

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

THE LEAGUE OF WOMEN VOTERS OF OHIO, <u>et al.</u> ,	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 3:04 CV 7622
	)	
J. KENNETH BLACKWELL,	)	Judge Carr
Secretary of State,	)	
	)	
Defendant.	)	

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

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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 less than one month prior to the November 2004 election, Plaintiffs ask this Court to 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. Further, Plaintiffs ask this Court to find that the Help America

Vote Act of 2002 (“HAVA”) prohibits and preempts the voter identification requirement set forth in Defendant Blackwell’s Directive, despite the fact that the identification requirement is entirely consistent with HAVA.

Requiring minimal identification from voters and requiring them to vote where they live are basic, longstanding practices in Ohio that are, despite Plaintiffs’ arguments to the contrary, permissible under HAVA. Moreover, both practices are effective methods of reducing voter fraud and increasing the integrity of Ohio elections. Indeed, Plaintiffs like Project Vote and the Association of Community Organization for Reform Now (“ACORN”) are at the very epicenter of fraudulent voter activity in Ohio (as discussed more fully in Intervenor’s Motion to Dismiss and Memorandum Contra Plaintiffs’ Motion for Preliminary Injunction). Yet they now appear in this litigation and ask this Court to take away two of the most powerful tools that elections officials have to catch and remedy voter fraud – precinct-based voting and minimal identification requirements.

The last-minute nature of the requested changes could create chaos in Ohio’s election system. If the remedies sought by Plaintiffs are granted, Intervenor stands 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. Further, Intervenor stands to have their votes diluted by voters who are able to poison the ballot box by misrepresenting their identities and casting multiple ballots. 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, Intervenor is 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 Plaintiffs' Motion for Preliminary Injunction is attached hereto as Exhibit A.

Respectfully Submitted,

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## MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

### I. INTRODUCTION

The League of Women Voters of Ohio and other organizations (hereinafter “Plaintiffs”) seek injunctive and declaratory relief to enjoin Defendant Blackwell’s Directives 2004-33 and 2004-07. Directives 2004-33 and 2004-07 provide 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 first to jettison Ohio’s long-standing precinct-based system of voting and replace it with a county-based system that is contrary to Ohio law and to 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 will be 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. This Court specifically recognized this danger and recently found that voters may only cast a valid ballot in the precincts in which they live. *Bell v. Marinko*, 235 F Supp. 2d 772 (N.D. Ohio 2002).

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, it 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 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 are entirely incorrect.

Local election 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. Unfortunately, some voters may be impacted by clerical or administrative errors by boards of elections. Such errors must be redressed, and Intervenor 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.

Plaintiffs' second claim alleges that Directive 2004-07 violates HAVA insofar as it requires certain first-time voters to present an acceptable form of identification before they can cast a valid ballot. Plaintiffs' argument is wholly without merit. In fact, all Ohio voters must establish identification upon registration. Plaintiffs have willfully misinterpreted provisions of HAVA and state regulations, both of which support a state's authority to require a voter to present valid identification before her ballot will be included in the canvass. Because the Directive at issue here is entirely consistent with HAVA, Plaintiffs cannot succeed on the merits.

The changes Plaintiffs seek would take away two of the most powerful tools elections officials have to catch and remedy voter fraud: precinct-based voting and minimal voter identification requirements. 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 or cast multiple votes by misrepresenting their identities. While clerical errors may result and must be addressed, a complete abandonment of Ohio's precinct-based system and voter identification requirement is not required and will potentially lead to chaos and the irreparable dilution of Intervenors' vote.

## **II. BACKGROUND**

Directive 2004-07 and 2004-33 contain a number of valuable provisions that will assist poll workers on Election Day. Turning first to Directive 2004-33, Plaintiffs argue that HAVA requires a county-based system of both casting and counting ballots. However, 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 Plaintiffs' Motion for Preliminary Injunction, Ohio law establishes a precinct-based system of elections. This Court upheld that system in *Bell*, supra. HAVA does not establish jurisdiction, but leaves this matter to state law, and 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, e.g., 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 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.

Plaintiffs' second challenge is to the voter identification requirement expressed in Directive 2004-07. However, Plaintiffs' allegation that the requirement violates HAVA is totally lacking in legal support. In fact, requiring identification for registration is supported by HAVA, the National Voter Registration Act, and case law. Ohio Revised Code § 3503.14 provides that the registration form "shall set forth the eligibility requirements needed to qualify as an elector and meet the requirements of the National Voter Registration Act of 1993." In turn, the National Voter Registration Act permits voter registration forms to require a minimal amount of information to: i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process. Clearly, identifying the voter is a fundamental and critical step in this process.

For example, in *McKay v. Altobello*, 1997 U.S. Dist. LEXIS 7162 (D. La., 1997), the court examined Louisiana's requirements that registrants provide their social security number and mother's maiden name as identification. While the requirement for providing the complete social security number was stricken as violating the Privacy Act, the Court upheld Louisiana's requirement that the voter provide his mother's maiden name:

The NVRA provisions at issue gives to each state discretion to do what is "necessary" to assess the eligibility of the applicant and to administer the state's election process. Thus, election officials for each state must determine the need for registration information based on the experience peculiar to that state. Although other states may utilize different identifying factors, determinations made in another state have little meaning to Louisiana elections. As stated above, it is the commissioner of elections' position that this information is necessary. This Court sees no reason to question it."

In Ohio, such identification is validly required on the face of the voter registration form, issued and approved by the Secretary of State in accordance with this authority to administer

elections and R.C. 3503.14. Everyone must establish her identity in order to be eligible to vote. The majority of Ohioans provide such identification when they register. Requiring those individuals who have not yet established their identification to do so before they vote is consistent with state law and specifically complies with the requirements of HAVA.

Such a requirement is a critical and fundamental step in the process aimed at preventing false registrations and fraud and completely within a state's well-established authority to govern the electoral process. As the United States Supreme Court held, "[t]he states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Mason v. Missouri*, 179 U.S. 328, 335 (1900). While the right of suffrage is established and guaranteed by the Constitution, it is subject to the imposition of nondiscriminatory state standards that do not contravene any restriction Congress has imposed. See *United States v. Classic*, 313 U.S. 299, 315 (1941) (*overruled on other grounds*). The Ohio General Assembly enacted those exacting standards in Title 35 of the Ohio Revised Code, and the Secretary of State reiterated those standards in Directive 2004-07.

### **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.

In addition to challenging Ohio's statutorily-based precinct system of voting, Plaintiffs also challenge the identification requirements. Essentially, Plaintiffs argue that, although all other Ohio voters were required to establish their identities, that Plaintiffs should be permitted to vote without sharing any identification whatsoever. The identification requirement is minimal and validly established through the Secretary of State's authority. It is also precisely the same requirement found in the National Voter Registration form.

The invalidation of the precinct system of voting and the voter identification requirement would eliminate the methods by which Ohio election officials ensure that individuals cast only one ballot and that the ballot is counted only for those races in which the individual is eligible to vote. Elimination of the precinct voting system and the voter identification requirement also creates the opportunity for individuals to cast multiple votes or to cast votes when not legally entitled to do so, thus creating 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. They will do so only to wait in line behind other

voters who improperly show up at their polling place, perhaps as a matter of convenience. 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 that 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, Intervenor meets 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 intervenor knew or reasonably should have known of the interest in the case; (4) the prejudice to the original parties due to the proposed intervenor'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. Intervenor Has 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, without identification, 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, unnecessary, and 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 prospect 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 their common claims of law and fact in one proceeding consistent with the principles of judicial economy.

**CONCLUSION**

For the foregoing reasons, Intervenor 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,

*/s/ Truman A. Greenwood*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 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*  
Truman A. Greenwood