

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

AMERICAN ASSOCIATION OF PEOPLE)
 WITH DISABILITIES, FEDERATION OF)
 WOMEN'S CLUBS OVERSEAS, INC., NEW)
 MEXICO PUBLIC INTEREST RESEARCH)
 GROUP EDUCATION FUND, and)
 SOUTHWEST ORGANIZING PROJECT,)
 Plaintiffs,)
 v.)
 MARY HERRERA, in her capacity as)
 Secretary of State,)
 Defendant.)

No. CV-08-702 JOB/WDS

MOTION TO INTERVENE

Nazarena ("Nina") Martinez, Justine Fox-Young, Rhoda Coakley (Chavez County Clerk), and the Republican Party of New Mexico hereby move this Court, pursuant to Fed. R. Civ. P. 24 for an Order allowing them to intervene in the above-entitled action. As grounds for this Motion, proposed Defendants-in-Intervention state as follows:

1. Nina Martinez is a registered voter and the Secretary of the Republican Party of New Mexico. She has lobbied the Legislature for more effective registration and voter identification requests, to deter fraud and increase public confidence in the election process.

2. Justine Fox-Young is a State Representative and a candidate for State Representative (District 30) in the general election on November 4, 2008. Representative Fox-Young has advocated and worked for effective registration and voter identification laws to deter fraud and increase confidence in the election process.

3. Rhoda Coakley is the Chavez County Clerk and has thirty (30) years of experience as County Clerk or Chief Deputy County Clerk. Exhibit 1, Affidavit of Rhoda Coakley.

4. The Republican Party of New Mexico ("RPNM") is a Section 527 non-profit organization. The RPNM employs persons who have registered and received training concerning the registration process.

5. Counsel for Plaintiffs has recently been contacted, but has not yet responded to this motion, except to oppose the request for any continuance.

6. Counsel for Defendant has been contacted and does not oppose this motion.

7. Defendants-in-Intervention do not have an Answer to attach and would request a reasonable continuance of the hearing on the Preliminary Injunction to allow for the filing of an Answer and a Response to the Motion for Preliminary Injunction. This statute has been in effect for more than three years. Plaintiffs' delayed filing of Preliminary Injunction in a matter that raises so many issues of fact and law, suggests that a careful consideration, investigation and analysis is appropriate. A short continuance of a week or ten days cannot prejudice Plaintiffs who chose to wait more than three (3) years to file a Motion for a Preliminary Injunction.

WHEREFORE, proposed Defendants-in-Intervention request the Court enter an Order permitting their intervention in this matter and grant a short continuance to allow the preparation and filing of an Answer to the Complaint and a Response to the Motion for Preliminary Injunction.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

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CERTIFICATE OF SERVICE

I certify that on this 18th day of August 2008 we filed the foregoing electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

_____/s/
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AFFIDAVIT OF RHODA COAKLEY

Duly sworn, and upon her oath, Rhoda Coakley states:

- 1) I am over the age of twenty-one and make these statements upon personal knowledge.
- 2) I am the (elected) Chaves County Clerk. I have served as either the Chief Deputy or County Clerk for Chaves County for thirty (30) years. As required by law, I have attended numerous election seminars held by the Secretary of State.
- 3) My staff and I have trained more than 50 people on registration requirements in the past year.
- 4) On August 4, 2008 I was contacted by Robert Fuentes. Mr. Fuentes is employed by the New Mexico for Change campaign.
- 5) Mr. Fuentes told me that he was concerned that persons who wanted training would not be able to commit to attending training sessions during working hours. I told Mr. Fuentes I would be happy to schedule training for any person or group after regular work hours or any time that is convenient.

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**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE**

Nazarena ("Nina") Martinez, Justine Fox-Young, Rhoda Coakley, and the Republican Party of New Mexico ("Intervenors") submit this Memorandum brief in support of their Motion to Intervene. Intervenors are entitled to intervene in this action.

I. Introduction.

On September 19, 2005, the Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, issued a non-partisan report which states, "effective voter registration and voter identification are **bedrocks** of a modern election system. By assuring uniformity to both voter registration and voter identification...access to elections and ballot integrity will both be enhanced." Carter-Baker Commission on Federal Election Reform (emphasis added).

New Mexico is, unfortunately, not immune from voter fraud and voter registration fraud. In 2004 thousands of fraudulent or invalid registrations were submitted in

Bernalillo County alone. The Legislature responded and created common sense obligations and requirements that are not unconstitutional or even difficult to abide.

A. Senate Bill 678.

In March 2005 the New Mexico Legislature passed Senate Bill 678 ("SB 678") as part of an attempt at election reform that included amendments to laws regarding voter registration, voter identification and paper records of voter's ballots. Section 17 (later codified as N.M. Stat. § 1-4-49) detailed the rights and responsibilities of third-party registration agents in registering voters throughout the state. After passing through the Senate Judiciary Committee and the House Voter and Election Committee, SB 678 passed the Senate by a 24-17 vote and the House by a 39-26 vote. The Senate concurred.

New Mexico Legislative website:
<http://legis.state.nm.us/lcs/session.asp?chamber=S&type=++&number=678&Submit=Search&year=05>.

Section 1-4-49—and the rules promulgated there under—provide various protections against voter registration fraud, including (a) requiring registration agents to complete a pre-registration process and provide personal information; (b) limiting the number of registration forms an organization or individual may have in their possession; (c) requiring third-party registration agents to return completed registration forms to the county clerk or Secretary of State within forty-eight hours; and (d) criminal and civil penalties for parties who do not comply with third-party registration laws. These provisions, among others, are the aspects of the law challenged by Plaintiffs in the instant case.

B. Legislative action.

SB 678 was introduced during the 2005 Regular Session by Sen. Linda Lopez and—after being combined by the Senate Rules Committee with SB 680, SB 718, and SB 735—was referred to the Senate Judiciary Committee for consideration. The Senate Judiciary Committee did not make any amendments to section 17 of the bill, but after making other substantial changes, the Committee substituted its own bill for that of the Senate Rules Committee. The Senate Judiciary Committee version was then passed by the Senate and sent to the House for its consideration. The House Voters and Election Committee (“HVEC”) made additional amendments to the bill. HVEC’s changes included the addition of provisions that made conviction of third-party registration agents who violated the registration laws more difficult and the criminal penalties for such violations less severe. House Voters and Election Committee Rep. at 1 (March 17, 2005) available at <http://legis.state.nm.us/Sessions/05%20Regular/bills/senate/SB0678VE1.pdf>. Specifically, the HVEC required that a person “willfully” violate the third-party registration law in order to be guilty of violating registration laws and reduced the penalty for such violation from a fourth degree felony to a petty misdemeanor. *Id.* The HVEC amendments to SB 678 passed the committee by an 8 to 5 party line vote. *Id.* at 4. Republicans on the committee opposed the watered down penalties, but failed to obtain the votes necessary to provide a more realistic deterrent for matters that can so seriously impact the election process and further erode public confidence in open and honest elections.

C. Election reform task force.

Between the First and Second Session of the Forty-Seventh Legislature, the 34-member Election Reform Task Force was created to address the changes made to election laws as a result of the passage of SB 678. Because of the complex nature of the changes,

the election reform task force was created to review the provisions and implementation of the new law, review the Election Code to ensure that any obsolete language that conflicts with federal law was adequately addressed and, if necessary, recommend legislation for the 2006 legislative session to address any implementation problems or other unintended consequences of the new law.

New Mexico Legislative Council Service, *Election Reform Task Force, 2005 Interim Final Report*, at 2 (March 2006) (available at <http://legis.state.nm.us/lcs/fileExists/interimReports/2005interreports/ERTF05.pdf>).

During their second meeting, the Election Reform Task Force discussed third-party registration and potential issues with the new laws. Ultimately, the sole recommendation from the task force relating to third-party registration was to amend N.M. Stat. Ann. § 1-4-49 to “require third-party registration organizations to provide the names and address of their officers and provide for penalties for violations of the registration process.” *Id.* at 47.

II. Intervenor are Entitled to Intervene as of Right.

Rule 24(a) provides that upon timely application, an applicant shall be permitted to intervene when (a) the applicant claims an interest relating to the property or transaction which is the subject of the action, (b) 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, and (c) the applicant’s interest is not adequately represented by existing parties. *See, Utah Association of Counties v. Clinton*, 255 F.3d

1246, 1249 (10th Cir. 2001); Fed.R.Civ.Pro. 1-24(a) (2005). “Federal courts should allow intervention ‘where no one would be hurt and greater justice could be obtained.’” *Id.*, p. 1250 (citation omitted). Under any analysis and, certainly under the Tenth Circuit’s liberal analysis towards intervention,¹ each of the criteria required for intervention are satisfied as discussed below.

A. The application is timely.

Because Rule 24 is silent as to what constitutes a timely application to intervene, the question of timeliness is determined on a case-by-case basis. *Simms v. Andrews*, 10th Cir., 118 F.2d 803. This application is timely. The statute challenge is now more than three years old and this suit was filed in late July and Plaintiffs did not request a temporary restraining order. Based on the docket, there has been minimal activity in this case. The passage of time has been nominal and favors intervention. More importantly, however, the litigation is at an early stage and there has been limited activity to date.

“The mere passage of time, in itself, does not render an application untimely; rather, the important question concerns actual proceedings of substance on the merits.” 6 Moore’s Federal Practice, 3rd Ed., §24.21[1]. Intervention is properly denied where, for example, a litigation is near its end stage and allowing a party to intervene would cause undue prejudice and delay in the proceeding. *See, e.g., U.S. v. Washington*, 86 F.3d 1499 (9th Cir. 1996) (denying motion to intervene where litigation was in final stages); *Associated Builders v. Herman*, 166 F.3d 1248 (D.C. Cir. 1999) (denying motion to intervene where the proposed intervenor sought intervention almost a year after the initial

¹ The Tenth Circuit generally follows a liberal view in allowing intervention under Rule 24(a). *Elliot Industries Limited Partnership*, 407 F.3d 1091, 1103 (10th Cir. 2005); *National Farm Lines v ICC*, 564 F.2d 381, 384 (10th Cir. 1977) (“our court has tended to follow a somewhat liberal line in allowing intervention”).

suit was filed and two weeks after judgment had been entered). By comparison, intervention is proper where despite the passage of time, there has been limited activity in the case and the intervention will not prejudice the existing parties. *See, Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (motion to intervene filed approximately two and one-half years after complaint was timely; “in view of the relatively early stage of litigation and the lack of prejudice to plaintiffs flowing from the length of time between the initiation of the proceedings and motion to intervene, we conclude the request for intervention is timely”).

No party will be prejudiced by granting Intervenors’ application. *Utah Association of Counties v. Clinton*, 255 F.3d at 1251 (“The prejudice prong of the timeliness inquiry ‘measures prejudice caused by the intervenors’ delay – not by the intervention itself’) (citation omitted). There has been very limited activity in this case. Accordingly, Intervenors’ application is timely.

B. Intervenors claim an interest relating to the transaction which is the subject of this action.

While Fed.R.Civ.Pro. 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). In the Tenth Circuit, determining the sufficiency of an applicant’s interest is a highly fact-specific determination. *Sanguine, Ltd v. United States Department of the Interior*, 736 F.2d 1416, 1420 (10th Cir. 1984) (“courts have enjoyed little success in attempting to define precisely the type of interest necessary for intervention”). The Tenth Circuit “has tended to follow a somewhat liberal line in allowing intervention.” *Utahns for Better Transportation*, 295 F.3d 1111, 1115 (10th Cir. 2002). 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.” *Id.*

Voting rights are necessary for the “preservation of other basic civil and political rights.” *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 596 (1964); *Ripon Soc. v. National Republican Party.*, 525 F.2d 548, 559 (D.C. 1975). And, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick v. Takuski*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *see also, Timmons v. Twin Cities Area New Parties*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.E.2d 589 (1997) (holding “that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election-and campaign-related disorder”).

There is no question that ascertaining an individual’s identity before allowing the person to vote and preventing voter fraud are compelling legal interests. *See Crawford v. Marion County Election Bd.*, 2008 U.S. Lexis 3846, 128 S. Ct. 1610 (April 28, 2008). In the decision below, *Indiana Democratic Party v. Rokita*, 2006 U.S. Dist LEXIS 20321 (Ind.), the Indiana District Court upheld a voter identification requirement finding there was a “compelling interest in ascertaining an individual’s identity before allowing the person to vote...[and] in preventing voter fraud.” *Id.*, * 131.

Here, the individual intervenors’ rights to an honest and accountable registration system and the right to vote and to have their votes counted, are unquestionably significant protectable interests. Voter fraud, registration fraud and threats to the sanctity of the ballot process due to fraud or possible fraud are legitimate concerns of individual

voters and Legislators, county clerks and the Republican Party of New Mexico. The restrictions challenged constitute both a safeguard against fraud and the appearance of fraud in the registration and election process. These potential Defendants-in-Intervention have an interest in promoting equal voting rights and combating voter registration fraud.

C. The Intervenors are so situated that the disposition of this action may, as a practical matter, impair or impede their ability to protect their interests.

“Rule 24(a)(2) also requires the intervenors to demonstrate that the disposition of this action may as a practical matter impair or impede their ability to protect their interest...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. **This burden is minimal.**” *Utah Association of Counties v. Clinton*, 255 F.3d at 1253 (citation omitted) (emphasis added). A third-party’s interest may be impaired “when the resolution of the legal questions in the case effectively foreclose the rights of the proposed intervenor in later proceedings, whether through *res judicata*, collateral estoppel, or *stare decisis*.” *Ute Distrib. Corp. v. Norton*, 43 Fed. Appx. 272, 2002 U.S. App. LEXIS 14982, *21 (10th Cir.). The Republican Party of New Mexico complies with the allegedly “onerous and unconstitutional” third party registration limitations.

Plaintiffs’ attempts to usurp the legislative and democratic process and the will of the Legislature by seeking to eliminate these very modest requirements puts the registration ballots and the New Mexico voters at the risk of fraud. The elimination of the modest identification requirements proposed by the Plaintiffs will further erode public confidence in the election process and discourage voters from voting in future elections.

D. Intervenors’ interests are not adequately represented by existing parties.

According to the Supreme Court, this prong of the intervention analysis merely requires the intervenor to show that representation of its interest "may be" inadequate and the applicant's burden on this matter should be viewed as "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed. 2d 686 (1972); *Utah Association of Counties v. Clinton*, 255 F.3d at 1254 (same); *National Farm Lines v. Interstate Commerce*, 564 F.2d 381, 383 (10th Cir. 1977) (recognizing the proposed intervenor's "slight" and "minimal" burden of establishing that representation of his interests "may be inadequate").

The potential Defendants-in-Intervention have interests that are not adequately represented by the existing parties. Representative Justine Fox-young is a State Representative and she is a candidate in the upcoming general election. Nazarene ("Nina") Martinez is a registered voter, Secretary of the Republican party of New Mexico and has lobbied the State Legislature for effective registration and voter laws.

Rhoda Coakley is the Chaves County Clerk. Exhibit 1, Affidavit of Rhoda Coakley. The Chaves County Clerk Ms. Coakley and presumably other county clerks and the Secretary of State would be happy to schedule additional sessions for interested persons. *Id.*

The Republican Party of New Mexico employs person who have properly registered and have been trained. As an entity subject to the alleged "onerous and unconstitutional" restrictions, the Republican Party of New Mexico has important facts to the contrary. The showing necessary to establish that the Intervenor's interests are not adequately represented is a "minimal" burden and the potential Intervenor's need only show that representation by the existing parties "may" be inadequate. *See Utah Ass'n of*

Counties v. Clinton, 225 F.3d 1246, 1254-55 (10th Cir. 2001). This minimal burden is further reduced when it is the government that is supposed to adequately represent the potential Intervenors' interests. *Id.* at 1254.

The Secretary of State "interests," are broad, diverse and could potentially shift or change due to politics and the nature of the political process and litigation. These potential Intervenors favor effective registration requirements to address voter registration fraud that has already occurred. The obvious result of the elimination of the registration and identification requirements will be more opportunity for identity theft, less accountability and more opportunity for mischief, related to voter registration fraud and other crimes. The recent identification requirement in present law that Plaintiffs seek to prohibit would have prevented media the reports concerning the unregistered sex offender and persons convicted of identity theft who were gathering social security numbers and other personal information from unsuspecting New Mexicans. No purpose would be served by less oversight and accountability. These potential Intervenors' interests are not circumscribed or restricted, as governmental defendants are, by the political strictures and constrains inherent in the nature of all suits involving governmental entities. The interests of these potential Defendants-in-Intervention go to the heart of the issue: the attempt to root out fraud in the registration process and the need to help restore public confidence in voting

III. In the Alternative, Permissive Intervention is Requested.

As set forth above, the proposed Intervenors are entitled to intervene as of right. However, in the alternative, proposed Intervenors should be granted permission to intervene under Rule 24(b).

Federal Rule of Civil Procedure 24(b) provides in relevant part that upon timely application, intervention should be permitted "when an applicant's claim or defense and the main action have a question of law or fact in common . . . [and] 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.Pro. 24(b). In this case, because the proposed Intervenor's application to intervene is timely, undue delay or prejudice to the parties will not result from intervention. Moreover, the proposed Intervenor does not intend to introduce collateral issues which might cause delay. Instead, their involvement in this action will involve one relevant and common question of law - the validity of a voter identification requirement.

Permissive intervention is within the sound discretion of the district court, and its decision will not be disturbed absent a showing of clear abuse. See Fed. R. Civ. P. Rule 24 (b); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F. 2d 1424, 1427 (10th Cir. 1990). Unlike intervention as a matter of right, permissive intervention does not require the proposed Intervenor to demonstrate either that they have an interest in the main action or that existing parties will not adequately protect their rights. See Rule 1-024(B); *SEC v. U.S. Realty and Improvement Co.*, 310 U.S. 434, 459 (1940) (Rule 24(b) "plainly dispenses with any requirement that the intervener shall have a direct personal or pecuniary interest in the subject of the litigation"). Instead, courts consider whether intervention is likely to contribute to a full exposition of the facts and law in the case. See, e.g., *Natural Resources Defense Counsel, Inc. v. Tennessee Valley Auth.*, 340 F. Supp. 400, 408-409 (S.D. NY 1971), *rev.d on other grounds*, 459 F.2d 255 (2nd Cir. 1972).

These potential Defendants-in-Intervention have the experience or expertise, and certainly the personal interest, necessary to contribute the full exposition of the facts and law at issue.

IV. Conclusion.

For the foregoing reasons, the Court should grant proposed intervenors leave to intervene in this action of right or, in the alternative, should grant permissive intervention. These proposed Defendants-in-Intervention also request the Court continue the Preliminary Injunction Hearing scheduled for August 19, 2008 for ten days to allow for an Answer to the Complaint and a Response to the Motion for Preliminary Injunction filed by Plaintiffs.

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