IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION (CHICAGO)

LIBERTARIAN PARTY OF ILLINOIS, ILLINOIS GREEN PARTY, DAVID F. BLACK, SHELDON SCHAFER, RICHARD J. WHITNEY, WILLIAM REDPATH, BENNETT W. MORRIS, MARCUS THRONEBURG,	)	
Plaintiffs	)	**Case No. 1:20-cv-02112**
v.	)	**Judge: Robert M. Dow, Jr.**
J.B. PRITZKER, in his official capacity as Governor of Illinois,	)	
and	)	
WILLIAM J. CADIGAN, KATHERINE S. O'BRIEN, LAURA K. DONAHUE, CASSANDRA B. WATSON, WILLIAM R. HAINE, IAN K. LINNABARY, CHARLES W. SCHOLZ, WILLIAM M. MCGUFFAGE, in their official capacities as Board Members for the Illinois State Board of Elections,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENTION

Facts

Plaintiffs filed the above-styled action on April 2, 2020, just days after Illinois's 90-day window for candidates' signature collection had opened on March 24, 2020. Verified Complaint, R. 1. The following day, on April 3, 2020, Plaintiffs filed their Motion for Emergency Relief seeking to enjoin Illinois's signature collection requirement. Motion for Temporary Restraining Order and Preliminary Injunction, R.2. As made clear in Plaintiffs' pleadings, time is of the

essence in this case. The numbers of signatures required by Illinois range into the thousands, and each lost day of petitioning makes it that much more difficult for candidates to comply with Illinois law. As things now stand, moreover, it is not clear when or even whether Illinois can safely re-open for in-person signature collection.

On April 10, 2020, the Court directed the parties "promptly to confer regarding a proposed resolution of their dispute." Notification of Minute Entry, R.5, at PAGEID# 60. Further, the Court directed Defendants to file a "written response to the motion, if any, … by noon on Thursday, April 16, 2020." Id. It added that "[a] hearing is set by telephone at 9:30 a.m. on Friday, April 17." *Id*. On April 14, 2020, the parties conducted a telephonic conference pursuant to the Court's Order to discuss possible resolution of the case. That discussion was productive but not yet dispositive of the case.

Late on April 13, 2020, Plaintiffs were notified that Kyle Kenley Kopitke, a potential independent presidential candidate, had filed a motion to intervene in the case. See Motion to Intervene, R. 6. Later that same day, Kopitke filed an Amended Emergency Motion to Intervene, R. 7, together with a Complaint, R.8, and a Motion for Emergency Relief. R. 10.

In his Amended Emergency Motion to Intervene, R. 7 at PAGEID # 70, Kopitke asserts that "common questions of law and fact" are presented, "in that as an independent candidate seeking election at the November 3, 2020 general election he [Kopitke] too must collect signatures of Illinois voters between March 24, 2020 and June 22, 2020 and file them and other documents with the Defendants by June 22, 2020." Further, Kopitke asserts that he "suffers under the same restrictions as the Plaintiff candidates and Plaintiff 'new' political parties' candidates that prohibit them from collecting voter signatures." *Id*. Lastly, he asserts that he "seeks similar relief as the Plaintiffs and Plaintiffs 'new' political parties' candidates in that he seeks an injunction prohibiting

Defendants from enforcing the Illinois' signature requirement for independent candidates for office for the November 3, 2020 election, and also directing Defendants to accept [his] nomination papers for the November 3, 2020 election without requiring the supporting signatures from voters …." *Id*.

In his Complaint, R.8, Kopitke largely borrows the allegations made in Plaintiffs' Verified Complaint. In his Motion for Emergency Relief, R.10, at PAGEID# 90, meanwhile, Kopitke "restates and incorporates by reference" the many arguments made in Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction without elaboration.

For the reasons set forth below, Plaintiffs respectfully oppose Kopitke's Amended Emergency Motion to Intervene, R.7.

Argument

Federal Rule of Civil Procedure 24, which governs intervention, states, in relevant part:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:
> …
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) PERMISSIVE INTERVENTION.
>
> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
> …
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
> …
>
> (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

F. R. Civ. P. 24.

Kopitke does not in his Emergency Amended Motion to Intervene seek to intervene under Rule 24(a) as of right. Instead, he claims only that "common questions of law and fact" support his intervention, Emergency Amended Motion to Intervene, R.7, at PAGEID # 70, which is the requirement for permissive intervention under Rule 24(b)(1)(B).

Kopitke does not seek to intervene as of right under Rule 24(a) because it is clear he cannot. In order to intervene as of right, a non-party must, in timely fashion, demonstrate to the Court's satisfaction that it possesses a "direct, substantial, and legally protectable" interest in the case, *United States v BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003), that will be practically impaired by the Court's resolution of the case in the proposed intervenor's absence. *See Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (holding that action did not in fact threaten the interests raised by the putative intervenors). Further, the putative intervenor must show that the existing parties cannot adequately represent its interests. *Trobovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972).

Even had Kopitke sought to intervene under Rule 24(a), his motion would fail for three reasons. First, he waited more than ten days following Plaintiffs' filing of this emergency action to seek intervention. "A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Service, Inc*., 316 F.3d 694, 701 (7th Cir. 2003). While the Seventh Circuit has stated that it does not "want a rule that would require a potential intervenor to intervene at the drop of a hat," *Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006), it has recognized that Rule 24 still requires that intervention not be dilatory. *Heartwood*, 316 F.3d at 701.

"Timeliness is determined based on the totality of the circumstances," S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 516 (2014), with Courts focusing on four factors:

> (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness."

Id. (citing *Heartwood*, 316 F.3d 129). Here, Kopitke had at least eleven days' notice of Plaintiffs' emergency filings. Indeed, his attorney knew several days before those filings that Plaintiffs would be quickly challenging Illinois's law. He knew a challenge was shortly moving forward. Still, Kopitke did nothing.

Kopitke's delay threatens to prejudice Plaintiffs' ability to win the immediate, timely relief they seek. Plaintiffs include two accomplished political parties that have a demonstrated record of success in qualifying for ballot access in Illinois. They plainly have an existing, significant modicum of support that justifies granting their candidates ballot access in Illinois' November 3, 2020 general election. *See Storer v. Brown*, 415 U.S. 724, 732 (1974) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot"); *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). Their ability to win timely relief based on this support may be compromised by Kopitke's presence in the case. Kopitke is an independent candidate running for President with little existing evidence of present support in the State.

Kopitke, meanwhile, would not be prejudiced by a denial of intervention in Plaintiffs' case. Whether Plaintiffs win or fail to win ballot access is irrelevant to his interest in ballot access, and he is always free to file his own action. Plaintiffs' success or loss in the present case will have no preclusive effect on Kopitke if he is not a party, and the Seventh Circuit has ruled that an interest

in avoiding an unfavorable precedent is insufficient to support intervention as of right. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531-33 (7th Cir. 1988).

Second, Kopitke cannot demonstrate that Plaintiffs are unable to adequately present the legal arguments that he (Kopitke) seeks to join in their entirety. Kopitke apparently makes no new arguments, but simply incorporates by reference every argument made by Plaintiffs. Courts generally "consider whether the existing party is 'capable and willing' to make all of the arguments that the intervenor would make." GENSLER, *supra*, at 523 (citations omitted). Here, Kopitke's rote incorporation of Plaintiffs' legal claims -- not some, but all -- demonstrates that he himself believes that Plaintiffs are "capable and willing" to make all the legal arguments he would make. His presence in the case is hardly necessary to a proper resolution of the legal questions. Instead, his presence appears to be an attempt to make free use of Plaintiffs' work and timely filings.

Third, Kopitke will experience no practical impairment of his ability to seek ballot access. As pointed out above, so long as he is not a party there will be no preclusive effect should Plaintiffs win or lose. He will remain free to pursue his own action for his own relief on his own terms -- which is as it should be. He should not be allowed to remotely piggy-back onto Plaintiffs' many hours of work and fevered push to file a timely challenge in this Court.

As for Kopitke's attempt to intervene permissively under Rule 24(b), that too must fail -- for the same reasons. *See Ligas*, 478 F.3d at 776 ("The district court's extensive consideration of the issues of impairment and adequate representation puts the other common question of fact or law to rest as well."). First and foremost is the tardiness of Kopitke's motion. "In addition to finding that the minimum criteria for permissive intervention are satisfied, the trial court must also consider whether intervention would unduly delay of prejudice the adjudication of the rights of the existing parties." GENSLER, *supra*, at 526.

Consequently, even though common questions of law are presented -- indeed, Kopitke relies exclusively on Plaintiffs' legal arguments -- permissive intervention need not be allowed. Whether to do so, of course, is left to this Court's discretion, *Ligas*, 478 F.3d at 775, and Plaintiffs respectfully submit that allowing Kopitke to piggy-back on Plaintiffs' case at this late date is not necessary nor warranted. Kopitke should file his own action seeking relief under his own unique facts.

Conclusion

Plaintiffs respectfully **OPPOSE** Kopitke's Amended Emergency Motion to Intervene, R.7, in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed using the Court's CM/ECF system, which will effect service on all counsel of record. Counsel for proposed intervenor Kyle Kopitke was served through his counsel, Samuel Cahnman, via email to samcahnman@yahoo.com.

/s/Scott K. Summers
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