

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

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NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE STATE CONFERENCE OF
PENNSYLVANIA (“NAACP-SCP”), ELECTION REFORM
NETWORK, RICHARD BROWN, ANGEL COLEMAN,
and GENEVIEVE GEIS,

Plaintiffs,

08 Civ. _____

– against –

PEDRO A. CORTÉS, SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; and
CHET HARHUT, COMMISSIONER, BUREAU OF
COMMISSIONS, ELECTIONS AND LEGISLATION,
PENNSYLVANIA DEPARTMENT OF STATE,

Defendants.

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MOTION TO INTERVENE ON BEHALF OF PLAINTIFFS

Pursuant to Federal Rule of Civil Procedure (“Rule”) 24, Pennsylvania elector Joseph B. Maguire and the Republican Party of Pennsylvania (Proposed Intervenors) move to intervene in this action as a matter of right or, alternatively, to intervene permissibly as party plaintiffs for the purpose of offering evidence and argument in support of Plaintiffs' Complaint. The Proposed Intervenors seek to intervene to protect their interests, the interest of their members, and the interests of Pennsylvania voters, in a fair, orderly, and legal election process. The Proposed Intervenors share the same goals as Plaintiffs, in that they want every eligible voter to have every opportunity to cast a ballot, but the Proposed Intervenors also want to ensure that those ballots are undiluted by fraudulent ballots and that election officials have the necessary tools to detect ineligible or fraudulent votes.

ARGUMENT

THE PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE IN THIS ACTION AS A MATTER OF RIGHT OR, ALTERNATIVELY, AS A MATTER OF PERMISSIVE INTERVENTION.

The Proposed Intervenors seek to intervene under Federal Rule of Civil Procedure (“Rule”) 24(a)(2), or, alternatively, Rule 24(b)(2). Rule 24(a)(2) and (b)(2) state in relevant part:

(a) **Intervention of Right.** 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.

(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.

The Proposed Intervenors are an elector, Joseph B. Maguire, who is concerned about the integrity of the election, and the Republican Party of Pennsylvania, which is a political organization vested with a charter to protect all voters, including its members, as well as Republican candidates in an election to public office. The Party has standing to sue based on injuries to itself or to its members. *See, e.g., Northeast Ohio Coalition for Homeless and Service Employees Int’l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Svcs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (“An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the

participation of individual members in the lawsuit.”)). For an association’s members to “otherwise have standing to sue in their own right,” they must have (1) “suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”; (2) “the injury has to be fairly traceable to the challenged action of the defendant”; and (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Blackwell*, 467 F.3d at 1010 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and citations omitted)).

Federal courts have allowed the major political parties of this state to intervene as parties in litigation concerning the election laws. *See, e.g., Trinsey v. Pennsylvania*, 941 F.2d 244 (3d Cir. 1991). “Rule 24 traditionally receives liberal construction in favor of applicants for intervention.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Further, in a special emergency proceeding such as this, Rule 24 need not be literally applied. *See Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (stating that the Rule is “obviously tailored to fit ordinary civil litigation, these provisions [of Rule 24] require other than literal application in atypical cases.”).

I. **THIS COURT SHOULD GRANT PROPOSED INTERVENORS INTERVENTION AS A MATTER OF RIGHT.**

Here, the Proposed Intervenors satisfy the requirements for intervention as a matter of right under Rule 24(a)(2). “In short, the Rule [24(a)(1)] provides that a party seeking mandatory intervention must establish that: (1) it has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties.” *South Dakota v. U.S. Dept. of Interior*,

317 F.3d 783, 785 (8th Cir. 2003). The Proposed Intervenors have filed a timely application to intervene that proves all three elements of this test.

A. **The Proposed Intervenors Have A Recognized Interest Relating To The Transaction Which Is The Subject Of The Action.**

In *Nuesse v. Camp, supra*, the Court stated:

"We know from the recent amendments to the civil rules that in the intervention area, the "interest" test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." 385 F.2d at 700.

Each of the Proposed Intervenors is an "apparently concerned" person in this matter. The Party supports or shares the same views as several candidates running for public office and represents a substantial portion of the voters of this state.

Moreover, the Party, its candidates, and its members may suffer irreparable harm unless this Court grants relief to ensure that every eligible voter has the opportunity to vote, and that local election officials have sufficient tools to detect and protect fraud. Eligible voters throughout the state, both Republicans and non-Republicans, may lose legal protections under the Constitution if they are denied the opportunity to cast ballots due to the unavailability of ballots, or if their ballots are diluted through the votes of ineligible or fraudulent voters. Additionally, the Intervenors have an important interest in the proper functioning of the Commonwealth's election. The Party is an integral part of the election process and has a moral obligation to uphold our democratic system. Whether the Party ultimately prevails on the merits concerning its proposed relief is irrelevant to the question of intervention. All that is necessary is that an intervenor possess a sufficient interest. The Party possesses such an interest.

B. The Proposed Intervenors Are So Situated That The Disposition Of This Action May As A Practical Matter Impair Or Impede Their Ability To Protect Their Interests.

Commenting on this requirement of Rule 24, the court in *Nuesse v Camp*, stated:

"The changes wrought in Rule 24(a) have repudiated that narrow approach in general This alternative is obviously designed to liberalize the right to intervene in Federal actions. Interestingly, an earlier draft would have required that judgment 'substantially' impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment." 385 F.2d at 701.

Here, an Order would affect the Party's rights. Once this Court has spoken, all voters and candidates in this state, including the Proposed Intervenors, shall be bound by any judgment this Court may enter. More importantly, a separate action by the Proposed Intervenors would be useless. Once judgment is entered in this case, time will be short. A subsequent court would be unwilling to upset election plans this close to November 4. Moreover, on Election Day, any emergency ballots cast will be mingled with all other ballots. There will be no way to review or challenge possibly fraudulent ballots. Any relief granted in a subsequent suit will not remedy the harm as such relief might well be too late. If the Proposed Intervenors are to appear in any action, it must be this one.

C. The Interests Of The Proposed Intervenors Are Not Adequately Represented By Existing Parties.

In *Nuesse*, the court set forth the controlling rules concerning the adequacy of representation by existing parties as follows:

". . . it underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." 385 F.2d at 702.

Courts have held that it need not be shown positively that representation of an applicant's interest by existing parties *will be* inadequate. It is sufficient if it is shown that such representation *may* be inadequate. *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D.C. Minn. 1972); *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972). Further, the burden of making that showing should be treated as minimal. *Hodgson v. United Mine Workers of America, supra*.

The record demonstrates that the existing parties will not attempt to represent the vital interests of the Proposed Intervenors. Plaintiffs mention neither the interests of the Party nor the possibility of provisional ballots. While the Proposed Intervenors share Plaintiffs' goal to seeking to ensure that every eligible voter has the opportunity to cast a ballot, the Proposed Intervenors have an additional goal of ensuring that *only* eligible voters cast ballots and have those ballots counted. The existing defendants, holding public office in the executive branch of government, have no interest in raising the rights of the Proposed Intervenors. The Proposed Intervenors should raise their own rights, and the rights of its candidates and its members.

II. **IF THE COURT DOES NOT GRANT INTERVENTION AS OF RIGHT, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.**

A. **Proposed Intervenors' Claims And The Main Action Have Common Questions Of Law And Fact.**

Rule 24(b)(2) provides that permissive intervention is proper where, upon timely application, an applicant's claim or defense in the main action have a question of law or fact in common. In exercising discretion to grant permissive intervention, Rule 24(b)(2) provides that the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Applying Rule 24(b)(2), Plaintiffs' Complaint alleges that the election laws of this state are unconstitutional. In the pleadings accompanying this Motion, the Proposed Intervenors state that they share the same goals as Plaintiffs, but also seek to ensure that local election officials have the necessary tools to detect ineligible ballots.

Clearly, the Proposed Intervenors' claims and the main action involve common questions of law and fact relating to the constitutionality of the election laws and to a potential deprivation of legal rights. These common questions of law and fact should all be decided in one cause in which all the interested parties are present. In that way this Court will be able to evaluate the competing claims and arguments, preventing piecemeal and prolonged adjudication which would, in this emergency situation, cause irreparable injury. The time element makes this imperative.

B. Permissive Intervention Will Not Result In Either Undue Delay Or Prejudice To The Rights Of The Original Parties.

Proposed Intervenors' application is timely, will not prejudice or delay the original parties, and is necessary to prevent grave injury to the Proposed Intervenors.

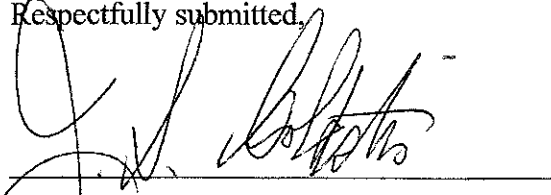
Upon learning of this lawsuit, the Proposed Intervenors have, without delay, filed their application for leave to intervene. Intervenors' pleadings are already before the Court. The Proposed Intervenors' claims raise questions of law without the need for discovery or an evidentiary hearing. All questions before the Court may be orally argued at one hearing. Accordingly, Intervention, will not cause delay or prejudice to the original parties. Even if intervention by the Proposed Intervenors caused delay or prejudice, this harm must be balanced against the great harm that will result to the Proposed Intervenors if their application is denied. *See, Pace v. First National Bank of Osawatomie, Kansas*, 277 F. Supp 19 (D.C. Kan. 1965). It is

essential that the Proposed Intervenors be present in this action as there exists no other effective remedy.

CONCLUSION

For these reasons, the Proposed Intervenors respectfully request that this Court grant their Motion to Intervene and permit them to intervene in this action as party plaintiffs and to exercise all the rights of a party.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan S. Goldstein", is written over a horizontal line. The signature is fluid and cursive.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion to Intervene** was served this 24th day of October, 2008, via hand delivery upon the counsel for plaintiffs and the defendants as follows:

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