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UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

FRANK PARTNOY, an individual; LAURA ADAMS, an individual; RACHANA PATHAK, an individual; PETER STRIS, an individual; JASON WILSON, an individual; and CALIFORNIA INFORMED VOTERS GROUP, an unincorporated association,

Plaintiffs,

v.

KEVIN SHELLEY, in his official capacity as Secretary of State for the State of California; SALLY MCPHERSON, in her official capacity as the Registrar of Voters for the County of San Diego; and CONNY MCCORMACK, in her official capacity as the Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants.

CASE NO. 03 CV 1460 BTM (JPS)

OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

Date: None Set
Time: None Set
Ctrm: 15

The Court should deny the request by Mr. Rafferty for leave to intervene. Mr. Rafferty does not satisfy the requirements for intervention under Rule 24; moreover, the request to intervene is barred in any event for a plethora of jurisdictional and procedural reasons.

A. Mr. Rafferty Does Not Satisfy the Requirements of Rule 24.

Tellingly, the motion for intervention nowhere cites or even mentions Rule 24, which controls both mandatory and permissive intervention as well as the resolution of the present case. Rule 24 precludes intervention by Mr. Rafferty.

1. Rafferty Cannot Intervene as a Matter of Right.

Mr. Rafferty clearly does not satisfy the requirements for intervention as a matter of right under Rule 24(a). No statute of the United States grants an unconditional right to intervene. See Fed. R. Civ. P. 24(a)(1). Moreover, as noted infra, Mr. Rafferty does not claim an interest relating to the property or transaction at issue that will be impaired. See Fed. R. Civ. P. 24(a)(2); infra at 6-7 (discussing lack of standing). Finally, Mr. Rafferty's alleged interest in defending California Elections Code § 11382 and the constitutionality of the current California election statutes is adequately represented by the existing defendants. See Fed. R. Civ. P. 24(a)(2) (no intervention as a matter of right if "the applicant's interest is adequately represented by existing parties"). Mr. Rafferty's desire to defend the current California statutes and avoid issuance of an injunction has already been represented by the defendants, each of whom has actively briefed and participated in the merits. Blocker v. Board of Education, 229 F. Supp. 714, 715 (E.D.N.Y. 1964) ("Representation by governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part.").

Mr. Rafferty claims that these defendants inadequately represent his interests because he is a Democrat whereas defendants are charged with neutral enforcement of the law. However, the relief that Mr. Rafferty seeks (i.e., avoidance of the injunction) is identical to the relief desired by the current defendants, and they accordingly adequately represent his interests. See Bush v. Viterna, 740 F.2d 350, 355 (5th Cir. 1984) ("When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance."). The fact that defendants may not raise the particular legal arguments that Mr. Rafferty would like to assert (e.g., abstention or a stay) does not establish inadequate representation. See United States v. Brooks, 163 F.R.D. 601, 604-05 (D. Or. 1995).

Finally, to the degree that Mr. Rafferty would have liked specific legal issues raised with respect to the crafting or issuance of the injunction, he was free to submit an *amicus* brief on the merits. See Lelsz v. Kavanagh, 98 F.R.D. 11, 17-20 (E.D. Tx. 1982) (denying intervention on this ground). Mr. Rafferty's failure to file such an authorized submission prior to this Court's consideration of and decision upon the merits does not justify post-hoc intervention. See also infra at 7-9 (discussing the belated, time-barred nature of Mr. Rafferty's intervention request).

Put simply, Mr. Rafferty cannot establish intervention as a matter of right.

2. Permissive Intervention Would Also Be Improper.

Mr. Rafferty also does not satisfy the requirements for permissive intervention under Rule 24(b). First, Mr. Rafferty does not satisfy the requirement of Rule 24(b)(2) that "an applicant's claim or defense and the main action have a question of law or fact in common." As noted infra at 5-6 (discussing absence of subject matter jurisdiction), Mr. Rafferty does not even possess a "claim or defense" in this action, much less one with a common question. Mr. Rafferty does not possess a claim against defendants because Mr.

Rafferty does not assert that they have violated any law. Nor does Mr. Rafferty possess a defense to any claim by plaintiffs; indeed, plaintiffs assert no claim against Mr. Rafferty against which he must defend. Mr. Raffery thus does not satisfy the basic requirements for permissive intervention established in Rule 24(b)(2).

In any event, Mr. Rafferty should not be granted permission to intervene even if Rule 24(b) is construed to invest this Court with discretion. There is no real advantage to allowing Mr. Rafferty's participation. Moreover, the fact that Mr. Rafferty's interests have already been represented by the defendants weighs heavily against permitting his intervention. See United States v. Marion County School Dist., 590 F.2d 146, 148 (5th Cir. 1979) ("The court may deny permission to intervention . . . if it determines that the issues these new plaintiffs seek to present have been previously determined or that the parties in the original action are aware of these issues and completely competent to represent the interests of the new group."). There is, in short, little reason to allow Mr. Rafferty to intervene in the action – particularly at this late date – as his participation will add little (if anything) to the process.

By contrast, the prejudice incurred by his participation would be substantial. First, his participation would critically injure the defendants, who have repeatedly indicated to this Court that they require a final decision by all courts no later than August 18, 2003. Both this Court and each of the existing parties have devoted massive efforts and energy to ensuring that this deadline was satisfied. The expedited briefing schedule resulted in a speedy final decision, and – critically – one in which the parties were able to resolve any appeals to the Ninth Circuit and/or the Supreme Court prior to the August 18th deadline for printing ballots. Permitting Mr. Rafferty to intervene would entirely destroy the fruits of these herculean efforts. It is simply impossible that any appeal (or, indeed, any further proceedings in this Court) would be finally resolved by this Court, the Ninth Circuit, and the Supreme Court prior to the printing of ballots on August 18, 2003 were Mr. Rafferty permitted to intervene. Mr. Rafferty's belated participation would accordingly destroy the fundamental reason for this Court's deliberately expedited resolution of this action..

Defendants would thus suffer substantial prejudice as a result of any intervention by Mr. Rafferty. Prejudice to defendants would result from (1) uncertainty surrounding the composition of the ballot and voter instruction manuals, (2) continuing litigation expenses and required monitoring and/or participation by defendants in any appeal by plaintiffs and/or Mr. Rafferty, and (3) the possible shredding, reprinting, and remailing of millions of absentee ballots, sample ballots, and voter instruction documents were this Court's decision to be belatedly overturned – indeed, potentially overturned multiple different times – in the appellate system. Not only would the defendants be severely prejudiced as a result, but so too would the entire electoral process. The existence of this prejudice to both defendants as well as to nonparties should alone compel the denial of the request for intervention. See United States v. Metropolitan District Commission, 147 F.R.D. 1, 6 (D. Mass. 1993) (denying intervention because intervention would prevent the critical expedited resolution of the merits).

Second, the intervention by Mr. Rafferty would also cause prejudice to plaintiffs and their counsel. Plaintiffs have already prevailed and obtained a final judgment in this action. To allow Mr. Rafferty to intervene and relitigate the issues that have already been adjudicated (e.g., whether a preliminary and permanent injunction should issue and the content of any such injunction) would obviously prejudice plaintiffs; moreover, it would compel plaintiffs to prevail on multiple fronts over multiple periods, hardly an equitable process. Furthermore, because 42 U.S.C. § 1988 does not authorize an award of fees in civil rights cases against an intervenor,[1] any intervention by Mr. Rafferty would either (a) compel defendants to pay for further proceedings and/or an appeal between Mr. Rafferty and plaintiffs, an appeal which defendants have deliberately avoided,[2] or (b) compel the plaintiffs to pay the full cost of this (extensive) portion of the litigation themselves, in

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[1] See Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

[2] See id. at 767-68 (Blackmun, J., concurring) (defendants may be liable for fees in civil rights cases expended in response to intervention of third parties).

contravention of the core purpose and deliberate function of the Civil Rights Act. Either consequence would cause substantial prejudice to the party forced to incur the cost of Mr. Rafferty's intervention. This fact would alone justify the denial of Mr. Rafferty's proposed multiplication of parties. See, e.g., Tasby v. Wright, 109 F.R.D. 296, 298-99 (N.D. Tx. 1985) ("The Court also finds that it would be prejudicial to allow [] intervention. The prejudice includes: (1) the unnecessary cost to the Defendants of defending against additional parties, including possible attorney's fees for intervenors; (2) the reduced control over the lawsuit that flows from adding additional parties, (3) the inevitable delay that goes with adding parties; and (4) the possibility, perhaps likelihood, that other dormant intervenors [] will [similarly seek intervention].") (citations omitted) (denying intervention on these bases).

Intervention by Mr. Rafferty would accordingly cause substantial prejudice to both parties and nonparties to this action; indeed, would potentially disrupt or even prevent the recall from taking place.[3] Moreover, wholly beyond the disruption to the electoral process, both the plaintiffs and defendants would be severely harmed by the proposed intervention. This prejudice would be incurred for little reason other than to satiate Mr. Rafferty's idiosyncratic desire to personally defend the constitutionality of California Elections Code § 11382 rather than allow the California Attorney General to do so.

This is not a sufficient reason to allow intervention. Mr. Rafferty's interests in avoiding an injunction were adequately represented by the existing defendants, and there are a variety of reasons why Mr. Rafferty should not be allowed to intervene at this stage of the proceedings. The prejudice of the proposed intervention would clearly outweigh the benefit. Mr. Rafferty's request for intervention should accordingly denied on this basis.

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[3] It is unclear whether this is Mr. Rafferty's express desire, as he claims (at 1:21) that he is a "Democratic Party activist" and has standing on this basis.

B. The Proposed Intervention Is Also Procedurally Improper.

Wholly apart from Rule 24, Mr. Rafferty's proposed intervention is improper for a number of additional reasons as well, any one of which would compel denial of the motion to intervene.

1. Absence of Subject Matter Jurisdiction.

First, this Court does not have subject matter jurisdiction over Mr. Rafferty's proposed intervention. Mr. Rafferty may intervene only if he possesses a claim with an independent basis for subject matter jurisdiction. See EEOC v. Nevada Resource Ass'n, 792 F.2d 882 (9th Cir. 1986). He has no such claim. He has no federal claim against defendants because he does not allege that defendants have violated the Constitution or any federal law. Similarly, he has no federal claim against plaintiffs, nor do plaintiffs have a federal claim against Mr. Rafferty, as none of these parties have allegedly violated any federal statute (nor have any of these non-state actors violated the Constitution). Finally, diversity jurisdiction does not exist over any claim by or against Mr. Rafferty because both he and each of the existing parties are citizens of California.

Accordingly, while Mr. Rafferty may have a claim for a declaratory judgment that the provisions of the California Elections Code are to be interpreted as he claims, this is a state law claim. See also Staacke v. U.S. Secretary of Labor, 841 F.2d 278, 180 (9th Cir. 1988) ("It is well-settled that the Declaratory Judgment Act does not itself confer federal subject matter jurisdiction."). Mr. Rafferty accordingly cannot intervene.

2. Lack of Standing.

Second, Mr. Rafferty also lacks standing to intervene. This is true for two distinct reasons, either of which would compel denial of the present motion.

First, because the original parties have not decided to appeal, there is no longer an Article III "case or controversy" in which Mr. Rafferty may intervene on the merits, and intervention is accordingly barred. See Associated Builders & Contractors v. Perry, 16 F.3d 688, 690-93 (D.C. Cir. 1994) (private party lacks standing and cannot intervene to

appeal injunction that declares statute unconstitutional and enjoins enforcement of statute if state elects not to appeal); see also Diamond v. Charles, 476 U.S. 54, 56-65 (1986) (dismissing appeal by intervenor for lack of standing). These cases are dispositive here.

Second, wholly apart from this categorical standing problem, Mr. Raffery lacks a particularized interest in this action sufficient to establish standing even under traditional standing principles. Mr. Rafferty asserts (at 1:25-2:2:23) that he has standing because the injunction prohibits him from telling voters that their votes will not count. But this misreads the injunction, which applies only to the defendants and similar governmental officials, not to private citizens like Mr. Rafferty. See Fed. R. Civ. P. 65(d) ("[E]very order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."). Moreover, even if the injunction did apply to Mr. Rafferty, he nowhere alleges that he is currently being prosecuted for its violation, and any alleged fear of future contempt proceedings against him would be both factually frivolous as well as inadequate to establish standing as a matter of law. See City of Los Angeles v. Lyons, 461 U.S. 95 (1982) (dismissing analogous claim for lack of standing).

Mr. Rafferty alternately asserts (at 2:24-3:13) that he has standing because the injunction would "effect [sic] the manner in which the intervenor's vote would be counted." But Mr. Rafferty – a self-described "Democratic Party activist" – nowhere alleges that he would abstain on the recall measure, and abstentions are the only votes changed by the injunction. In any event, Mr. Rafferty would hardly have standing to complain that his vote will now be counted rather than discarded. Mr. Rafferty also has no standing to complain that the votes of other citizens will now be counted rather than ignored. Not only is any resulting change in any election result entirely speculative, but Mr. Rafferty is also not a candidate, and hence would not be personally harmed by such an outcome. It is insufficient that Mr. Rafferty has a political and personal aversion to particular votes or possible electoral winners. See Planned Parenthood v. Doyle, 162

F.3d 463, 465 (7th Cir. 1998) ("A purely ideological interest is not an adequate basis for standing to sue in federal court – and we require such standing of all would-be intervenors.").

Mr. Rafferty accordingly lacks standing both because he is not personally injured by the injunction as well as because the parties have elected not to appeal. Article III and prudential standing requirements thereby compel the denial of his motion to intervene.

3. The Motion is Untimely.

Third, Mr. Rafferty's motion to intervene is time-barred; again, for two different reasons. First, as a matter of law, the fact that the request was filed only after this Court had already resolved the merits of the lawsuit is a sufficient basis by itself to deny the motion to intervene. See, e.g., SEC v. Amarillo Nat. Bank, 474 F. Supp. 1042, 1044 (N.D. Tx. 1979) ("This court is unwilling to allow OKC to intervene in this enforcement action so that it may assert claims that have already been adjudicated."); United States v. Metropolitan District Commission, 147 F.R.D. 1, 6 (D. Mass. 1993) ("[A] court may block intervention where intervention would unduly delay or prejudice the adjudication of the original parties' rights."); Adarand Constructors Co. v. Romer, 174 F.R.D. 100, 104 (D. Colo. 1997) ("[T]he issues which DOT seeks to relitigate through intervention have already been adjudicated . . . . Such intervention would therefore needlessly delay and prejudice the adjudication of the rights of the original parties to this action, cause them to incur additional expense, and waste judicial resources. Accordingly, permissive intervention is inappropriate.").

Second, as a factual matter, permitting intervention at this late date would severely prejudice the existing parties. As noted supra, both this Court and the parties deliberately and successfully attempted to ensure a final resolution of this matter with sufficient time for review by the Ninth Circuit and/or Supreme Court prior to the printing or mailing of ballots. This action received extensive press coverage, and Mr. Rafferty could have filed a motion to intervene at any point during the Court-ordered briefing schedule or prior to the hearing on the merits. He did not do so; rather, during this period, Mr. Rafferty filed

and prosecuted an (unsuccessful) petition in the California Supreme Court to enjoin the second part of the ballot. The present motion nowhere justifies Mr. Rafferty's refusal to file a motion to intervene prior to – rather than after – the hearing on the merits. See Caterino v. Berry, 922 F.2d 37, 41 (1st Cir. 1990) (denying intervention because party "had the opportunity to learn of the lawsuit through the press or other public means"); Narragansett Indian Tribe v. Ribo, Inc., 868 F.2d 5, 7 (1st Cir. 1989) ("Parties having knowledge of the pendency of litigation which *may* affect their interest sit idle at their peril.") (denying intervention on this basis) (emphasis in original).

The Ninth Circuit has held that "timeliness stands as a sentinel at the gates whenever intervention is requested and opposed."[4] The belated nature of Mr. Rafferty's request to intervene will cause the parties substantial prejudice; indeed, would require that some ballots that have already been mailed to voters be voided.[5] By contrast, had Mr. Rafferty intervened prior to the hearing and/or submitted briefs contemporaneously with the briefs of the parties, the entire matter could indeed have been resolved prior to the drop-dead date of August 18, 2003 for the printing of ballots. Intervention at this late date would accordingly cause substantial prejudice to the parties.

Because Mr. Rafferty's motion was untimely, it should accordingly be denied on this additional basis as well.[6]

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[4] Empire Blue Cross & Blue Shield v. Janet Greeson's A Place for Us, Inc., 62 F.3d 1217, 1221 n.5 (9th Cir. 1995) (quoting from and agreeing with First Circuit).

[5] There was a dispute at a prior hearing whether the defendants intended to send out "60-Day Ballots" on the statutory deadline of August 4, 2003. At the hearing on the merits, counsel for the Registrar-Recorder of Los Angeles indicated that her office presently intended to send out those ballots on that deadline.

Wholly apart from the 60-Day Ballots, it is clear that were this Court to grant Mr. Rafferty's motion to intervene, review by this Court, the Ninth Circuit and the Supreme Court could not possibly be completed by the drop-dead date of August 18, 2003.

[6] Mr. Rafferty's motion was actually untimely for yet a third reason as well; indeed, it was filed in express violation of the Order of this Court dated August 4, 2003 (and faxed to the parties at 9:26 a.m. on August 4, 2003, but erroneously dated as August

(continued...)

4. The Lack of Pleading and Evidence.

Fourth, and finally, Mr. Rafferty's motion to intervene is improper because it does not comply with several clear procedural requirements, at least two of which are worthy of mention. First, there is no admissible evidence – or any evidence at all – submitted in support of the motion. Second, notwithstanding the clear requirement of Rule 24, Mr. Rafferty does not include the required pleading. See Fed. R. Civ. P. 24(c) ("A person desiring to intervene shall serve a motion to intervene . . . . and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.").

These procedural improprieties again justify a denial of Mr. Rafferty's motion to intervene. See, e.g., Hirshorn v. Mine Safety Appliances Co., 186 F.2d 1023, 1023 (3rd Cir. 1951) (jurisdictional dismissal for lack of required Rule 24(c) pleading); School Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd., 160 F.R.D. 66, 67 (E.D. Pa.1995) ("PAMD moves to intervene on behalf of its member milk dealers in Pennsylvania. PAMD has not, however, attached a "pleading setting forth the claim or defense for which intervention is sought" as required by Rule 24(c). Accordingly, PAMD has not properly moved this Court for intervention, and so PAMD's motion to intervene either as of right or by permission must be DENIED.").[7]

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[6](...continued)
5, 2003). This Order stated: "Any motion for leave to intervene shall be filed and served on the other parties by fax by 5:00 p.m. on Wednesday, August 6, 2003." Mr. Rafferty did not meet this deadline; rather, the undersigned sent Mr. Rafferty an e-mail on 11:03 p.m. on August 6, 2003, noting that no motion had been received – at which point the undersigned went home. From the stamp on the fax machine, Mr. Rafferty appears to have faxed his motion to the Court and the parties around midnight on August 7, 2003, rather than by the 5:00 p.m. deadline of August 6, 2003 established by the Court.

[7] These failures are not only substantial ones, but also matter. The failure to submit any supporting evidence – or even pleadings – makes it impossible for this Court to evaluate the presence or absence of standing. Further, the absence of a pleading also makes it difficult to ascertain whether subject matter jurisdiction exists, as it is unclear whether Mr. Rafferty seeks to intervene as a plaintiff or as a defendant, and – in either case – the cause of action he seeks to assert or against which he seeks to defend. This (continued...)

Accordingly for multiple reasons, Mr. Rafferty should not be permitted to intervene in the present action.

C. A Final Digression on the Merits.

Plaintiffs will not exhaustively explore the merits of Mr. Rafferty's creative claims for abstention, for the simple reason that Mr. Rafferty is not currently a party. Plaintiffs nonetheless briefly mention three points on the merits for this Court's consideration.

First, defendants knowingly, intelligently, and for good reason waived any claim of abstention, and affirmatively desired the rapid resolution of this action by this federal tribunal. Abstention defenses generally can be waived, particularly when – as here – the defendants are state actors, thereby obviating the federalism concerns that form the basis for these doctrines. See, e.g., Ohio Bureau of Employment Svcs. v. Hodory, 431 U.S. 471, 479-80 (1977) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system."); Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986) ("A state may . . . voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention.").

Second, on the merits, there were never any pending state proceedings regarding the constitutionality of Section 11382; that issue did not involve a complex issue of state law; and controlling precedent consistently refuses to abstain in constitutional right to vote cases. See, e.g., Harman v. Forssenius, 380 U.S. 528, 535-37 (1965) (rejecting abstention arguments). Accordingly, there was (and is) no substantial basis upon which this Court should have abstained from resolving the purely legal issue of whether Section 11382 unconstitutionally deprives individuals of their federal constitutional rights.

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[7](...continued)
Court, and the parties, are also left to guess as to precisely what relief will be requested by Mr. Rafferty. All of these matters are substantial (and unjustified) omissions.

Finally, to the degree that any possible abstention argument existed, it disappeared entirely when the California Supreme Court dismissed all pending state law challenges to the recall, as that Court did last week. There are no current state law challenges that will prevent the Davis Recall. Moreover, even if there were, this Court properly adjudicated the invalidity of Section 11382 as applied to other future recall elections as well. Cf. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 (1979) (plaintiffs have standing to invalidate future applications of statute; e.g., future recall elections).

Accordingly, even were this Court eventually to adjudicate the merits of the claims that Mr. Rafferty would seek to interject in the present lawsuit, Mr. Rafferty would not be entitled to any relief.

Conclusion

There is no good reason why Mr. Rafferty should be permitted to intervene, and substantial – indeed, overwhelming – reasons why he should not. This Court should accordingly deny Mr. Rafferty's request for intervention.

DATED: August 11, 2003

By _____
Shaun P. Martin
Counsel for Plaintiffs