaint are attached.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION OF PROPOSED INTERVENORS
NORTHEAST OHIO COALITION FOR THE HOMELESS
AND OHIO DEMOCRATIC PARTY TO INTERVENE**

I. INTRODUCTION.

On November 21, 2010, Plaintiff Tracie Hunter filed a verified complaint and motion for Temporary Restraining Order in this action. She alleges that she is a candidate for Hamilton County Juvenile Court Judge who is 23 votes behind her opponent. (Compl., ¶ 1). She alleges that Defendants Hamilton County Board of Elections and its Members (collectively “Board”) have wrongly rejected hundreds of provisional ballots that were cast in the wrong precinct. (Id.). She seeks to enjoin certification of the vote until this Court determines whether these ballots should be counted under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (Id., ¶ 2).

Plaintiff’s challenge in this case involves 849 provisional ballots that were cast in the wrong precinct. (Compl., ¶ 30). She alleges that the Board did not separate out which of these ballots were cast in the right polling location, among other deficiencies. (Id.) She further alleges that these ballots should be counted because they were voted in the wrong precinct due to poll worker error. (Id., ¶ 35).

Some, and perhaps all, of these 849 challenged ballots appear to fall within the provisions of the Consent Decree entered on April 19, 2010 in the case of *Northeast Ohio Coalition for the Homeless v. Brunner*, Case No. 2:06-cv-896 (S.D. Ohio) (Marbley, J.) (copy attached as Exhibit A). Both Proposed Intervenors—the Northeast Ohio Coalition for the Homeless (“NEOCH”) and the Ohio Democratic Party (“ODP”)—are parties to the Consent Decree and have a substantial legal interest in monitoring, interpreting and enforcing its provisions.

The Consent Decree provides, in relevant part:

b. Boards of Elections may not reject a provisional ballot cast by a voter, who uses only the last four digits of his or her social security number as identification, for any of the following reasons:

v. The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll worker error. (Ex. A at 4).

In Directive 2010-74 (copy attached as Exhibit B), Secretary of State Brunner provided non-exclusive examples of “poll worker error” as used in the Consent Decree. These examples include provisional ballots that were cast in the wrong precinct but the right polling place:

Another example of poll worker error is where the provisional ballot affirmation envelope (SOS Form 12-B) contains notations indicating that a poll worker directed the voter to the wrong precinct at a polling location containing multiple precincts. Because it is a poll worker’s duty to ensure that the voter is directed to the correct precinct, these notations provide objective evidence that the poll worker did not properly or to the fullest extent required carry out his or her Election Day duties. Similarly, if a board of elections finds multiple provisional ballots voted in the correct polling location but wrong precinct, it should, either in writing, with written responses from the poll workers, or at a public meeting of the board, question the poll workers in that polling location to determine whether they followed the board’s instructions for ensuring that voters were directed to the correct precinct. (Ex. B at 12).

II. LAW AND ARGUMENT.

Under the Federal Rules of Civil Procedure, upon timely motion, anyone may intervene as a matter of right when the movant “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent their interest.” Fed. R. Civ. P. 24(a)(2). Alternatively, on timely motion, a

court may permit a movant to intervene when they have a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B).

Intervenor-Plaintiffs move to intervene as a matter of right, or in the alternative, move to intervene permissively.

A. NEOCH And ODP Are Entitled To Intervene As Of Right.

The Sixth Circuit has held that a motion under Rule 24(a)(2) requires a showing of four elements: “(1) timeliness of the application to intervene, (2) the applicant’s substantial legal interest in the case, (3) impairment of the applicant’s ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by the parties already before the court.” *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). As shown below, both Intervenor-Plaintiffs meet each of these requirements and thus have a right to intervene.

1. This motion is timely filed.

Plaintiff filed this lawsuit on Sunday, November 21, 2010. Counsel for NEOCH and the ODP learned of the action earlier today, on Monday, November 22, 2010, and promptly took steps to intervene. Thus, this motion is timely filed.

Moreover, Intervenor-Plaintiffs’ intervention in this matter will not unduly delay or prejudice the rights of the parties to this action. See *Miller*, 103 F.3d at 1245. The Court has scheduled a hearing on the Plaintiff’s motion for TRO on November 22, 2010 at 4:30 p.m. Intervenor-Plaintiffs will not seek a continuation of this conference. Therefore, their participation in this lawsuit will not unduly delay or prejudice the rights of the original parties to this action in connection with the Plaintiff’s motion for TRO.

2. *Intervenor-Plaintiffs have a substantial legal interest in monitoring, interpreting and enforcing the Consent Decree, which arguably governs at least some of the provisional ballots at issue in this case.*

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. Dept. of Interior*, 100 F.3d 837, 841 (10th Cir. 1996). The Sixth Circuit has “opted for a rather expansive notion of the interest sufficient to invoke intervention of right.” *Purnell v. Akron*, 925 F.2d 941, 948 (6th Cir. 1991); see also *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (“This court has acknowledged that ‘interest’ [for Rule 24(a)(2)] is to be construed liberally.”)

Here, Intervenor-Plaintiffs have a legal interest in the subject matter of this action because at least some of the 849 provisional ballots at issue in this lawsuit appear to fall under the provisions of the Consent Decree, to which they are parties. Intervenor-Plaintiffs have a legal interest in monitoring, interpreting and enforcing the provisions of the Consent Decree. Therefore, Intervenor-Plaintiffs have a legal interest in the same subject matter (and, arguably, the same property) that is at issue in this case.

3. *It is possible that Intervenor-Plaintiffs’ substantial legal interest in monitoring, interpreting and enforcing the Consent Decree will be impaired if their request for intervention is denied.*

To satisfy this element, a proposed intervenor need only show that impairment of its substantial legal interest is *possible* if intervention is denied. *Purnell*, 925 F.2d at 948 (emphasis added). The Sixth Circuit has held that the burden on the movant to satisfy this element is minimal. *Miller*, 103 F.3d at 1247.

Here, Intervenor-Plaintiffs’ substantial legal interest in monitoring, interpreting and enforcing the terms of the Consent Decree may possibly be impaired if they are not allowed to intervene in this action. None of the parties to this lawsuit are parties to the Consent Decree, which was issued by another Judge in the United States District Court for the Southern District

of Ohio. Intervenor-Plaintiffs have an interest in ensuring that the Consent Decree's terms are fully complied with and properly interpreted, and no existing party has that same interest. Therefore, Intervenor-Plaintiffs' substantial legal interest may possibly be impaired if they are not allowed to intervene.

4. Intervenor-Plaintiffs may be inadequately represented by the Plaintiff.

An intervenor's burden for demonstrating the inadequacy of representation is minimal. As the United States Supreme Court has stated, "Rule [24] is satisfied if the applicant shows that the representation 'may be' inadequate, so the applicant's burden ... should be minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1982). The Sixth Circuit and this Court have previously acknowledged that the movant's burden is a minimal one. *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999); *U.S. v. Schreiber*, 150 F.R.D. 106, 109 (S.D. Ohio 1993).

The possibility of inadequate representation may be established by showing that a party who purports to seek the same outcome may not make all of the putative intervenor's arguments. *Miller*, 103 F.3d at 1247. Alternatively, "a decision not to appeal by an original party to the action can constitute inadequate representation of another party's interest." *Id.*

Here, Plaintiff Hunter's interests in this lawsuit are not identical to Intervenor-Plaintiffs' interests. Although both the Plaintiff and Intervenor-Plaintiffs seek to have all of the challenged provisional ballots properly processed under the Consent Decree and Directive 2010-74, the Plaintiff's practical interest in this matter will arguably be at an end when (and if) she accumulates enough votes to defeat her opponent. Intervenor-Plaintiffs, by contrast, are not interested in the outcome of a single race but, instead, are interested in ensuring that every provisional vote that should be counted under the terms of the Consent Decree and Directive 2010-74 is in fact counted—even if not all of those votes are necessary for Plaintiff Hunter to

prevail. It is therefore quite possible that Plaintiff Hunter will not make all of Intervenor-Plaintiffs' arguments, nor seek to appeal in circumstances where Intervenor-Plaintiffs would seek to appeal. Accordingly, this minimal burden has also been met and Intervenor-Plaintiffs should be permitted to intervene as of right.

B. Alternatively, Intervenor-Plaintiffs Are Entitled To Intervene Permissively.

There are only two requirements for being permitted to intervene under Rule 24(b)(1)(B): (1) timely application, and (2) a claim or defense that shares a common question of law or fact with the main action. *Purnell*, 925 F.2d at 950. This rule is also to be construed liberally. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983).

As shown above, Intervenor-Plaintiffs' motion to intervene is timely filed as it is filed only one day after the Plaintiff's motion for TRO. The motion also is timely insofar as it will not unduly delay or prejudice the rights of the existing parties.

In addition, Intervenor-Plaintiffs' proposed complaint (attached as Exhibit 1) shares several common questions of law or fact with the Plaintiff's verified complaint (Doc. No. 1), including: (1) Did the Defendants correctly follow and apply the provisions of the Consent Decree? (2) Do some of the 849 challenged ballots fall under the definition of poll worker error? and (3) Should some of the 849 challenged ballots be counted under the provisions of the Consent Decree and/or Directive 2010-74?

Accordingly, the requirements of Rule 24(b)(1)(B) have been met and NEOCH should be permitted to intervene in this matter.

III. CONCLUSION.

For all of the foregoing reasons, the Motion to Intervene should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22nd, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

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