

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

**LIBERTARIAN PARTY OF
ILLINOIS, ILLINOIS GREEN
PARTY, DAVID F. BLACK,
SHELDON SCHAFER,
RICHARD J. WHITNEY,
WILLIAM REDPATH,
BENNETT W. MORRIS and
MARCUS THRONEBURG,**
Plaintiffs,

vs.

Case No. 1:20-cv-02112

**J.B. PRITZKER, in his official
capacity as Governor of Illinois,
WILLIAM J. CADIGAN,
KATHERINE S. O'BRIEN, LAURA
K. DONAHUE, CASSANDRA B.
WATSON, WILLIAM R. HAINE,
IAN K. LINNABARY, CHARLES
W. SCHOLZ and WILLIAM M.
MCGUFFAGE, in their official
capacities as Board Members for
the Illinois State Board of
Elections**

Defendants,

and

KYLE KENLEY KOPITKE,
Intervenor.

Judge: Rebecca R. Pallmeyer

**INTERVENOR'S REPLY TO PLAINTIFFS' RESPONSE IN
OPPOSITION TO INTERVENTION**

Facts

On Thursday, April 2, 2020 the Plaintiffs filed their complaint (Dkt. 1), and on Friday April 3rd their motion for preliminary injunction/temporary restraining order and memorandum of law in support. (Dkt. 2)

The following week Kyle Kopitke, an independent candidate for President, asked Attorney Cahnman to file on his behalf a motion to intervene in the Plaintiffs' lawsuit, seeking similar ballot relief to that sought by the Plaintiffs. Attorney Cahnman then commenced drafting the pleadings required by Fed.R.Civ.Pro. 24 to seek intervention relief for Kopitke (hereinafter sometimes referred to as: "Intevenor").

As a courtesy, on Sunday, April 12, 2020, Attorney Cahnman emailed the Plaintiffs' counsels that he was planning to file a motion to intervene for Kopitke, and asked if he could represent that the Plaintiffs had no objection to the motion to intervene. (See email exchange attached hereto as Exhibit "A".)

One of Plaintiffs' counsels (Oliver Hall) responded Monday, April 13, 2020 that he would need to confer with his clients and that "given the relief we are seeking, they are concerned not to add too many plaintiff

parties to the case.” Mr. Hall’s email did not voice any concern about the timeliness of the motion to intervene.

Intervenor’s counsel did not hear anything further from Plaintiffs’ counsels, and then that Monday evening filed Kopitke’s Motion To Intervene (Dkt. 7), and then Emergency Amended Motion To Intervene (Dkt. 8), and Motion For Preliminary Injunction/TRO and Memorandum of law in support (Dkt. 10).

All Plaintiffs, except one, are Green or Libertarian party candidates or officials. Plaintiff Mark Thorneberg is an independent candidate for state senator from District 37. The extent of his electoral history as disclosed by the complaint and public information is that he was elected as a Republican to the Bureau County Board, District 1, in 2004. (See Exhibit “B” attached hereto.)

Argument

Plaintiffs argue that Kyle Kopitke’s motion to intervene should be denied based on timeliness. Yet they cite no case where a party sought to intervene 6 court days after a motion for preliminary injunction was filed, as Intervenor did here, and the motion was denied for timeliness.

As the U.S. District Court for the Southern District of New York held, “delay is insufficient alone to mandate denial of the motion to intervene.” *Meyer v. MacMillan Publishing Co., Inc.*, 85 F.R.D. 149, 150 (S.D.N.Y. 1980) In that case the motion to intervene was filed five years after the complaint was filed in the Equal Opportunities Employment Commission, and a year and a half after the complaint was filed in the District Court. That motion to intervene was held timely. *id.*

Plaintiffs argue at p. 5 that “Kopitke’s delay” threatens to prejudice Plaintiffs’ ability to win the immediate, timely relief they seek, but fail to articulate how this Court’s allowing Kopitke to intervene prejudices Plaintiffs’ ability to get timely relief. Kopitke moved to intervene one court day after Plaintiffs’ motion for preliminary injunction was set for hearing and 4 days before the hearing was held. He entered the case in sufficient time to participate in settlement discussions with the Defendants. Finally, Intervenor entered the case in time to have his motion for preliminary injunction heard at the same time as the Plaintiffs’, and that is what this Court ordered.

In *Planned Parenthood MN, ND, SD v. Daugaard*, 836 F.Supp.2d 933 (D.S.D. 2011) the District Court held the motion to intervene was

timely when it was filed one day after the motion for preliminary injunction was granted and 28 days after the motion was filed. *id.* at 933 and 940. *See also Taylor v. Southwestern Bell Tele. Co.*, 251 F.3d 735, 741 (8th Cir. 2001) (motion to intervene filed 11 days after court granted preliminary injunction held timely)

The cases cited by the Plaintiffs on timeliness are inapposite. In *Aurora Loan Services, Inc. v. Craddieth*, 442 F.3d 1018 (7th Cir. 2006) the Seventh Circuit held that less than six weeks of delay in filing the motion to intervene was acceptable, and even longer would not necessarily be untimely in the absence of prejudice. *id.* at 1027. In *Ligas ex rel. Foster v. Maram*, 478 F.3d 771 (7th Cir. 2007) the Court of Appeals noted that “the parties do not dispute that the petition (to intervene) was timely.” *id.* at 774. In *Heartwood, Inc. v. U.S. Forest Service, Inc.*, 316 F.3d 694 (7th Cir. 2003) the intervenor did not file until after a consent judgment had been entered and almost a year after suit was filed. *id.* at 697. Even at that, the Seventh Circuit did not reverse the granting of the motion to intervene outright; it reversed and remanded because the District Court had not properly considered the factors relating to determining timeliness. *id.* at 701. Those four factors quoted on page 5

of the Plaintiffs' Response, and weigh in favor of allowing Kopitke's intervention.

(1) Kopitke made his motion to intervene almost immediately after he had notice of Plaintiffs' suit; (2) there is no prejudice to the Plaintiffs resulting from any delay because there is no delay; (3) there is prejudice to Kopitke if the motion is denied as set forth below; and (4) the unusual circumstances militating for a finding of timeliness are that Kopitke made his motion almost two and half months before the independent and new party filing deadline of June 22, 2020.

Of particular note is that in the email of Plaintiffs' counsel sent earlier the same day as the motion to intervene was filed the only reason posed as to why the Plaintiffs might oppose intervention was that Plaintiffs were "concerned not to add too many plaintiff parties to the case." (See Exhibit "A") This certainly does not indicate Plaintiffs will adequately represent Intervenor's interests.

Not allowing Kopitke to intervene could well impair his interest, as the Plaintiff's counsel could agree to a settlement that applied to all new party and independent candidates, but was adverse to Intervenor's interest. In fact, Defendants have indicated they would not agree to a

resolution unless it applied to all candidates. On the other hand, if the case is resolved by the Court, the relief requested by the Plaintiffs is limited to seeking an order to print only the names of the Plaintiff candidates and the candidates of the Plaintiff political parties on the ballot. Plaintiffs did not ask the Court to order the names of all similarly situated candidates be printed on the ballot.

Contrary to Plaintiffs' contention (p.5), Intervenor has demonstrated a record of success in getting on the ballot in Illinois and other states. He ran for Congress in IL CD-13. His name also appeared on the ballot in races for Salt Lake County Assessor (Utah); Lake County Appraiser (FL); and the Honolulu City Council.

Plaintiffs Response incorrectly asserts at page 6 that Intervenor makes no new arguments. Intervenor did makes a new argument for relief based on the principle of equitable estoppel. (Dkt. 10 at 3-4)

Intervenor Meets The Criteria To Intervene Under 24(a) & 24(b)

Under 24(a) (intervention as of right) the intervenor has to show that "disposing of the action may...impair or impede the movant's ability

to protect its interest, unless existing parties adequately represent that interest.” Fed.R.Civ.Pro. 24(a). Plaintiffs incorrectly cite *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525 (7th Cir. 1988) for the proposition that avoiding an unfavorable precedent is insufficient to support intervention as of right. *Response* at 6.

But in *Bethune* the intervenor was a trade association and the Court of Appeals noted that “interest” in Rule 24(a) means a “legal interest,” not “an interest in the colloquial sense” that the trade association had. The Court also pointed out that legal interest encompasses more than money or other property. *id.* at 530. Disposing of the instant action without allowing Kopitke to intervene could well impede his ability to protect his interest in getting on the ballot, and as stated earlier, the existing Plaintiffs are focused on their new political parties, and do not adequately represent Intervenor’s interest as an independent candidate.

Under 24(b) (permissive intervention), there is no question that Intervenor has a claim that shares with the main action a common question of law and fact. Further, there is no evidence that intervention will unduly delay or prejudice the adjudication of the original parties’ rights.

CONCLUSION

WHEREFORE, Intervenor respectfully request that his
Emergency Amended Motion To Intervene be granted.

Respectfully submitted

/s/Samuel J. Cahnman
Attorney for Intervenor

Samuel J. Cahnman
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Attorney for Intervenor
IL Bar No. 3121596

CERTIFICATION OF SERVICE

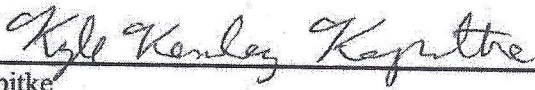
I hereby certify that the foregoing document was filed 4/16/20 using the Court's CM/ECF system, which will effect service on all counsel of record. Plaintiffs' were also served through their counsels Scott K. Summers and Oliver B. Hall via emails to Scott@scottksummers.com and oliverhall@competitivedemocracy.org.

/s/Samuel J. Cahnman
Attorney at Law

VERIFICATION OF INTERVENOR
(pursuant to 28 U.S.C. Sec. 1746)

I, Kyle Kenley Kopitke, verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 16, 2020



Kyle Kenley Kopitke
Intervenor

Re: Libertarian et al. v. Pritzker et al, 20-cv-2112 -Motion To Intervene

From: sam cahnman (samcahnman@yahoo.com)

To: oliverbhall@gmail.com

Date: Monday, April 13, 2020, 3:36 PM CDT

Thanks!

On Monday, April 13, 2020, 2:25:02 PM CDT, Oliver Hall <oliverbhall@gmail.com> wrote:

Sam,

If you'd like to send your motion and proposed intervenor-complaint over, we can take a look. I will need to confer with my clients because, given the relief we are seeking, they are concerned not to add too many plaintiff parties to the case.

-Oliver

Oliver Hall
Legal Counsel
Center for Competitive Democracy
P.O. Box 21090
Washington, DC 20009
202-248-9294
oliverhall@competitivedemocracy.org

On 4/12/2020 8:44 PM, sam cahnman wrote:

Oliver,


Kyle Kopitke, an independent candidate for President, asked me to file a motion to intervene for him in the above-referenced case. He is currently on the ballot in Colorado and has a case pending in the 4th Circuit challenging North Carolina's early filing deadline and excessive signature requirement. He had been collecting signatures in other states until COVID-19, but he is passionate about getting on the ballot here, as Illinois his where he was born, grew up and ran for Congress.

Can I represent in the motion that Plaintiffs have no objection to Kopitke's motion to intervene?

Sam Cahnman
Attorney at Law
915 S. 2d St.
Springfield, IL 62704
217-691-6207

Exhibit A

RE: election of MarkThorneburg

From: Valerie Bronson (vbronson@bureaucounty-il.gov)

To: samcahnman@yahoo.com

Date: Thursday, April 16, 2020, 4:19 PM CDT

In 2002 Ronald Happach was the Bureau County board member for District 1. He didn't re-run in 2004 and retired December 2004.

Marcus Throneburg ran as a republican party candidate for the General Election on November 4, 2004. He won that election and would have taken office in December 2004.

Marcus Throneburg did not run again for the 2008 election.

Valerie Bronson

Deputy Clerk

Bureau County Clerk's Office

700 S. Main Street, Room 104

Princeton, IL 61356

Phone: 815-875-2014

Fax: 815-879-4803

Email: VBronson@bureaucounty-il.gov

www.bureaucountyclerk.com

From: sam cahnman [mailto:samcahnman@yahoo.com]

Sent: Thursday, April 16, 2020 3:33 PM

To: Valerie Bronson <VBronson@bureaucounty-il.gov>

Subject: election of MarkThorneburg

Ms. Bronson,

I just spoke to you. Per our conversation, please look up as to when and under what political party Marcus Thorneburg, now of Kewanee, was elected to the Bureau County Board.

Exhibit B

The information I have is he was elected in 2003, but Co. Bd. members are elected in even years, so he was likely elected in 2002 or 2004.

Can you also check to see if he was every re-elected and let me know that as well.

Please try to get back to me today.

Thanks!

Sam Cahnman

Attorney at Law

915 S. 2d St.

Springfield, IL 62704

cell: 217-691-6207