

CASE NO. 12-35889

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR; STEVE DOGIAKOS; AMERICAN TRADITION
PARTNERSHIP; AMERICAN TRADITION PARTNERSHIP PAC;
MONTANA RIGHT TO LIFE ASSOCIATION PAC; SWEET
GRASS COUNCIL FOR COMMUNITY INTEGRITY; LAKE
COUNTY REPUBLICAN CENTRAL COMM.; BEAVERHEAD
COUNTY REPUBLICAN CENTRAL COMM; JAKE OIL, LLC; JL
OIL, LLC; CHAMPION PAINTING; JOHN MILANOVICH,

Plaintiffs-Appellees,

v.

STEVE BULLOCK, in his official capacity as Attorney General of
the State of Montana; JAMES MURRY, “Jim”, in his official capacity
as Commissioner of Political Practices; LEO GALLAGHER, in his
official capacity as Lewis and Clark County Attorney,

Defendants-Appellants,

On Appeal From the United States District Court
District of Montana, Helena Division, Case No. CV-12-00012
The Honorable Charles C. Lovell, Presiding

**EMERGENCY MOTION UNDER CIR. RULE 27-3(a) TO
CLARIFY STAY ISSUED ON OCTOBER 16, 2012
IMMEDIATE RELIEF NEEDED**

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FOR RICK HILL, LORNA KUNEY

PRELIMINARY STATEMENT

Plaintiffs-Intervenors RICK HILL, A LOT OF FOLKS FOR RICK HILL, and LORNA KUNEY (collectively, the “Hill Campaign”) seek to intervene in this matter for the very limited purpose of seeking clarification of the Stay Order issued by this Court on October 16, 2012.

Rick Hill is the Republican candidate for Governor of Montana in the 2012 general election. Due to a misinterpretation by Montana officials of the Stay Order issued by this Court on October 16, 2012, Mr. Hill’s campaign has been shut down due to a prior restraint order issued by a state judge on October 24, 2012.

On October 3, 2012, the District Court issued a permanent injunction against the Montana Attorney General, Steve Bullock, prohibiting enforcement of § 13-37-216, MCA, the statute establishing campaign contribution limits for candidates for public office in Montana. On October 5, 2012, the Montana Republican Party contributed \$500,000 to the Hill Campaign. Under the terms of the District Court’s injunction, the contribution was entirely legal.

On October 9, 2012, this Court temporarily stayed the District Court's injunction. This Court issued a detailed explanation for its stay order on October 16, 2012.

The "purpose of a stay is simply to preserve the status quo." *Flynn v. Sandahl*, 58 F. 3d 283, 287 (7th Cir.1995). As of October 9, 2012, the date when this Court's initial stay issued, the status quo was that the Hill Campaign was legally in possession of a \$500,000 contribution from the Montana Republican Party. The Hill Campaign acted in good faith by relying upon the District Court's order when it accepted a \$500,000 contribution from the Montana Republican Party on October 5.

Nevertheless, on the afternoon of October 23, 2012, Attorney General Steve Bullock, who is also the Democratic candidate for Montana Governor, sought an ex parte temporary restraining order from a state judge to prohibit the Hill Campaign from spending any of the \$500,000 contribution. Two hours later, a state judge ordered the Hill Campaign not to spend any of the \$500,000. She also ordered the Hill Campaign to cancel its remaining commercials and other activities being financed with the contribution. She issued this order ex parte without giving the Hill Campaign or undersigned counsel any

notice or hearing and has refused to hear from the Hill Campaign until Monday, October 29, 2012.

This grossly unjust, prior restraint has shut down the Hill Campaign with less than two weeks to go before Election Day. The Hill Campaign is therefore requesting clarification of the Stay Order issued by this Court on October 16, 2012. Specifically, the Hill Campaign requests the Stay be clarified as follows:

The District Court's permanent injunction issued on October 3, 2012, is stayed with regard to violations of Montana's campaign finance Statute occurring after this Court's initial stay issued on October 9, 2012. The District Court's injunction remains in full force and effect with regard to alleged violations of § 13-37-216, MCA, occurring between October 3, 2012 and October 9, 2012.

This clarification would make clear to all parties, candidates and Montana officials that this Court's Stay Order was intended to preserve the status quo that existed on October 9, 2012. This would enable Montana to continue enforcing its campaign contribution limits for violations occurring after October 9, 2012, while allowing parties such as the Hill Campaign that relied in good faith on the District Court's Order regarding contributions made between October 3 and October 9 (the dates that the District Court Order was in full force and effect) to not be penalized based upon such reliance.

1) Relief is Needed Immediately to Avoid Further Irreparable Harm

With less than two weeks left before Election Day, the irreparable harm being inflicted upon the Hill Campaign with each passing moment is impossible to overstate. The state court order requires the Hill Campaign to cancel its remaining commercials and refrain from spending any of the money in the campaign's account. Less than two weeks before Election Day, the Campaign is effectively shut down without a clarification relief from this Court regarding its Stay Order. The state court's action is a blatantly unconstitutional prior restraint, issued without even notice "comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Relief is needed immediately. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir.2011) ("harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as timing is of the essence in politics and delay of even a day or two may be intolerable").

2) Contact Information for Counsel for All Parties

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3) Notice to Opposing Counsel

On October 26, 2012 contacted the Attorney General's office at (406) 444-2026 at approximately 2:21p.m. (MST) and left a message with the secretary for Michael Black and Andy Huff regarding this Motion. Undersigned counsel contacted James Bopp, Jr. and Anita Y. Woudenberg of the Bopp Law firm, counsel for Plaintiffs-Appellees, Phone: (812) 232-2434, regarding this Motion and left a message with their secretary at 2:21 p.m. (MST).

4) Procedural Facts Showing the Need for Plaintiffs-Intervenors' Emergency Motion

In support of their motion, the Hill Campaign states as follows:

1. Plaintiff-Intervenor Rick Hill is the Republican candidate for Montana Governor in the 2012 general election.
2. Plaintiff-Intervenor A Lot of Folks for Rick Hill is a duly registered political committee pursuant to § 13-37-201, MCA. Its principle place of business is in the City of Helena, Lewis and Clark County.
3. Plaintiff-Intervenor Lorna Kuney is a duly appointed and certified campaign treasurer of the Hill Campaign.

4. On October 3, 2012, the District Court found Section 13-37-216, MCA, the Montana statute establishing contribution limits for Montana candidates for public office, unconstitutional and directed that “[t]he defendants are permanently enjoined from enforcing those limits.” (**Exhibit 1**)

5. In reliance upon the District Court’s Order, the Hill Campaign accepted a contribution on October 5 of \$500,000 from the Montana Republican Party that exceeded the limits imposed by § 13-37-216, MCA, the statute that the District Court enjoined enforcement of when it issued its Order on October 3, 2012.

6. On October 9, 2012, the Ninth Circuit temporarily stayed the District Court’s injunction in *Lair v. Bullock*, Cause No. 12-35809.

7. Once the Ninth Circuit issued its stay on October 9, 2012, the Hill Campaign’s acceptance of subsequent campaign contributions conformed strictly to § 13-37-216, MCA.

8. On October 16, 2012, the Ninth Circuit issued a detailed Stay Order. (**Exhibit 2**).

9. Steve Bullock’s running mate is John Walsh.

10. On October 18, 2012, Bullock and Walsh filed a Complaint, (hereinafter, the “State Complaint”), in the Montana First Judicial District against the Hill Campaign (Case No. CDV 2012-904). A true and correct copy of the Complaint is attached as **Exhibit 3**.

11. The State Complaint alleges that the \$500,000 contribution the Hill Campaign received on October 5, 2012 -- a time in which this Court’s order was in full force and effect -- violated § 13-37-216, MCA.

12. The State Complaint also seeks “temporary, preliminary and permanent injunctive relief to enjoin Defendants from acting in violation of Montana’s election laws, and to require Defendants to immediately perform the acts necessary to comply with Montana’s election laws,” (Complaint (Prayer), ¶ 2), as well as “any and all other equitable relief that may be necessary to correct the harms caused by the acts and conduct of Defendants.” (Complaint (Prayer), ¶ 3, **Exhibit 3**).

13. The actions giving rise to the Bullock’s allegations and requests for relief occurred during the time in which the District

Court's Order was in full force and effect. These actions were therefore lawful.

14. On October 19, 2012, the Hill Campaign filed a Notice of Removal in the United States District Court for the District of Montana, thereby removing Case No. CDV 2012-904 from the Montana First Judicial District.

15. Later that same day, Bullock and Walsh filed an Emergency Motion to Remand regarding Case No. CDV 2012-904.

16. On October 23, 2012, the Hill Campaign filed a response to the Motion to Remand.

17. On October 24, 2012, at 11:45 a.m., United States District Judge Dana L. Christensen issued an order granting Bullock's Motion to Remand.

18. Approximately 30 minutes after U.S. District Court Judge Christensen issued the Remand Order on October 24, counsel for Bullock contacted undersigned counsel to inform him that Bullock would seek a temporary restraining order in Lewis & Clark County Case No. CDV 2012-904. Undersigned counsel requested that Bullock's counsel notify the state court that the Hill Campaign requested notice and a hearing before any order issued.

19. At approximately 3 p.m. on October 24, the Honorable Kathy Seeley, District Court Judge of the Montana First Judicial District, issued a Temporary Restraining Order in Case No. CDV 2012-904. A true and correct copy of this order is attached as **Exhibit 4**.

20. Undersigned counsel received no notice or hearing before Judge Seeley issued the temporary restraining order.

21. By the terms of the temporary restraining order, the Hill Campaign is:

[R]estrained from spending, using or realizing any benefit from the campaign contributions in excess of the aggregate amounts permitted by § 13-37-216, MCA, and that Defendants further be required to stop any agents, such as media buyers to whom these funds in whole or part have been transferred, from proceeding to purchase any media time with these funds or otherwise benefit the Hill campaign through the use of the funds. Insofar as advertisements have been purchased with these funds and are set to air imminently, they must be cancelled.

22. Judge Seeley's ex parte order, issued on October 24, 2012, without notice or a hearing, has effectively shut down the Hill Campaign with less than two weeks to go before Election Day.

23. On October 25, 2012, the Hill Campaign filed in the District Court an Emergency Motion to Intervene and For Temporary Restraining Order in this matter.

24. On October 26, 2012, the District Court denied the Hill Campaign's Motion. **Exhibit 5**. In so doing, the District Court stated "Plaintiffs may also be able to seek review of this Court's order in the Ninth Circuit." (**Exhibit 5**, p. 14)

ARGUMENT

A THE HILL CAMPAIGN IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Rule 24(a)(2) of the Federal Rules of Civil Procedure traditionally receives "liberal construction in favor of applicants for intervention." *Arakaki v. Cayetano* 324 F.3d 1078, 1083 (9th Cir.2003); *Donnelly v. Glickman* 159 F.3d 405, 409 (9th Cir.1998). Rule 24(a)(2) provides that on a timely motion, the Court must permit anyone to intervene who "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 impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Rule 24(a)(2). The Ninth Circuit has instructed that intervention should be granted so long as the moving papers state the legal and factual grounds for intervention. *Beckman Indus., Inc. v. Int'l Ins. Co.* 966 F.2d 470, 474 (9th Cir.1992).

A party seeking to intervene as of right must meet four requirements: (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may, as a practical matter, impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties. F.R.Civ.P. 24(a)(2); *Arakaki, supra*, 324 F.3d at 1083. The Hill Campaign can meet all four requirements

1. The Hill Campaign Has Timely Moved to Intervene

The instant motion was filed at the earliest possible time without any delay, and without causing any prejudice to the existing parties. The Ninth Circuit has directed that courts be lenient in applying the timeliness requirement where, as here, intervention is sought as a matter of right. *U.S. v. Oregon* 745 F.2d 550, 552 (9th Cir. 1984). The Court's leniency is applied after considering three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *U.S. ex rel. McGough v. Covington Technologies*

Co. 967 F.2d 1391, 1394 (9th Cir.1992). All three factors militate in favor of finding that the Hill Campaign's motion is timely.

The Hill Campaign has filed this Motion in order to avail itself of the injunction issued by this Court on October 3. Bullock filed his State Complaint in state court on October 18, 2012, seeking an order penalizing the Hill Campaign for accepting a contribution on October 5 that was authorized by the District Court. He then successfully sought a temporary restraining order from Judge Seeley on October 24, an order in which the Hill Campaign did not receive a notice or a hearing.

The timing of the Hill Campaign's motion does not unduly prejudice Bullock, given that his actions in violation of this Court's order are what created the need for the Hill Campaign to move to intervene in the first place. And there is certainly none of the "serious prejudice" necessary to bar intervention. *U.S. ex rel. McGough, supra*, 967 F.2d at 1395 (reversing the denial of a post-judgment motion to intervene and distinguishing cases in which intervention would result in "serious prejudice"). The Hill Campaign has therefore met the timeliness requirement of Rule 24(a).

2. **The Hill Campaign has a Significantly Protectable Interest Relating to the Issues.**

The requirement of a significantly protectable interest is satisfied when “the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.” *Arakaki, supra*, 324 F.3d at 1084. The Court’s inquiry is “practical,” and “[n]o specific legal or equitable interest need be established.” *Forest Conservation Council v. U.S. Forest Serv.* 66 F.3d 1489, 1493 (9th Cir. 1995). The Ninth circuit has held that the “interest test” is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned parties as is compatible with efficiency and due process. *In re Estate of Ferdinand E. Marcos Human Rights Litig.* 536 F.3d 980, 985 (9th Cir. 2008).

Intervenors seeking to enforce an injunction of which they are beneficiaries, and which a defendant is violating, have a protectable interest relating to the case in which they seek to intervene. See, e.g., *Southern Pacific Co. v. City of Portland*, 221 F.R.D. 637, 643 (D.Or. 2004) (association of residents of an area affected by a permanent injunction restricting the railroad’s use of portions of its right-of-way could intervene as of right in the original action between the railroad

and the original residents in order to enforce the injunction, even though the injunction had issued 50 years earlier). The Hill Campaign is a direct beneficiary of the District Court's Order issued on October 3, and relied upon that Order in accepting the \$500,000 campaign contribution from the Montana Republican Party on October 5. This gives the Hill Campaign a protectable interest in this matter.

3. **Disposition of the Action May Impair or Impede the Hill Campaign's Ability to Protect Its Interests**

An intervenor satisfies this requirement "if the resolution of the plaintiff's claims actually will affect the applicant." *Arakaki, supra*, 324 F.3d at 1084. The impairment need only be a practical one, and need not rise to the level of stare decisis or res judicata. *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1038 (9th Cir.1998); *California ex. Rel. Lockyer v. United States* 450 F.3d 436, 441 (9th Cir.2006); *Sierra Club v. EPA* 995 F.2d 1478, 1486 (9th Cir.1993); *Development Finance Corp. v. Alpha Housing & Health Care, Inc.* 54 F.3d 156, 158 (3d Cir.1995); see *SEC v. Navin* 166 F.R.D. 435, 440 (N.D.Cal. 1995).

Judge Seeley's order has, as a practical matter, shut down the Hill Campaign during the last two weeks before the election. If the

Hill Campaign cannot obtain an order from this Court clarifying its Stay Order, the Campaign will be impaired, to say the least. This requirement is therefore met.

4. **The Hill Campaign's Interests Are Not Adequately Represented by the Existing Plaintiff**

An intervenor's burden in showing inadequate representation is minimal. It is sufficient to show that representation *might be* inadequate. *Arakaki*, 324 F.3d at 1086; *Forest Conservation Council*, 66 F.3d at 1498. Courts consider three factors: (1) whether the existing parties will “undoubtedly” make all the intervenor's proposed arguments; (2) whether the parties are capable and willing to make such arguments; and (3) whether the intervenor would offer any necessary elements to the proceeding that other parties would neglect. *Arakaki, supra*, 324 F.3d at 1086; *Sagebrush, supra*, 713 F.2d at 528.

The Plaintiffs who are already in this matter might not be able to adequately represent the Hill Campaign. Unlike the Plaintiffs, the Hill Campaign has been burdened with complying with an unlawful, ex parte, prior restraint issued by a state judge issued without notice or a hearing, an order that has shut down the Hill Campaign. As shown

below, the Hill Campaign will need to offer differing arguments than the Plaintiffs need to make regarding issues that do not affect the Plaintiffs in this matter and are therefore unlikely to be advanced by them.

II ALTERNATIVELY, THE HILL CAMPAIGN IS ENTITLED TO INTERVENE ON A PERMISSIVE BASIS

Permissive intervention is a two-stage process. After deciding whether one of the applicable grounds for permissive intervention exists, the court then exercises its discretion in deciding whether intervention should be allowed. The Court may grant permissive intervention under Rule 24(b)(1)(B) to any party that files a timely motion, where there is a claim or defense that shares a common question of law *or* fact with the main action, and where allowing intervention will not unduly delay or prejudice the adjudication of the original parties' rights.

The Hill Campaign's situation easily meets these requirements. As discussed above, the instant motion is timely. In addition, the Hill Campaign's claims share the same nucleus of laws and facts as the Plaintiffs'. See *Kootenai Tribe of Idaho v. Veneman* 313 F.3d 1094, 1111 (9th Cir. 2002) ("[I]f there is a common question of law or fact,

the requirement of the rule has been satisfied”) The Hill Campaign also have a substantial interest in the outcome of this litigation, and its participation would “significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.” *Spangler v. Pasadena City Bd. of Educ.* 552 F.2d 1326, 1329 (9th Cir. 1977). By advancing these arguments, the Hill Campaign would assist the litigation and not prejudice or delay the adjudication of the original parties’ rights. Permissive intervention is therefore a proper, alternative ground for the Hill Campaign to intervene in this matter

RELIEF SOUGHT

The Hill Campaign respectfully requests that the Court grant the following relief, namely a clarification of the Stay orders issued by this Court on October 9 and October 16 reflecting the following:

The District Court’s permanent injunction issued on October 3, 2012, is stayed with regard to violations of Montana’s campaign finance Statute occurring after this Court’s initial stay issued on October 9, 2012. The District Court’s injunction remains in full force and effect with regard to alleged violations of § 13-37-216, MCA, occurring between October 3, 2012 and October 9, 2012.

Respectfully submitted,

DATED: October 26, 2012

/s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Plaintiffs-
Intervenors