

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

RONALD G. MARTIN, JR., VIRGINIA
JIMENEZ, MAYELA ARIZPE, SYLVIA
AGUILAR, HON. RICK OLIVO, HON.
DAVID BONILLA, HON. DANIEL
ROBLEDO, HON. MAX MUNOZ and
HON. ODELL HOLMES,

Plaintiffs,

v.

THE CITY OF EL PASO, TEXAS,
Defendant,

v.

EL PASOANS FOR TRADITIONAL
FAMILY VALUES, MAURICE FIELD,
JR., MALCOLM MCGREGOR, III,
ELIZABETH BRANHAM, SONIA
BROWN, THOMAS BROWN, JR.,
GILBERT T. GALLEGOS, VICTOR
NEVAVAZ, IGNACIO PADILLA, and
RONALD WEBSTER,

Defendant-Intervenors.

CAUSE NO. EP10-CV-00468-FM

**MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24
AND MEMORANDUM OF LAW IN SUPPORT**

COMES NOW El Pasoans for Traditional Family Values (“EPTFV”), Maurice Field, Jr., Malcolm McGregor, III, Elizabeth Branham, Sonia Brown, Thomas Brown, Jr., Gilbert T. Gallegos, Victor Nevavaz, Ignacio Padilla, and Ronald Webster, by and through their undersigned counsel and pursuant to Federal Rule of Civil Procedure 24, and moves this Court for leave to intervene as defendants in this action, relying upon the incorporated supporting memorandum of law, saying as follows:

MOTION TO INTERVENE

1. In August of 2009, Defendant City of El Paso, Texas, decided to begin offering benefits to what it termed “domestic partners” of its current employees and retired employees.
2. Absent that decision by the Defendant City of El Paso, neither active employees, retired employees nor their domestic partners had any legal right to “domestic partner” benefits, much less any right to such benefits arising from the Texas Constitution, the US Constitution, or applicable local, state or federal law.
3. Defendant-Intervenor EPTFV is the only Specific Purpose Committee under Texas law formed to support a ballot measure to affirm traditional family values in the government of the City of El Paso by limiting the City’s employee benefits to employees, their legal spouses, and dependants, thereby reversing the decision of the City to extend the city employee benefits to unmarried domestic partners of city employees, both active and retired.
4. Pursuant to Section 3.11 of the City Charter of Defendant City of El Paso, Defendant-Intervenor EPTFV prepared ordinance language, prepared petitions for registered voters, gathered signatures of more than 5% of the City’s active voters, and presented the petitions to the El Paso City Clerk who in turn placed the proposed ordinance language on the agenda of the City Council, which affirmatively declined to enact the citizen initiated ordinance language or any amendment thereto.
5. Pursuant to the City Charter, Defendant-Intervenor EPTFV then prepared a second round of petitions for registered voters, gathered signatures of more than 5% of the City’s active voters, and presented the petitions to the El Paso City Clerk for placement of the citizen

initiated ordinance language rejected by City Council on the ballot of the November 2, 2010 general election.

6. As the sponsor of the ballot initiative, Defendant-Intervenor EPTFV raised money, vigorously campaigned, and filed campaign finance reports for its support of the citizen initiated ballot measure, and was ultimately successful when the El Paso voters adopted the proposed ordinance by majority vote.
7. In accordance with the City Charter, the ordinance initiated by petition became a City ordinance, reading as follows: “That the City of El Paso endorses traditional family values by making health benefits available only to city employees and their legal spouse and dependant children” (the “Ordinance”).
8. Defendant-Intervenors Maurice Field, Jr., Malcolm McGregor, III, Elizabeth Branham, Sonia Brown, Thomas Brown, Jr., Gilbert T. Gallegos, Victor Nevavaz, Ignacio Padilla, and Ronald Webster are citizens of the state of Texas and residents of the City of El Paso, Texas, and are active members of EPTFV. Specifically, Maurice B. Field, Jr., is the organization’s chairman and Malcolm G. McGregor, III is its secretary.
9. Defendant-Intervenors Maurice Field, Jr., Malcolm McGregor, III, Elizabeth Branham, Sonia Brown, Thomas Brown, Jr., Gilbert T. Gallegos, Victor Nevavaz, Ignacio Padilla, and Ronald Webster contributed time and/or funds toward the effort to adopt the Ordinance, signed petition(s) in favor of the proposed ordinance, and voted in the general election in favor of the ordinance.
10. Plaintiffs filed an Amended Petition which alleges that the Ordinance enacted through the efforts of Defendant-Intervenors is unconstitutional, illegal, void and of no legal force and

effect, and also seeks to have the Ordinance temporarily and permanently enjoined from being operative or enforced, and declared unconstitutional, illegal and void.

11. Defendant-Intervenors all have a vested interest in the enforcement and continued validity of the Ordinance and are opposed to any delay in its implementation or enforcement. Their interest may be impaired by the disposition of this action.
12. Defendant-Intervenors have defenses to Plaintiffs' claims, and specifically to the prayer for temporary and preliminary injunctive relief. Those defenses are set forth in Defendant-Intervenors' Responsive Pleading and their Opposition to Plaintiffs' Request for a Preliminary Injunction, both filed contemporaneously with this motion.
13. Defendant City of El Paso, on the other hand, has not raised any defenses to Plaintiffs' claims but instead has removed the case to this Federal Court and consented to an extended Temporary Restraining Order which was entered imprudently and without adequate bond.
14. The Defendant City's actions in this case thus far have been contrary to the position of the Defendant-Intervenors and the majority of the voters in the City of El Paso.
15. Every day that the temporary restraining order remains in effect, the rights of the citizens who have properly petitioned government and joined in a majority vote of the citizens is thwarted.
16. Defendant-Intervenors' interests are separate and apart from the Defendant City of El Paso's interests and are not being adequately represented by any of the existing parties to this action.
17. Defendant-Intervenors defenses present questions of law and fact that are common to this action.

18. Admitting Defendant-Intervenors will not affect this Court's jurisdiction under 28 U.S.C. §1331.

19. Joinder of Defendant-Intervenors as parties to this action is thus proper.

WHEREFORE, Defendant-Intervenors respectfully request that the Court to enter an order granting leave for them to intervene as Defendant-Intervenors and allow their Responsive Pleading to stand as properly filed.

MEMORANDUM OF LAW IN SUPPORT

Proposed Intervenors Meet the Four Requirements for Granting Intervention

Rule 24 of the Federal Rules of Civil Procedure states:

On 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 as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

F. R. Civ. P. 24(a). The Fifth Circuit has interpreted this Rule to be applied through the use of a four-part test which includes the following elements; "(1) timeliness, (2) an interest relating to the action, (3) that the interest would be impaired or impeded by the case, and (4) that the interest is not adequately represented by the parties." *Poynor v. Chesapeake Energy Ltd. P'ship (In re Lease Oil Antitrust Litigation)*, 570 F.3d 244, 247 (5th Cir. 2009) (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994)). Those four criterion must be met in order for an intervenor to qualify for Intervention of Right, "but Rule 24 is to be construed liberally, . . . and doubts resolved in favor of the proposed intervenor." *Id.* at 248 (internal quotation marks omitted).

The Motion is Timely

When evaluating the first element of the intervention test, the Fifth Circuit has adopted “another four-part framework,” wherein Courts must evaluate the following:

(1) how long the putative intervenor knew, or reasonably should have known, of its stake in the action; (2) the prejudice, if any, the existing parties may suffer because the putative intervenor failed to intervene when it knew, or reasonably should have known, of its stake; (3) the prejudice, if any, the putative intervenor may suffer if intervention is not allowed; and (4) any unusual circumstances weighing in favor of, or against, finding timeliness.

Effjohn int’l Cruise Holdings, Inc. v. A&B Sales, Inc., 346 F.3d 552, 560-61 (5th Cir. 2003).

These factors are merely an aid for determining timeliness based on the totality of the circumstances. *Id.*, at 561. “The timeliness clock does not start running until the putative intervenor also knows that class counsel will not represent his interest.” *Poynor*, 570 F.3d at 248 (citing *Sierra Club*, 18 F.3d at 1206).

In the active case, there is no real issue regarding timeliness. The original suit in the state court was filed on December 15, 2010, and the notice of removal to this Court was filed on December 21, 2010. On the date that this motion is filed—January 12, 2011—a mere 28 days has transpired since the original filing in state court, and only 22 since the notice of removal to this Court was filed. Additionally, because “[t]he timeliness clock does not start running until the putative intervenor also knows that class counsel will not represent his interest,” *Poynor*, 570 F.3d at 248, the relevant time is even shorter, since it was only by the actions of the City of El Paso in consenting to the extension of an imprudently entered Temporary Restraining Order with inadequate bond that Defendant Intervenors learned that their interests were not being adequately represented. *See Adequate Representation section, infra*. There is no unfair prejudice to the existing parties that results from granting intervention, and there are no other circumstances that would otherwise make this motion untimely.

Proposed Intervenor’s Interests Relating to the Action May be Impaired or Impeded

The standard for determining whether a putative intervenor has an interest relating to the action that may be impaired or impeded requires that a would-be intervenor “show that it has a direct, substantial, legally protectable interest in the action, meaning that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant.” *Poynor*, 570 F.3d at 250 (internal quotation marks omitted).

“The official sponsors of a ballot initiative have a strong interest in the vitality of a provision of the state constitution which they proposed and for which they vigorously campaigned.” *Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), *rev’d sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In *Yniguez*, when a provision of the Arizona State Constitution was invalidated by a district court, and the state decided not to appeal, the organization that had organized and sponsored the initiative that created that provision moved to intervene in order to appeal the district court’s decision. *Id.* at 729-30. Upon receiving the district court’s opinion invalidating Article XXVII, the only defendant to the original action—governor of Arizona, “who had publicly opposed the adoption of Article XXVII during the 1988 election—immediately announced her decision not to appeal” *Id.* at 730. The Ninth Circuit, after a comprehensive and thorough analysis of the issue of intervention, held that “[t]here appears to be a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of the litigation to intervene pursuant to Rule 24(a). *Id.* at 731-38.

Just as in *Yniguez*, the sponsors of the ballot initiative that enacted the Ordinance have a strong interest in the vitality of the Ordinance which it proposed and for which it vigorously campaigned. To disregard the “*per se* rule that the sponsors of a ballot initiative have a sufficient

interest in the subject matter of the litigation to intervene” would erode the very power of the citizens to govern themselves which they reserved for themselves in the City Charter.

The interests asserted by the putative Defendant-Intervenors are essential interests of citizens in any self-government. *See Perry v. Schwarzenegger*, 2011 U.S. App. LEXIS 153, 12 (9th Cir. 2011) (acknowledging “that the Supreme Court of California has described the initiative power as one of the most precious rights of our democratic process, and indeed, that the sovereign people’s initiative power is considered to be a fundamental right.”). EPTFV and the citizens voters of El Paso enacted an ordinance by citizens’ initiative through Section 3.11 of the Charter for the City of El Paso—the rough equivalent of the City’s Constitution. The Charter vested the citizens of El Paso with that legal right. This interest is thus fundamental.

Finally, there can be no doubt that the interests of EPTFV “may as a practical matter” be impaired or impeded by the disposition of this action. F. R. Civ. P. 24(a)(2). The issues being brought before this Court address whether the Ordinance is constitutional or illegal, and the decision in this case with either validate the ordinance or strike it down and enjoin its enforcement. The opportunity for it to be struck down or even temporarily enjoined is more than sufficient to qualify as an interest that may be impaired by this action’s disposition.

Intervenors’ Interests are Not Adequately Represented by the Existing Parties

The right to be governed with legislation adopted through citizen initiative is separate and apart from the right to be governed through representative government in the form of the City Council. The fact that the thrust of the citizen initiative in this case was to undo a previous decision of the City Council (effectively exercising a citizen nullification or veto of the extension of benefits to domestic partners or active and retired employees) and the fact that the City Council declined to enact the proposed ordinance when given the opportunity, highlights the

difference in right to legislation via the citizen initiative process verses the right to legislation through the representative government route. The former must be controlled and defended by the citizens and proponents of ordinance referenda while the later can be adequately safeguarded by the officials and employees of the representative government.

The element of inadequate representation by existing parties “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972); *See also Saldano v. Roach*, 363 F.3d 545, 553 (5th Cir. 2004). In *Trbovich*, the Supreme Court rejected the argument that the Secretary of Labor was sufficiently representing the interests of union members in its suit with the union because of its statutory duty. *Id.* at 538-39. The Court explained that, “[e]ven if the Secretary is performing his duties... as well as can be expected, the union member may have a valid complaint about the performance of ‘his lawyer.’ Such a complaint . . . should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).” *Id.* at 539.

Just as the union members’ interests were not necessarily adequately represented by the Secretary of Labor, who was statutorily designated to be their representation in suits against the trade union, the interests of EPTFV and the citizen voter would-be intervenors are not adequately represented by the City of El Paso, even though the ordinance is now a City Ordinance and the City and its attorney have appeared in the action. EPTFV and the voting citizens that enacted Municipal Ordinance No. 017456 have valid complaints about the performance of the City of El Paso’s performance in defending the ordinance that they duly enacted, and this constitutes “sufficient” showing to “warrant relief in the form of intervention under Rule 24(a)(2).” *Id.* Specifically, no responsive pleading has been filed and the City has consented to an extension of

an improvidently entered Temporary Restraining Order with an inadequate bond. These complaints about the performance of the City of El Paso in regards to plaintiffs' claims are valid, in light of the City's failure to challenge or contradict the plaintiff's allegations of unconstitutionality, failure to challenge standing issues, and agreement and compliance with the institution of a temporary restraining order prohibiting the execution the Ordinance its entirety, as opposed to limiting the effect of the injunction to the plaintiffs only. Further, there is a very real conflict of interest between the proposed intervenors and the City. EPTFV and the voting citizens of El Paso passed the Ordinance in direct response to the actions of the City in extending health benefits to "domestic partners" of city employees. The method required to enact the Ordinance circumvented the City Council's previous decisions, first to extend the benefits and then to reject adopting the Ordinance language when first proposed by petition. The City of El Paso does not adequately represent the interests of the Defendant-Intervenors, and the issues raised here are more than enough to pass the Supreme Court's "may be inadequate," minimal-burden test for this element.

Granting Intervention will Not Destroy Subject Matter Jurisdiction

Because qualifying for intervention under Rule 24 does not mean that a court will necessarily have subject matter jurisdiction to hear the claims relating to the intervening party, it is necessary to evaluate whether jurisdiction is proper. *See* Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary* 437-38 (2010). Because the issues before the Court are appropriately within its jurisdiction as federal question issues, the addition of the moving parties as intervenors will not, in and of itself, destroy subject matter jurisdiction, and intervention is thus appropriate under 28 U.S.C.A. §1367. The claims that the intervening defendants raise are part of the same case or controversy, and thus this Court has subject matter jurisdiction.

CERTIFICATION OF CONFERENCE

The undersigned hereby advises the court that attorneys with his office have conferred to the parties in accordance with Local Rule CV-7(h) and in a good faith attempt to resolve the matter by agreement and counsel for Plaintiffs objects to intervention because he does not believe Defendant-Intervenors have standing to intervene and counsel for Defendant believed it would be premature to agree or oppose the motion without taking more time to study it.

Respectfully submitted,



Mathew D. Staver *
Horatio G. Mihet *
LIBERTY COUNSEL
PO Box 504774
Orlando, FL 32854-0774
Telephone 800-671-1776
Facsimile 407-875-0770

Matthew H. Krause *
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
Telephone 434-592-7000
Facsimile 434-592-7700

** pro hac vice admission pending*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24 AND MEMORANDUM OF LAW IN SUPPORT has been sent by regular U.S. mail and by facsimile this 11th day of January, 2011 to counsel of record at the following addresses:

Charlie McNabb, City Attorney
Karla M. Nieman, Assistant City Attorney
The City of El Paso, Texas
2 Civil Center Plaza, 9th Floor
El Paso, TX 79901-1196
Facsimile 915-541-4190

Jim K. Jopling, Esq.
Combined Law Enforcement
Associations of Texas, Inc.
747 East San Antonio Avenue, Suite 103
El Paso, TX 79901
Facsimile 915-533-5117


