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

The Ohio Democratic Party, :

Plaintiff, :

v. : Case No. 2:04-cv-1055

J. Kenneth Blackwell, et al., : JUDGE MARBLEY

Defendants. :

OPINION AND ORDER

On November 2, 2004, Election Day, the Ohio Democratic Party filed this action against Ohio Secretary of State J. Kenneth Blackwell and the Boards of Elections of Franklin and Knox Counties, Ohio. The complaint sought immediate injunctive relief in the form of an order directing the County Boards of Elections to provide alternate voting means for voters who were standing in line waiting to cast their votes. According to the complaint, the lengthy lines and the possible disenfranchisement of those standing in those lines resulted from a failure to supply an adequate number of voting machines to voting precincts within Franklin and Knox Counties. The specific relief requested was "a temporary restraining order and a preliminary and permanent injunction requiring Defendants to provide paper ballots, or another alternative means of voting to voters in Franklin and Knox Counties." Complaint at 3.

After the Democratic Party filed a motion for a temporary restraining order, the Court held a hearing on that motion on November 2, 2004 at 6:45 p.m. Counsel appeared on behalf of both the named parties and for the Ohio Republican Party of the State of Ohio. Those latter entities were provisionally granted leave to intervene. The Court granted a temporary restraining order

and denied a stay pending appeal. Later that evening, the Court of Appeals for the Sixth Circuit denied an emergency motion for a stay.

The following day, the Ohio Republican Party filed a formal motion for leave to intervene. That motion has not been opposed by any of the parties to the case. The State of Ohio, which had been provisionally granted leave to intervene, then filed an answer and a counterclaim in which declaratory relief was requested. The Democratic Party, having obtained the relief which it sought by way of the temporary restraining order issued by the Court, then dismissed its claims against the Franklin County Board of Elections and moved to dismiss the entire action and to strike or, in the alternative, to dismiss the State of Ohio's counterclaim. After that motion was briefed, on January 14, 2005, the Alliance for Democracy moved to intervene as a plaintiff. It tendered an intervenor's complaint alleging that the facts set forth in the original complaint were part of a wide-ranging conspiracy involving the Ohio Secretary of State and the Ohio Republican Party to deny the right to vote to Afro-American Ohio citizens. The complaint asserted that the Ohio Presidential vote was incorrectly reported and that the "fraud" involved in that reporting should be exposed before the scheduled inauguration of George W. Bush on January 20, 2004. The Ohio Democratic Party and the Ohio Republican Party have both opposed the motion for leave to intervene.

The motion to dismiss this entire action is currently under advisement. Prior to issuing a decision on that matter, it is important for the Court to rule on the two pending motions for leave to intervene. For the following reasons, the motion filed by the Ohio Republican Party will be granted and the motion filed by the Alliance for Democracy will be denied.

I.

The Ohio Republican Party asserts in its motion that it is entitled to intervene as of right under Fed. R. Civ. P. 24(a) or, alternatively, that it should be granted permission to intervene under Rule 24(b). In this case, because the complaint presents a question of federal law, the intervention of the Ohio Republican Party would not affect the Court's jurisdiction. Consequently, the Court need only analyze the question of whether permissive intervention is appropriate under Rule 24(b).

The Court has broad discretion to permit parties to intervene under Rule 24(b), and that rule is to be construed liberally. See, e.g., German by German v. Federal Home Loan Mortgage Corp., 896 F. Supp. 1385 (S.D.N.Y. 1995). The focus of the inquiry is on the timeliness of the application and the potential for prejudice to existing parties. United States v. City of New York, 179 F.R.D. 373, 381 (E.D.N.Y. 1998), aff'd 198 F.3d 360 (2d Cir. 1989). However, the Court may also consider other "relevant factors [such as] the nature and extent of the intervenor's interest, any contribution the intervenor's presence will have on the just and equitable adjudication of the matter, and whether the intervenor's interests are adequately protected by the parties of record." Mrs. W. v. Tirozzi, 124 F.R.D. 42, 45 (D. Conn. 1989). Although adequacy of representation by an existing party is a consideration, it is not dispositive, and the Court may permit a party to intervene if the presence of that party will enhance representation of an interest already asserted, or even when the intervenor's interests are completely and adequately represented by an existing party. See, e.g., Eljer Manufacturing v. Liberty Mutual Insurance Co., 773 F. Supp. 1102, 1108 (N.D. Ill. 1991), rev'd on other grounds, 972 F.2d 805 (7th Cir. 1992); Austell v. Smith, 634 F. Supp. 326, 334-35 (W.D. N.C.), appeal dismissed, 801 F.2d 393 (4th Cir. 1986).

It is debatable whether the Ohio Republican Party has an interest in the outcome of the case which differs from the interest of either the Ohio Secretary of State or the respective County Boards of Elections. However, there is no dispute that the Ohio Republican Party had an interest in the subject matter of this case, given the fact that changes in voting procedures could affect candidates running as Republicans and voters who were members of the Ohio Republican Party. The request to intervene was timely, coming on the same day as the complaint was filed (although the formal motion was not filed until the following day), and the Court does not perceive any prejudice to existing parties from the presence of the Ohio Republican Party in the case. Those parties, having not opposed the motion, also perceive no prejudice. Under all of those circumstances, the Court concludes that the Ohio Republican Party should be granted leave to intervene, and the Court therefore GRANTS the motion (doc. #8).

II.

The motion of the Alliance for Democracy to intervene differs from that filed by the Ohio Republican Party in several important respects. First, it is less clear that the Ohio Alliance for Democracy has an interest in the subject matter of the original complaint. Second, the motion was not filed until more than two months after the original complaint for immediate injunctive relief was filed. Third, the primary basis for the filing of the motion to intervene was to seek relief with respect to the inauguration of President Bush, an event which occurred many months ago. Next, the Court has under advisement a motion to dismiss this entire action based upon the fact that the complaint sought limited immediate injunctive relief, which relief was granted. Finally, the Ohio Alliance for Democracy proposes to expand the scope of this action to add allegations

and address issues going far beyond the scope of the original complaint. The Court also notes that both the Ohio Democratic and Republican parties have opposed the motion to intervene.

Intervention is governed by Fed. R. Civ. P. 24, which states in pertinent part that:

> "(a) Intervention of Right
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> 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 interests is adequately represented by existing parties.
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> (b) Permissive Intervention
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> 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."

The leading case in this circuit on both permissive intervention and intervention as of right is Bradley v. Milliken, 828 F.2d 1186 (6th Cir. 1987). With respect to intervention as of right under Rule 24(a)(2), Milliken indicates that, first, the application must be timely. Whether an application for intervention is timely must be evaluated in light of the purpose for which intervention is sought, the length of time that the intervenor has known about the interest in the litigation, whether any of the original parties to the litigation would be prejudiced, and the stage to which the lawsuit has progressed when

intervention is sought. See also Michigan Association for Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981), holding that the stage to which a lawsuit has progressed is only one factor in the inquiry and is not dispositive, and that the court must also consider whether there are any "unusual circumstances" militating either in favor of or against intervention.

Second, in order to intervene as of right, a party must have an interest in the subject matter of the suit. Milliken indicates that this requirement must be liberally construed. Id. at 1192. However, the interest must be direct and substantial rather than peripheral or speculative. Grubbs v. Norris, 870 F.2d 343 (6th Cir. 1989); Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290 (6th Cir. 1983).

Next, the intervenor's ability to protect its interest must somehow be impaired by the disposition of the case. Grubbs, supra; Triax Co. v. TRW, Inc., 724 F.2d 1224, 1227 (6th Cir. 1984). Finally, the interest which the intervenor seeks to assert must not be adequately represented by the existing parties to the suit. Milliken, supra, at 1192. Ordinarily, where the intervenor and an existing party have the same ultimate objective in the litigation, the representation of the intervenor's interest by the existing party is presumed to be adequate, and the intervenor bears the burden of demonstrating the inadequacy of that party's representation of his interests. Meyer Goldberg, Inc. v. Goldberg, supra, at 293; see also In re General Tire and Rubber Co. Securities Litigation, 726 F.2d 1075, 1087 (6th Cir.), cert. denied sub nom. Schreiber v. Gencorp. Inc., 469 U.S. 858 (1984). However, the burden is not a particularly heavy one, and is satisfied if the intervenor can show that there is substantial doubt about whether his interests are being adequately represented by an existing party to the case. National Wildlife Federation v. Hodel, 661 F.Supp. 473

(E.D.Ky. 1987); see Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 (1972).

Milliken indicates that the same timeliness inquiry must be made with respect to a motion for permissive intervention. Again, the timing of the application is only one factor to be considered, and it is critical to consider whether the intervention will bring about undue delay in the litigation or prejudice existing parties. Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159 (6th Cir. 1987); Arrow Petroleum Co. v. Texaco, Inc., 500 F.Supp. 684 (S.D. Ohio 1980). Even a timely application for permissive intervention should be denied where the intervenor has not established that a common question of law or fact exists between his proposed claim and the claim of one or more of the existing parties.

Finally, the Court is not required to evaluate an application for intervention under only one subsection of Rule 24. When a party has moved for intervention as of right, but the facts more appropriately suggest that permissive intervention might be granted, and there are no other obstacles such as jurisdictional considerations which would counsel against such an analysis, the Court is free to consider whether permissive intervention might be granted. See Penick v. Columbus Education Ass'n, 574 F.2d 889 (6th Cir. 1978).

It is unclear whether the Alliance is seeking leave to intervene under Subsection (a) or Subsection (b) of Rule 24. The memorandum supporting the motion does not identify whether intervention is sought under one or both subsections, and no case law is cited. The Court will analyze the motion under each separate subsection.

With respect to the timeliness of the motion, both of the parties opposing intervention note that, despite the fact that this case was relatively recently filed when the motion to intervene was presented, the case had progressed substantially

along the path to completion. The only relief sought in the original complaint was immediate injunctive relief relating to actions to be taken on November 2, 2004. Such relief was granted and appeals were then filed and dismissed. Believing that it had obtained all the relief requested, the Ohio Democratic Party has moved to dismiss the case. Thus, at the time the motion to intervene was filed, the case has progressed substantially toward completion. Moreover, the Alliance was clearly aware of the filing of this suit at or about the time of filing and could have moved to intervene earlier had it believed that the scope of the complaint, limited as it was, would not provide full relief concerning the issues which the Alliance attempts to raise. Thus, the timeliness factor weighs against permitting intervention.

The next issue is whether the Alliance has an interest in the subject matter of the suit. Because this requirement is to be liberally construed, the Alliance may well have an interest, although its interest would not seem to go beyond those of other registered voters in Ohio. Because the interest is somewhat attenuated, this factor does not weigh heavily in favor of intervention.

The third issue is whether the Alliance's ability to protect its interest is impaired by the disposition of the case in its absence. The answer to this question is made more difficult by the fact that the issues sought to be raised by the Alliance go well beyond those raised by the initial complaint. Whatever interest the Alliance had in the outcome of the initial complaint has essentially been resolved. Although it may have an interest in raising additional issues which the existing parties to the case do not share, its ability to raise those issues in other fora are not impaired by the disposition of this case. In fact, as the motion to intervene notes, members of the Alliance have raised the same issues in other courts challenging the outcome of the Ohio election. Thus, weighing the various factors under Rule

24(a) together, the Court concludes that the Alliance has not made a sufficient showing to justify intervention as of right.

With respect to permissive intervention, as noted above, the Court does have substantial discretion in determining whether to allow a party to intervene under Rule 24(b). However, timeliness is also a factor to be considered with respect to a motion under Rule 24(b), so that factor weighs against permissive intervention. Further, there is a potential for prejudice to the existing parties, many of whom believe that this case has been resolved. The presence or absence of the Alliance as a party would have no impact on the Court's adjudication of the issues already presented because those issues have been decided. Additionally, although seeking to enlarge the scope of an action in order to advance related issues is not fatal to an application to intervene, it is a factor which may be considered. The Court does not believe it would serve the interests of justice to permit the expansion of this lawsuit, filed for a very limited purpose, in order to address the additional issues raised by the Alliance, especially when the Alliance has taken the advantage of other opportunities to raise those issues and is not precluded from doing so in the future. Under all of these circumstances, the better exercise of discretion is to deny the motion.

III.

Based upon the foregoing, the motion of the Ohio Republican Party for leave to intervene (file doc. #8) is GRANTED, and the motion of the Alliance for Democracy to intervene (file doc. #20) is DENIED.

s/Algenon L. Marbley
Algenon L. Marbley
United States District Judge