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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

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,

vs.

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. 03CV1460 BTM

ORDER GRANTING MOTION TO INTERVENE

I. BACKGROUND

On July 23, 2003, the California Secretary of State certified that a petition to recall Governor Gray Davis had obtained the requisite number of signature to require a recall election ("the Davis Recall"). Consistent with California law, Lieutenant Governor Cruz Bustamante set an election date of October 7, 2003. On July 23, 2003, Plaintiffs filed the instant lawsuit seeking to enjoin the enforcement of California Elections Code § 11382 ("section 11382") and a declaration that section 11382 violates the United States

Constitution.

On July 24 and 25, 2003, the Court held several status conferences to coordinate the proceedings in this case. At these hearings the Court asked the Defendants whether there were any grounds for abstention in this case. The Attorney General stated that while there were other cases involving the Davis recall before the California state courts, none of them addressed the validity of section 11382 and the State did not have "any basis to assert abstention." July 25, 2003 Hearing Transcript at 7:9-10.

Also during these status conferences, Los Angeles County and San Diego County informed the Court that in order to meet the October 7th election deadline, they must send the ballots to the printer no later than August 16, 2003, and August 20, 2003. Therefore, Defendants requested that the Court expedite review of this case so that they could know what they should print on these ballots by these deadlines. In order to meet these deadlines and to allow sufficient time for any appellate review of this Court's decision, the Court set an expedited briefing schedule in this case.

On July 29, 2003, after reviewing the submissions from both parties and entertaining oral argument, the Court issued an order declaring section 11382 unconstitutional. In order to avoid a potential issue of uncertainty created by the striking of section 11382, the Court construed the words "recall election" in section 11382 and "recall proposal" in section 11384 to be synonymous and to refer solely to the question of whether or not the incumbent official shall be recalled. In a statement to the press on July 30, 2003, the Attorney General's Office stated that it was not going to appeal this ruling. See San Diego Union-Tribune, July 30, 2003, at A1. To date none of the Defendants have appealed the decision.

On Friday afternoon at 3 p.m., August 1, 2003, Scott Rafferty faxed a letter to the Court ostensibly seeking to intervene in this case. By order dated August 4, 2003, the Court granted Mr. Rafferty leave to file a proper motion to intervene provided that he did so by 5 p.m. on August 6, 2003. Mr. Rafferty faxed a motion to intervene at 11:30 p.m. on August 6, 2003. The Court has accepted the late filing.

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II. DISCUSSION

Mr. Rafferty is seeking to intervene in this case "as of right." (See Rafferty Reply at 10). Under Rule 24(a) of the Federal Rules of Civil Procedure, a court may allow intervention "as of right" under the following circumstances:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (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.

According to Ninth Circuit case law, a court will grant a motion for intervention "as of right", in the absence of a statutory provision, if four criteria are met: (1) the application is timely filed, (2) the applicant has a "significantly protectible" interest relating to the transaction that is the subject of the litigation, (3) the applicant's interest will be impaired as a practical matter if intervention is not granted, and (4) the applicant's interest is inadequately represented by the parties before the court. United States v. State of Washington, 86 F.3d 1499, 1503 (9th Cir. 1996). Whether an application is "timely" is determined by three factors: (1) the stage of the proceedings at which an applicant seeks to intervene, (2) the prejudice to the other parties, and (3) the reason for and length of the delay. League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1308 (9th Cir. 1997).

As a threshold matter, Plaintiffs contend that Mr. Rafferty's motion should be denied because his motion was not accompanied by a pleading setting forth the intervenor's claims or defenses as required by Rule 24(c) of the Federal Rules of Civil Procedure.[1] The Ninth Circuit, however, does not require strict compliance with Rule 24(c). See Beckman Industries, Inc. v. Int'l Ins. Co., 966 F.2d 470, 474-75 (9th Cir. 1992). Where the movant "describes the basis for intervention with sufficient specificity to allow the district court to rule," the failure to comply with the technical requirements of Rule 24(c) may be excused. Beckman, 966 F.2d at 475. Mr. Rafferty' moving papers, albeit a bit mercurial, sufficiently

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[1] Rule 24(c) states: "The motion shall state the ground therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

specify the grounds for intervention. (See Rafferty Reply at 10-11.) Therefore, Mr. Rafferty's failure to attach a pleading setting forth his claims or defenses does not preclude intervention.

As for the merits of his motion to intervene, the Court finds that Mr. Rafferty meets the four aforementioned requirements for intervention as a matter of right. First, the Court finds that Mr. Rafferty's motion to intervene is timely. Although the court has issued its judgment in this case, the motion was heard on an expedited basis and the deadline to appeal the decision has not passed. See Tocher v. City of Santa Ana, 219 F.3d 1040, 1045 (9th Cir. 2000) (A post-judgment motion to intervene is generally considered timely if it is filed before the time for filing an appeal has expired), abrogated on other grounds by City of Columbus v. Ours Garage and Wrecker Service, Inc., 536 U.S. 424 (2002).

Furthermore, the reason for and length of delay on the claims sought to be raised do not weigh against intervention. The case was barely a week old when Mr. Rafferty notified the Court of his intention to seek to intervene, albeit by letter rather than a proper motion. Considering the speed with which the case progressed and the limited media coverage it initially received, it is reasonable that an interested party in Northern California would not necessarily learn about the existence of a case in Southern California until the more extensive media coverage afforded this Court's judgment in this case occurred on July 29, 2003.

Furthermore, Mr. Rafferty does not seek relief that would upset the Court's holding that section 11382 is unconstitutional. Rather, he seeks to attack the application of the injunction to him and the Court's ruling on the construction of section 11383. Mr. Rafferty initially sought to intervene to seek the Court to abstain, but in light of the California Supreme Court's dismissal of the cases before it, he has now abandoned an argument for abstention. (See Rafferty Reply at 3.) Therefore, the Defendants can still print the ballots as this intervention will not affect the form of the ballots. Had Mr. Rafferty sought to intervene to change the Court's determinations which affect the actual ballots, the Court would not allow intervention as the prejudice to the State and Counties would be immense. Additionally,

while the Court has excused any untimeliness on the present claims, Mr. Rafferty's actions – faxing a letter to the Court Friday afternoon on August 1, 2003 rather than actually filing a motion and then faxing a motion late on August 5, 2003 – would result in denial of intervention to seek reconsideration of the Court's declaratory judgment as to the unconstitutionality of section 11382. However, Mr. Rafferty does not seek such relief (See Rafferty Reply at 3.) and therefore the State and Counties will not be prejudiced. Accordingly, the Court finds that the present limited motion to intervene is timely.

The Court also finds that the applicant has a "significantly protectible" interest relating to the subject of this litigation, namely his interest as a voter in the upcoming Davis recall election. Although the protectible interest analysis overlaps, in this instance, with the standing inquiry, the Court finds that both analyses support Mr. Rafferty's intervention. The Court agrees with the reasoning of the Eleventh Circuit in Dillard v. Baldwin County Commissioners, 225 F.3d 1271 (11th Cir. 2000) and Meek v. Metropolitan Dade County, Fla., 985 F.2d 1471 (11th Cir. 1993). As the court stated in Meek:

> The intervenors sought to vindicate important personal interests in maintaining the election system that governed their exercise of political power, a democratically established system that the district court's order had altered. As such, they alleged a tangible actual or prospective injury and did not merely challenge unlawful conduct in the abstract.

Id. at 1480. The Court is unaware of any Ninth Circuit precedent disallowing voter standing, or rejecting the assertion of a protectible interest in voting in an upcoming election, in a case such as this.[2] Rather, Ninth Circuit caselaw appears to support voter standing in similar instances. See, e.g., Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991) (Hawaii voter had standing to challenge Hawaii's prohibition against write-in voting); Erum v. Cayetano, 881 F.2d 689, 691 (9th Cir. 1989) (Hawaii voter has standing to challenge the whole of the state election laws creating ballot access restrictions), abrogated on other grounds by Burdick v.

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[2] Plaintiffs rely on Associated Builders & Constractors v. Perry, 16 F.3d 688, 690-93 (D.C. Cir. 1994) and Diamond v. Charles, 476 U.S. 54, 56-65 (1986), for the proposition that private parties lack standing and cannot intervene to appeal an injunction that declares a state statute unconstitutional if the state elects not to appeal. Plaintiffs' reliance on these cases is misplaced. Diamond involved that application of a criminal statute and Perry involved a union's unsuccessful attempt to force a state to enforce unconstitutional health and safety standards. Neither case is factually or legally similar to the motion at hand.

Takushi, 504 U.S. 428 (1992). Accordingly, the Court finds that Mr. Rafferty has both standing and a significantly protectible interest in this litigation sufficient to allow his intervention.

The Court also finds that Mr. Rafferty's interest will be impaired as a practical matter if intervention is not granted. As previously mentioned, the Court has determined that Mr. Rafferty has a significantly protectible interest in this litigation as a voter in how the state's electoral process is administered. Additionally, he contends that the broad language of this Court's injunction reaches his conduct as a private individual because it states that the permanent injunction applies to "any other individual . . . with actual notice of this order." Judgment of 7/29/03 at ¶ 4. Since the Court has rendered a final judgment in this case and Defendants have chosen not to appeal the Court's decision, Mr. Rafferty's interests will, as a practical matter, be impaired if he is not allowed to intervene. See Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 822 (9th Cir. 2001) ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.") (quoting Fed. R. Civ. P. 24 advisory committee notes).

Finally, the Court finds that Mr. Rafferty's interest is inadequately represented by the parties before the court. Since the various parties do not necessarily have the same interests in this litigation as the intervenor, the presumption of adequacy of representation does not arise. 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.") (internal citation omitted). Although Mr. Rafferty does not directly challenge the Court's determination that section 11382 is unconstitutional, he does challenge the Court's authority to construe other provisions of the California Elections Code, namely section 11383. (Rafferty Reply at 7-9.) Mr. Rafferty is correct that this is not relief that Plaintiffs sought in their complaint. Only one of the Defendants requested that the Court address the potential uncertainty that would be

created in applying section 11383 in the absence of 11382. None of the current parties to this litigation argued against the Court's construction. See California Pro Life Council Political Action Committee v. Scully, 989 F.Supp. 1282, 1299-1301 (E.D. Cal. 1998) (discussing federal courts' role in severing, construing, and reforming state statutes).

It also important that unlike Mr. Rafferty, none of the parties was seeking to halt the impending recall election, but rather voiced concerns that the current process not be impeded if at all possible. While the Defendants certainly have a valid interest in having a stable, expedient, and smoothly-running election process – an interest affected more by the timing than the substance of this Court's decision – this interest is not necessarily shared by partisan-minded voters such as Mr. Rafferty. This determination is further supported by the fact that none of the Defendants sought to appeal this Court's decision. See Tocher v. City of Santa Ana, 219 F.3d at 1045 (9th Cir. 2000) (failure of state parties to adequately represent persons with standing may become "apparent only after the district court [has] issued its final judgment.").

Accordingly, the Court finds the intervenor has satisfied his burden of showing that his interests are inadequately represented. See Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.").

Therefore, the Court finds that Mr. Rafferty has meet all the requirements of Rule 24(a) for intervention as of right. However, because Mr. Rafferty has represented to this Court that he is seeking to intervene in this matter only for the purpose of gaining limited relief, the Court restricts the relief he may seek in this intervention to that outlined in his papers. In his Reply, Mr. Rafferty stated that he is only seeking to have this Court "amend its opinion to remove the construction of § 11383, and . . . vacate clauses (2), (3), and (4) of the permanent injunction dated July 29, 2003 on the basis that precedent precludes this Court from altering political rules in an imminent state election." (Rafferty Reply at 1). Accordingly, the Court limits Mr. Rafferty's intervention to seeking this relief.

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III. CONCLUSION

For the aforementioned reasons, the Court GRANTS Mr. Rafferty's motion to intervene for the limited purpose of seeking the relief requested in his Reply. Mr. Rafferty shall file and serve his Complaint for relief by noon on August 15, 2003. He may fax file his complaint pursuant to S.D. Cal. Civil L. R. 5.3. Any failure to comply with the rules of court will be grounds for immediate dismissal. The Court will hold a status conference on this matter at 4 p.m. on August 14 and 15, 2003. The parties shall simultaneously file any papers on a motion for judgment on the pleadings by noon on August 19, 2003. The Court will hold a hearing on the Complaint on August 20, 2003, at 10:00 a.m.

IT IS SO ORDERED.

Dated: August 14, 2003

Barry Ted Moskowitz

HONORABLE BARRY TED MOSKOWITZ
United States District Judge

Copies to:
All Parties and Counsel of Record