UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMPOWER TEXANS, INC., and **MICHAEL QUINN SULLIVAN**,	)	
Plaintiffs,	)	
V.	)	**Cause No. 1:14-cv-00172-SS**
THE STATE OF TEXAS ETHICS COMMISSION, and **NATALIA LUNA ASHLEY**, in her capacity as Interim Executive Director of the Texas Ethics Commission,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO STEVE BRESNEN'S MOTIONTO INTERVENE

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COME NOW Plaintiffs Empower Texans, Inc. and Michael Quinn Sullivan and respectfully file this response opposing Steve Bresnen's motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or to be granted permissive intervention under Rule 24(b)(1). Mr. Bresnen is not entitled to intervention as of right under Rule 24(a)(2) because he has failed to establish that he has a direct, substantial, and legally protectable interest that would be impeded or impaired by this action, and because even if he had such an interest, he has failed to show that the State of Texas Ethics Commission would not adequately represent that interest. This Court should also exercise its discretion under Rule 24(b)(1) to deny permissive intervention to avoid the irrelevant and collateral issues Mr. Bresnen intends to pursue. Any interests Mr. Bresnen has in this litigation may be fully addressed through *amicus* participation.

I. BACKGROUND

Plaintiffs filed this action seeking declaratory and injunctive to bar the enforcement of

provisions of the Texas Election Code ("**Election Code**") and Texas Government Code ("**Government Code**") that, facially and as applied by the Texas Ethics Commission ("**TEC**"), violate the First and Fourteenth Amendments to the United States Constitution.

Although Plaintiffs commenced this litigation a week and a half ago, administrative and judicial proceedings addressing whether the TEC, in the investigation of a sworn complaint, may use a subpoena to require the disclosure of information from the Plaintiffs which is otherwise constitutionally protected and whether the TEC should be required to adopt procedural rules, rules of evidence and appellate procedure (including mandamus and interlocutory appeal) in their hearings to safeguard citizens from the risk of erroneous deprivation of their Constitutional rights and to ensure the uniform application of the law to all persons who are subject to TEC hearings have been ongoing since April 20, 2012, culminating in the TEC unanimously issuing two subpoenas to Plaintiffs which seek the disclosure of constitutionally protected information. Compl. ¶¶ 22-41 (Doc. No. 1).

Although Mr. Bresnen compiled all the information contained in the complaints filed with TEC, which TEC is using to prosecute Plaintiffs, he did not file the complaints himself or assert any harm to himself or his business interest, yet now seeks to intervene in the instant case and asserts a panoply of alleged interests in support of his request. As explained below, not only do none of these professed interests support intervention, they weigh heavily against it.

II. INTERVENTION AS OF RIGHT

A. Legal Standard

Mr. Bresnen may intervene as of right only if he meets the four prerequisites under Federal Rule of Civil Procedure 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or

> transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs, 493 F.3d 570, 578 (5th Cir. 2007) (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.* ("*NOPSI*"), 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). The failure to satisfy even one of the four prerequisites precludes intervention as of right under Rule 24(a)(2). *Haspel & Davis Milling & Planting Co.*, 493 F.3d at 578. The party seeking to intervene bears the burden of proving each of these requirements. *Kneeland v. National Collegiate Athletic Assoc.*, 806 F.2d 1285, 1287 (5th Cir. 1987).

B. Steve Bresnen has not established that he may intervene as of right under Rule 24(a)(2)

Mr. Bresnen has failed to meet three of the four prerequisites imposed by Rule 24(a)(2), and therefore, is not entitled to intervention as of right.

1. Mr. Bresnen fails to assert the legal interest necessary to intervene as of right.

Mr. Bresnen cannot satisfy either the second or third prerequisite for intervention under Rule 24(a)(2) because he has not shown that he has a "direct, substantial, legally protectable interest" in the action, *NOPSI*, 732 F.2d at 464, that may be impaired or impeded by the lawsuit. Although he claims a "civic" interest in the outcome of this litigation, Mr. Bresnen fails to identify any specific injury that he might suffer in the event this Court determines that the TEC has violated federal law. Mot. to Intervene at ¶ 3.3. Rather than proving an injury, Mr. Bresnen simply makes vague and unsupported allegations that the granting of injunctive relief to Plaintiffs would frustrate and hamper his decades old duty of helping to "shepherd" the creation of the TEC and would somehow undermine his efforts to "[r]epresenting no one but himself…"

in advocating for new rules at the TEC. Mot. to Intervene at ¶¶ 2.3 and 3.3 (Doc. No. 11). He offers no factual support whatsoever for these bald assertions and, in fact, notes for the Court that any rules he has petitioned for at the TEC would not affect the current matter before the Court. Mot to Intervene at FN4b (Doc. No. 11).

A more generalized grievance of Mr. Bresnen is his assertion that he may be disadvantaged, assuming the statutes challenged by Plaintiffs are found unconstitutional, by the creation of a competitive marketplace of "promoting or defeating legislation." "Assertions about what might happen do not establish an injury that is concrete and particularized." *Nat'l Alliance for Mentally Ill, St. Johns Inc. v. Bd. of Cnty. Comm'rs*, 376 F.3d 1292, 1295 (11th Cir. 2004) (internal quotation marks omitted).

2. Any alleged legally valid interests are adequately represented

The final prerequisite for intervention under Rule 24(a)(2) is to show that the existing parties to the pending suit would not adequately represent the proposed intervenor's interests. "[W]hen the party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance." *Kneeland*, 806 F.2d at 1288. The ultimate objective is limited to the outcome of the litigation, rather than the resolution of broader principles. *See Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs*, 493 F.3d 570, 578 (5th Cir. 2007). The proposed intervenor bears the burden of proving inadequacy of representation. Moreover, every circuit to consider the question has held that a proposed intervenor must make an exact showing of inadequacy when it shares the same objective as a government party. *Stuart v. Huff*, 706 F.3d 345, 351-52 (4th Cir. 2013); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003); *Daggett v. Comm'n on Governmental Ethics & Election*

Practices, 172 F.3d 104, 111 (1st Cir. 1999); *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982).

Even if Mr. Bresnen had established direct, substantial, and legally protectable interests, intervention as of right is not warranted because the State of Texas Ethics Commission more than adequately represents any such interest. The position of the TEC and Mr. Bresnen regarding the constitutionality of the application of the Election Code and Government Code provision challenged here are essentially identical.

Moreover, Mr. Bresnen has not demonstrated and cannot demonstrate adversity of interest between himself and the TEC. In fact, Mr. Bresnen admits as "…true that both Intervenor and Defendants should want to defeat the Plaintiffs' claims…" and only have divergent interests with regard to any relief granted to Plaintiffs. Mot. to Intervene at ¶¶ 2.3 and 3.6 (Doc. No. 11). Mr. Bresnen cites a district court case from Ohio where the intervenors in that case were asserting a vote dilution claim (a statutory claim) distinct from the state defendants efficient and accurate vote counting. However, Mr. Bresnen fails to cite any statutory basis for his divergent interest regarding a remedy

Finally, Mr. Bresnen has not alleged, and certainly cannot demonstrate any collusion between the Plaintiffs and Defendants in this matter. The parties' vigorous advocacy, both in the administrative and previous state court actions in this case, makes clear that any suggestion of collusion would be unfounded.

III. PERMISSIVE INTERVENTION

A. Legal Standard

The Court may grant permissive intervention on a timely motion to a party with a "claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P.

24(b)(1)(B). Permissive intervention "'is wholly discretionary with the [district] court … even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied.'" *NOPSI*, 732 F.2d at 470-71 (quoting 7C Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1913) (alteration in original)). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3). It is also proper to consider "whether the intervenors' interests are adequately represented by other parties and whether they will significantly contribute to full development of the underlying factual issues in the suit." *NOPSI*, 732 F.2d at 472 (internal quotation marks and citations omitted).

B. Steve Bresnen has not established that permissive intervention is appropriate

Steve Bresnen's participation will prevent the efficient resolution of this case. For this reason, the Court should exercise its discretion to deny its motion for permissive intervention.

As set forth in Mr. Bresnen's motion to intervene, he seeks to participate to advance a dismissal theory and, alternatively, to facially challenging any statute that might be found unconstitutional on an as applied basis. Mot. to Intervene ¶¶ 1.1 – 1.3 (Doc. No. 11). Clearly, Mr. Bresnen seeks to be a burdensome distraction from the merits of this case by asserting a defensive position on one hand – abstention doctrine dismissal – and an offensive position on the other – rule completely for Plaintiffs if they are due any relief. With regard to the first position, there is no evidence that the State of Texas will not vigorously present defenses in this matter.

As to the second, Mr. Bresnen's participation would not contribute to the development of a full and complete factual record necessary to support this Court's decision. To the contrary,

he would divert the Court's attention from relevant information already in the possession of both plaintiff and defendants.

IV. THE COURT NEED NOT EXCLUDED STEVE BRESNEN FROM ALL PARTICIATION

Although the Plaintiffs believe that Mr. Bresnen has not established the prerequisites to warrant intervention as of right and that permissive intervention is not appropriate, the Court, in its discretion, may allow interested parties to file briefs as *amicus curiae* at an appropriate point in the proceedings. Conversely, if the Court does grant intervention, Plaintiffs respectfully requests that it impose express conditions on Mr. Bresnen's participation in order to prevent him from delaying adjudication or unnecessarily burdening the existing parties. District courts may impose nearly any condition on a party permitted to intervene. *See* FED. R. CIV. P. 24 Advisory Committee Note (1966) ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); *Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 351, 353 & n.2 (5th Cir. 1997) ("reasonable conditions may be imposed even upon one who intervenes as of right" and "virtually any condition may be attached to a grant of permissive intervention"). It is within this Court's discretion to foreclose an intervenor from switching sides during litigation, and Plaintiffs respectfully requests that, if this Court were to grant intervention, it bar Mr. Bresnen from litigating on both sides of the dispute or raising extraneous issues as a condition of his intervention.

V. CONCLUSION

For the reasons set out above, this Court should deny Steve Bresnen's motion to intervene. Plaintiffs do not object to him being permitted to participate as *amicus* in this case. Pursuant to Local Rule CV-7(g), a proposed order denying the motion is attached hereto.

Date: March 11, 2014

Respectfully submitted,

BEIRNE, MAYNARD & PARSONS, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2014, I served a true and correct copy of the foregoing via the manner indicated Court's ECF system on the following counsel of record:

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