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

PATRICK HARLAN, et al.,	)	
	)	
Plaintiffs,	)	Case No. 1:16-cv-7832
	)	
v.	)	Hon. Samuel Der-Yeghiayan
	)	
CHARLES W. SCHOLZ, Chairman, Illinois State Board of Elections, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION
TO COOK COUNTY CLERK DAVID ORR'S PETITION TO INTERVENE

Plaintiffs Patrick Harlan and Crawford County Republican Central Committee oppose the petition to intervene filed by Cook County Clerk David Orr ("Clerk Orr") (Doc. 18, Petition to Intervene (hereinafter "Petition")). Any interest Clerk Orr has in this matter can be fully and adequately represented by the existing Defendants, who, as members of the Illinois State Board of Elections, are charged with overseeing and administering voter registration and elections throughout Illinois. For that reason alone, the Court should deny both intervention as of right and permissive intervention. Moreover, the Court should deny permissive intervention because Clerk Orr has not stated any other reason why the Court should allow it; allowing Clerk Orr to intervene would open the door to participation by every other county and city election authority in Illinois; and, in any event, intervention would needlessly prolong this litigation.

I. Clerk Orr may not intervene as a matter of right.

Federal Rule of Civil Procedure 24 allows a person to intervene in a case as a matter of right only when that person "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." Fed. R. Civ. P. 24(a)(2). To intervene as a matter of right under Rule 24(a), a party must meet four requirements: "(1) timeliness, (2) an interest relating to the subject matter of the main action, (3) at least potential impairment of that interest if the action is resolved without the intervenor, and (4) lack of adequate representation by existing parties." *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002).

Clerk Orr is not entitled to intervene as a matter of right because the existing Defendants, who are members of the Illinois State Board of Elections, (collectively, the "Board") can and will adequately represent any interest that Clerk Orr has in this matter.

Clerk Orr asserts that he has an interest in these proceedings as "ex-officio the registration officer of [Cook C]ounty" and because he has "full charge and control of the registration of voters within [Cook C]ounty." (Petition 4, quoting 10 ILCS 5/1-3(8).) Clerk Orr also asserts that he has an interest in grace period and Election Day voter registration, citing his authority to "establish procedures for the registration of voters and for change of address during the period from the close of registration for an election until and including the day of the election." (Petition 4, quoting 10 ILCS 5/5-50.) These allegations do not suffice to establish that the existing Defendants will not adequately represent Clerk Orr's putative interests in this case.

First, Clerk Orr's argument fails because he cannot overcome the presumption that the Board, as the body charged with overseeing the administration of voter registration and elections statewide, will adequately represent his interests related to the administration of elections in Cook County. Indeed, the Board has "general supervision over the administration of the registration and election laws throughout the State." 10 ILCS 5/1A-1. In addition, the Board is charged with, among other things: disseminating information to election authorities; publishing a

manual of uniform instructions to furnish to each election authority; prescribing and requiring the use of such uniform forms, notices, and other supplies; and adopting, amending or rescinding rules and regulations. 10 ILCS 5/1A-8. Accordingly, the Board's interest in implementing and supervising the registration of voters statewide clearly overlaps and fully encompasses Clerk Orr's asserted interest in the registration of voters in Cook County. "[W]hen the representative party is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith." *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007). Because Clerk Orr has not alleged, let alone shown, gross negligence or bad faith on the part of the existing Defendants, the Court must presume that the existing Defendants will adequately represent his interests and must deny intervention as a matter of right.

Second, Clerk Orr's argument fails because he cannot overcome the presumption that current parties to the lawsuit who share his ultimate objective in the litigation will adequately represent his interests. A "presumption of adequacy of representation arises . . . when the proposed intervenor and a party to the suit (especially if it is the state) have the same ultimate objective." *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982). To overcome this presumption, a would-be intervenor must demonstrate that some conflict exists between the existing party to the lawsuit and himself. *National Union Fire Ins. Co. v. Continental Illinois Corp.*, 113 F.R.D. 532, 537 (N.D. Ill. 1986). "Where the interests of the original party and of the intervenor are identical – where in other words there is no conflict of interest – adequacy of representation is presumed." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996). "Representation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest

adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty." *United States v. Board of School Comm'rs*, 466 F.2d 573, 575 (7th Cir. 1972). Here, Clerk Orr has indicated that he has the same objective as the existing defendants: upholding the provisions of Illinois law regarding Election Day voter registration at polling places against Plaintiffs' constitutional challenge. (*See* Petition 8 ("Clerk Orr contends as a matter of law that the polling place ERD [sic] law is legal and that, should the matter not be decided upon a motion to dismiss but on Plaintiffs' motion for preliminary injunction, Clerk Orr's defenses include, but are not limited to, those that likely will be raised by the State defendants.").) Because Clerk Orr has identified no conflict between his own objective and the Board's in this litigation, there is no conflict between them, and the Court must presume that the Board's representation of Clerk Orr's interests will be adequate.

Finally, Clerk Orr has not otherwise met his burden, as a party seeking to intervene as a matter of right, to demonstrate why the existing defendants could not adequately represent his interests. "A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy. Moreover, the burden of persuasion is ratcheted upward in this case because the [existing defendants] are defending the [challenged governmental action] in their capacity as members of a representative governmental body." *Public Serv. Co. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998) (citation omitted). Clerk Orr's assertions that the Board cannot adequately represent his interest are without support, especially in light of the fact that the Board's interests directly overlap with Clerk Orr's asserted interests. Clerk Orr insists that "the Election Code identifies specific functions that are within the sole purview of the election authority, such as having full charge of the registration of voters within suburban Cook County." (Petition 7.) But, again, the Board has "general supervision over the administration of the

registration and election laws throughout the State." 10 ILCS 5/1A-1. Clerk Orr's assertion that the existing defendants' "interests are nowhere near identical," (Petition 7) is unsupported and belied by the text of the statutes. The fact that Clerk Orr carries out some duties that the Board does not carry out directly is irrelevant to the Board's ability to defend his alleged interest in upholding the statutory provisions that Plaintiffs challenge in this case.

In sum, Clerk Orr has provided no reasons to doubt that the existing Defendants can adequately represent any interest he has in this case. For that reason, the Court should deny Clerk Orr's request to intervene as a matter of right.

II. The Court should deny Clerk Orr permission to intervene.

The Court should also deny Clerk Orr permission to intervene under Fed. R. Civ. P. 24(b) because the existing Defendants adequately represent Clerk Orr's interest, Clerk Orr has not articulated how he would contribute anything novel to the legal and factual development of this case, and allowing Clerk Orr to intervene would prejudice Plaintiffs by prolonging or delaying the litigation.

"Permissive intervention is within the discretion of the district court where the applicant's claim and the main action share common issues of law or fact and where there is independent jurisdiction." *Ligas*, 478 F.3d at 775. Permissive intervention is not a "one-sided equation" whereby the courts should focus solely on the interests of the proposed intervenor. *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 950 (7th Cir. 2000). Rather, courts must also consider "'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Heartwood, Inc. v. U.S. Forest Service, Inc.*, 316 F.3d 694, 701 (7th Cir. 2003) (*quoting* Fed. R. Civ. P. 24(b)(3)). Relevant factors that a court may consider when making its discretionary decision on permissive intervention include: (1) the nature and extent of

the intervenors' interest; (2) standing to raise relevant legal issues; (3) the legal position they seek to advance; and (4) its probable relation to the merits of the case. *See Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). The court may also consider: (5) whether the intervenors' interests are adequately represented by other parties; (6) whether intervention will prolong or unduly delay the litigation; and (7) whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented. *See id.*

The Court should deny permissive intervention for the same reason that it should deny intervention as a matter of right: because the existing Defendants, as members of the Illinois State Board of Elections, will adequately represent any interest Clerk Orr has in this case. With Clerk Orr's interests adequately represented, there is simply no good reason to complicate the case by allowing him to participate. Indeed, some courts have even found that "when intervention of right is denied for the proposed intervenor's failure to overcome the presumption of adequate representation by the government, the case for permissive intervention disappears." *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996).

Moreover, Clerk Orr has not shown that his participation would sufficiently contribute to the legal and factual development of this case to warrant intervention. Orr has indicated that he anticipates agreeing with the existing Defendants' legal theory of the case – indeed, he seeks to file a motion to dismiss exclusively adopting the arguments Defendants have already made in their memorandum in support of their motion to dismiss – and he has not identified any ways in which his legal theories or arguments might differ from those of Defendants. (*See* Petition 8-9.) In any event, merely wanting to add to (or repeat) another party's legal arguments is not a sufficient reason to allow intervention, particularly where, as here, there is no reason to doubt

that an existing party's representation will be adequate. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988) (reversing district court order granting motion to intervene where new party had only legal argument to contribute). If Clerk Orr believes that his office has insights related to the law's constitutionality that would be useful to the Court, he may, at an appropriate stage, seek leave to participate as amicus curiae. *See id.* ("Participation as *amicus curiae* will alert the court to the legal contentions of concerned bystanders, and because it leaves the parties free to run their own case is the strongly preferred option.").

Clerk Orr does not show how he could aid the factual development in this case, either. He simply states that "he can provide an expert and experienced perspective on how EDR actually works and why the current administration of it is not constitutionally improper." (Petition 8.) But Clerk Orr does not explain how he has access to more or better relevant factual information than the existing Defendants regarding how EDR "actually works." Though Clerk Orr asserts that he is "actually charged with the administration of EDR, as opposed to the State Board of Elections" (Petition at 7-8), the Board has "general supervision over the administration of the registration and election laws throughout the State." 10 ILCS 5/1A-1. Indeed, the Board is quite literally charged with telling Clerk Orr how to do his job. *See* 10 ILCS 5/1A-8. Accordingly, there is no reason to conclude that the Board is not informed about how EDR "actually works" not only in Cook County but also in Illinois' 101 other counties. Besides, if Clerk Orr does have unique relevant knowledge about the implementation of EDR, nothing prevents the Board from taking advantage of that by consulting with him.

Further, allowing Clerk Orr to intervene would needlessly prolong this litigation. "[P]ermissive intervention is to be denied if it would unduly delay or prejudice the adjudication of the rights of the original parties." *Southmark Corp. v. Cagan*, 950 F.2d 416, 419 (7th Cir.

1991). Clerk Orr seeks to file a brief opposing Plaintiffs' motion for preliminary injunction even though he anticipates that his legal arguments will be the same as those asserted by the existing defendants. (*See* Petition 8-9.) The existing Defendants' response to the motion to preliminary injunction is due Tuesday, August 30, 2016 (*See* Doc. 16, Minute Entry), the same day that Clerk Orr has noticed his motion to intervene (*See* Doc. 19, Notice of Motion), making it likely that Clerk Orr would file any response to the motion for preliminary injunction at some later date, after Defendants have filed their response, creating an additional burden for Plaintiffs and possibly delaying resolution of Plaintiffs' motion. "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair." *Pittman v. Chicago Bd. of Educ.*, Case No. 92 C 2219, 1992 U.S. Dist. LEXIS 13814, *7 (N.D. Ill. Sep. 9, 1992) (quoting *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1083 (N.D. Ill. 1977)); *see also One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) ("[A]dding the proposed intervenors could unnecessarily complicate and delay all stages of this case: discovery, dispositive motions, and trial . . . . [E]ven minor delays to the court's resolution of this case could jeopardize the parties' ability to obtain a final judgment (and appellate review of that judgment) in time for the election."). Clerk Orr has not shown that his intervention would be worth the additional time that it would require.

Finally, if it were appropriate for Clerk Orr to intervene in this lawsuit, there is no apparent reason why it would not be equally appropriate to allow intervention by the election authorities in Illinois' 101 other counties and by the election authorities for all Illinois cities required to oversee elections, such as the City of Chicago, as well. "Increasing the number of parties to a suit can make the suit unwieldy," which is one reason why courts deny intervention

by people whose interests will be adequately represented by an existing party to a case. *Solid Waste Agency*, 101 F.3d at 508. Granting Clerk Orr's motion could encourage other county clerks to seek to intervene in this case, which would certainly delay the resolution of this case. Additional petitions from other county clerks, together with any briefs those parties submit on Plaintiffs' motion for preliminary injunction, presumably would delay the expeditious resolution of Plaintiffs' motion, to say nothing of the rest of the case. To keep this litigation manageable, and timely resolve Plaintiffs' motion for preliminary injunction and the case as a whole, it only makes sense to limit participation to the Defendants the Plaintiffs named in their complaint: the Illinois State Board of Elections members who are charged with overseeing the administration of voter registration and elections statewide.

For all of these reasons, the Court should deny Clerk Orr's petition to intervene as a defendant in the current suit.

Dated: August 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, certify that on August 29, 2016, I served Plaintiffs' Response in Opposition to Cook County Clerk David Orr's Petition to Intervene on Defendants' counsel by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert