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7. IN THE UNITED STATES DISTRICT COURT
 8. FOR THE DISTRICT OF ALASKA

9. JOE MILLER,

10. Plaintiff,

11. v.

12. LIEUTENANT GOVERNOR MEAD
 TREADWELL, in his official capacity; and
 13. the STATE OF ALASKA, DIVISION OF
 ELECTIONS,

14. Defendants.

Case No. 3:10-cv-252 (RRB)

15. **SENATOR LISA MURKOWSKI'S MOTION FOR ORDER**
 16. **GRANTING LEAVE TO INTERVENE**

17. Senator Lisa Murkowski submits this motion for entry of an order granting her
 18. leave to intervene in this suit pursuant to Fed. R. Civ. P. 24. She has the right to
 19. intervene in accordance with Fed. R. Civ. P. 24(a). Because plaintiff Joe Miller filed this
 20. litigation only four weeks ago, this motion is timely. Further, as the prevailing party
 21. under the current vote tally of the Alaska Division of Elections ("the Division"), Senator
 22. Murkowski has a significantly protectable interest in being seated for another term as one
 23. of Alaska's two senators. Her right to serve the people of Alaska as Senator is based on
 24. the over one hundred thousand Alaskans who wrote her name on their ballots, and the

26. SENATOR LISA MURKOWSKI'S MOTION FOR ORDER GRANTING LEAVE TO INTERVENE
Miller v. Lieutenant Governor Mead Treadwell, et al.
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1. Division's procedures for counting these ballots is the subject matter of this lawsuit. The
2. disposition of this case may impair or impede Senator Murkowski's ability to protect her
3. interests, and Senator Murkowski meets her minimal burden of showing that no existing
4. party may adequately represent her interests. Her goal is not to simply uphold the
5. constitutionality of the existing vote count, but to ensure that the final certification of
6. Alaska's 2010 general election accounts for the thousands of voters whose write-in
7. ballots show their intent that Senator Murkowski represent the people of Alaska.

8. If the Court were to conclude that intervention as of right were inappropriate, it
9. should grant permission to intervene under Fed. R. Civ. P. 24(a), because any claims or
10. defenses that Senator Murkowski could bring in this Court regarding this election would
11. share common issues of law or fact with this case.

12. For these reasons, Senator Murkowski respectfully requests this Court grant this
13. motion. The defendants in this matter have advised the undersigned they do not oppose
14. this motion. Because we anticipate that Mr. Miller will object, Senator Murkowski also
15. requests by separate motion that the Court order an expedited briefing schedule for
16. resolution of this motion.¹

17. I. EVIDENCE RELIED UPON

18. This motion relies upon the accompanying Declaration of Timothy A. McKeever
19. in Support of Senator Lisa Murkowski's Motion for Order Granting Leave to Intervene
20. ("Dec. of McKeever"), the accompanying Answer and Cross-Claim of Intervenor Senator
21. Lisa Murkowski ("Answer and Cross-Claim"), as well as those matters of which the
22. Court may take judicial notice.

23. _____
24. ¹ The Court should take note that in the related state court matter, the judge has ordered that Senator
25. Murkowski can intervene. *See* Exhibit A. Order dated December 2, 2010.

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II. STATEMENT OF FACTS

Mr. Miller was the Republican Party candidate for U.S. Senator in Alaska's 2010 general election. Dec. of McKeever ¶ 3. Senator Lisa Murkowski, the incumbent senator, was a write-in candidate for the office. *Id.* According to the tabulation of the Division, Senator Murkowski defeated Miller by a count of 101,088 votes to 90,760. *Id.* During the process for tabulating write-in ballots, the Division refused to count 2,016 ballots that Senator Murkowski believes it should have. *Id.* ¶ 4.

Mr. Miller brought this action on November 9, 2010. Dkt. #1. In addition to raising state-law issues, he claims that the defendants' actions in tabulating votes violated the Equal Protection Clause of the Fourteenth Amendment and the Elections Clause, U.S. Const. art. I, § 4, cl. 1. Dkt. #40 ¶¶ 23-36. On November 19, 2010, the Court entered an order staying these proceedings, enjoining certification of the election, and referring the parties to Alaska state court for adjudication of the state-law issues. Dkt. #39. Mr. Miller then filed a state-law suit in Alaska Superior Court. Dkt. #47. The Court retains jurisdiction of this action pursuant to *Pullman*. Dkt. #39.

III. ISSUE

The issue presented for the Court's decision is whether to enter an order, pursuant to Fed. R. Civ. P. 24, granting leave to Senator Murkowski to intervene.

IV. ANALYSIS

A. Senator Murkowski Has The Right To Intervene Under Fed. R. Civ. P. 24(a).

Intervention as of right is available in accordance with Fed R. Civ. P. 24(a)(2).

This rule has been interpreted to contain 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 impair or impede the party's

1. ability to protect that interest; and (4) the applicant's
2. interest must not be adequately represented by existing
parties.

3. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*,
4. 159 F.3d 405, 409 (9th Cir. 1998)). The appropriateness of intervention depends mostly
5. on "practical and equitable considerations," and the requirements of Rule 24(a) are to be
6. construed "broadly in favor of intervention." *Donnelly v. Glickman*, 159 F.3d 405, 409
7. (9th Cir. 1998) (citing *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d
8. 1391, 1394 (9th Cir. 1992)).

9. **1. Senator Murkowski's motion to intervene is timely.**

10. The complaint of Mr. Miller was filed on November 9, 2010. Dkt. #1. Because
11. Senator Murkowski submits this motion to intervene only a few weeks later, her motion
12. is timely. See *Arakaki*, 324 F.3d at 1084 (holding that the district court acted within its
13. discretion in concluding that a motion to intervene was timely filed three weeks after the
14. complaint).

15. **2. The interest of Senator Murkowski is significant, protectable, and
related to the subject matter of this suit.**

16. Senator Murkowski meets the second requirement for intervention as of right
17. because she has a sufficient interest. To have a significantly protected interest, the
18. applicant does not have to establish that the laws underlying the suit create the interest.
19. *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). Rather, "a party has a
20. sufficient interest for intervention purposes if it will suffer a practical impairment of its
21. interests as a result of the pending litigation." *State ex rel. Lockyer v. United States*, 450
22. F.3d 436, 441 (9th Cir. 2006). The interest needs only to be "protectable under *some*
23. law." *Sierra Club*, 995 F.2d at 1484 (emphasis added). "Although the intervenor cannot
24. rely on an interest that is wholly remote and speculative, the intervention may be based on
25.

1. an interest that is contingent upon the outcome of the litigation.” *City of Emeryville v.*
2. *Robinson*, 621 F.3d 1251 (9th Cir. 2010) (quoting *United States v. Union Elec. Co.*, 64
3. F.3d 1152, 1162 (8th Cir. 1995)).

4. Senator Murkowski’s interest at stake in this suit is her lawful right to be seated as
5. a Senator representing the State of Alaska in the United States Senate. The voters of
6. Alaska preferred Senator Murkowski over Mr. Miller by 101,088 votes to 90,760, a
7. margin of 10,328 votes. Not only is this vote tally a reflection of the will of Alaska
8. voters, but it is the basis for Senator Murkowski to continue as Alaska’s Senator. But the
9. vote tally hinged, at least partly, on the actions of the Division that are the subject matter
10. of this suit. Therefore, this litigation directly implicates Senator Murkowski’s interest in
11. being seated as Senator.

12. Senator Murkowski also represents the interest of those voters who voted for her
13. to be re-elected to the Senate. Those voters have exercised their fundamental right to
14. vote and are entitled to have those votes counted fairly and accurately. See *Burdick v.*
15. *Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most
16. fundamental significance under our constitutional structure’”) (quoting *Illinois Bd. of*
17. *Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); *Dunn v. Blumstein*, 405
18. U.S. 330, 336 (1972) (describing the right to vote as a “fundamental political right”
19. (internal quotation marks omitted)).

20. Besides depending on the validation of the ballots that were counted by the
21. Division, Senator Murkowski’s right to be seated for another term rests, in part, on the
22. ballots that were not counted. The Division of Elections refused to count 2,016 ballots
23. that Senator Murkowski believes it should have. Dec. of McKeever ¶ 4. The validity of
24. the Division’s decision to throw out these ballots could plausibly turn on the questions of

1. federal law over which this Court retains jurisdiction. *See* Dkt. #39, Order Regarding
2. Pending Motions and Staying Proceedings, at 4 (“The Court shall retain jurisdiction
3. pursuant to *Pullman* and will remain available to review any constitutional issues that
4. may exist once the State remedies have been exhausted.”). Because Senator
5. Murkowski’s future as one of Alaska’s Senators goes hand in hand with the counting of
6. all ballots, she has an interest in this litigation.

7. At a broader level, Senator Murkowski has a unique interest in protecting
8. Alaska’s position within the upper chamber of the U.S. Congress. A U.S. Senator is not a
9. state official or agent, nor a representative of the state government. Rather, a U.S.
10. Senator is an independent federal representative of the people of Alaska acting as a
11. sovereign body. *See* U.S. Const. amend. XVII (“The Senate of the United States shall be
12. composed of two Senators from each state, elected by the people thereof, for six years
13. . . .”). Therefore, as an elected U.S. Senator, she has a distinct obligation to advance the
14. interests of the Alaskan people at the federal level. Her ability to do so is imperiled in
15. this litigation, as even a delay in the certification of the election could eliminate her
16. current seniority status and prevent her participating in the Senate’s committee selection
17. process. *See* Dec. of McKeever ¶¶ 5-6. Instead of being a Senator ranking in the upper
18. half of Senate who is ranking member of the Senate Energy and Natural Resources
19. Committee, Senator Murkowski could be deemed the body’s most junior member, and
20. her committee assignments could be lost. *See id.*

21. Based on the foregoing practical and equitable considerations, Senator Murkowski
22. respectfully submits that she has a significantly protected interest that relates to the
23. subject matter of this litigation, and the Court should find she has a right to intervene.
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1. 3. **The disposition of this suit could impair or impede Senator**
2. **Murkowski's ability to protect her significantly protectable interest.**

3. Also at issue is whether Senator Murkowski meets the third requirement of Fed.
4. R. Civ. P. 24(a)(2), that "the applicant must be situated such that the disposition of the
5. action may impair or impede the party's ability to protect that interest." *Arakaki*, 324
6. F.3d at 1083. This requirement is met "if an absentee would be substantially affected in
7. a practical sense by the determination made in an action." *Sw. Ctr. for Biological*
8. *Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting Fed. R. Civ. P. 24 advisory
9. committee's notes). If this Court reaches any federal constitutional claims raised in
10. Mr. Miller's complaint and rejects his arguments, the Division's tabulation of the
11. Alaskan voters' preference for Senator Murkowski will be certified and she will be seated
12. for another term in the Senate. On the other hand, a ruling by this Court could invalidate
13. the Division's ballot count, and thus Senator Murkowski's resumption of her duties in the
14. Senate would be, at the very least, delayed. Further, Senator Murkowski urged the
15. Division to count 2,016 ballots, but the Division refused. *Dec. of McKeever* ¶ 4. The
16. Division's obligations with regard to these ballots would be informed by the
17. constitutional principles developed during this litigation. In light of Senator Murkowski's
18. situation, it is apparent that the Court's disposition of this suit may impair her ability to
19. protect her interests.

19. 4. **None of the parties would adequately represent Senator Murkowski's**
20. **interests.**

21. Finally, Senator Murkowski's right to intervene turns on whether the existing
22. parties would adequately represent her interests. "The burden of showing inadequacy of
23. representation is minimal and 'is satisfied if the applicant shows that representation of its
24. interests 'may be' inadequate.'" *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006)
25. (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)). In the Ninth

1. Circuit, “several factors” guide the adequacy determination, *Sagebrush*, 713 F.2d at 528,
2. including these three: “(1) whether the interest of a present party is such that it will
3. undoubtedly make all of a proposed intervenor’s arguments; (2) whether the present party
4. is capable and willing to make such arguments; and (3) whether a proposed intervenor
5. would offer any necessary elements to the proceeding that other parties would neglect.”
6. *Arakaki*, 324 F.3d 1086 (citing *California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775,
7. 778 (9th Cir. 1986)). If the applicant and an interested party “share the same ‘ultimate
8. objective,’ a presumption of adequacy of representation applies, and the intervenor can
9. rebut that presumption only with a ‘compelling showing’ to the contrary.” *Perry v.*
10. *Proposition 8 Official Proponents*, 587 F.3d 947, 951 (9th Cir. 2009) (quoting *Arakaki*,
11. 324 F.3d at 1086).

12. Senator Murkowski carries this burden of showing the existing parties’
13. representation may be inadequate. The ultimate objective of the Division and Lieutenant
14. Governor Treadwell is to defend the constitutionality of their actions. Senator
15. Murkowski’s goal is broader. The voters of Alaska have spoken, and they have chosen
16. Senator Murkowski to represent their interests in the U.S. Senate for another six years.
17. Her objective is to counter any attempts to disenfranchise these thousands of Alaskans
18. who wrote her name on their ballots. This is not to say, of course, that the State
19. defendants do not care about the voters. But their immediate, narrow goal is to defeat
20. Mr. Miller’s claims that they acted improperly. In contrast, Senator Murkowski is
21. interested in the *results* of the State defendants’ work, namely the counting of ballots.
22. Senator Murkowski’s goal differs in another important way: if the Court decides to throw
23. out the Division’s current vote tally, she wants the ruling to rest on a constitutional
24. principle that would obligate the Division to count the 2,016 uncounted ballots that
25.

1. evidence an intent to vote for Senator Murkowski. *See Answer and Cross-Claim,*
2. Count 1.

3. Not only do the existing parties hold different ultimate goals from Senator
4. Murkowski, but there is also an intolerably high risk that they would not offer the same
5. range of arguments and other necessary elements of the case. The counting of write-in
6. ballots was really a three-party affair, involving the Division and the campaigns of
7. Mr. Miller and Senator Murkowski. Any constitutional rulings may be incomplete
8. without all three parties weighing in. Mr. Miller and the State defendants might not
9. furnish the Court with arguments or briefing that addresses the 2,016 uncounted ballots
10. that Senator Murkowski believes should have been counted. More importantly, the
11. existing parties quite likely will not be able to fully develop the factual record without
12. Senator Murkowski's intervention. After conducting a statewide write-in campaign and
13. providing observers for the ballot-counting process, Senator Murkowski understands
14. what happened. As an intervenor, she would stand ready to produce evidence correcting
15. any misunderstandings or filling any gaps left by the existing parties. These arguments
16. and factual contributions to the litigation would prove invaluable to the Court's
17. understanding of how federal law should apply to Alaska's 2010 general election.

18. There is an additional point on which the State defendants' representation of
19. Senator Murkowski's interests may be inadequate. That is, the danger of a settlement
20. lengthening the process of counting and certification. The State defendants could
21. plausibly agree to a settlement calling for it to reconsider ballots challenged by
22. Mr. Miller. Such a delay would put at risk Senator Murkowski's position of seniority in
23. the U.S. Senate and her committee assignments. Therefore, Senator Murkowski would
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1. litigate Mr. Miller's claims until their resolution by this court, but she cannot count on the
2. State defendants to do the same.

3. Senator Murkowski is aware of no case where a state's election process has been
4. subjected to a federal challenge but one of the individual candidates with a direct stake in
5. the outcome has been prevented from intervening. It is not without precedent to have
6. both major candidates involved in such a suit. *See, e.g., Bush v. Gore*, 531 U.S. 98
7. (2000). Because Senator Murkowski's significantly protectable interest in the subject
8. matter of this litigation may not be adequately represented by any existing party, she has a
9. right to intervene, and her motion should be granted under Fed. R. Civ. P. 24(a)(2).

10. **B. Senator Murkowski Should Be Permitted To Intervene Under Fed. R. Civ.**
11. **P. 24(b).**

12. Under Fed. R. Civ. P. 24(b)(1)(B), a district court has discretion upon a timely
13. motion to "permit anyone to intervene who . . . has a claim or defense that shares with the
14. main action a common question of law or fact." When deciding whether to permissively
15. grant leave to intervene, "the court must consider whether the intervention will unduly
16. delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ.
17. P. 24(b)(3). This Court could issue constitutional rulings that would govern any
18. subsequent recount of the ballots submitted in Alaska's 2010 general election. The
19. Court's resolution would turn on legal and factual questions that would coincide with
20. Senator Murkowski's cross-claim against the State defendants for their refusal to count
21. 2,016 write-in ballots. *See Answer and Cross-Claim, Count 1.* Therefore, the Court
22. should permit Senator Murkowski to intervene under Fed. R. Civ. P. 24(b) in the event
23. that it concludes intervention as of right is not available to her under Fed. R. Civ.
24. P. 24(a).

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V. CONCLUSION

Senator Murkowski respectfully submits that she meets the requirements to intervene as a party to this suit. She has the right to intervene in accordance with Fed. R. Civ. P. 24(a), and should be permitted to intervene under Fed. R. Civ. P. 24(b). A proposed form of order is submitted with this motion.

DATED this 18th day of December, 2010.

HOLMES WEDDLE & BARCOTT, P.C.

s/Timothy A. McKeever

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1. CERTIFICATE OF SERVICE

2. The undersigned certifies under penalty of perjury of the
3. laws of the State of Washington that, on the 10 day of
4. June, 2010, the foregoing was electronically
5. filed with the Clerk of Court using the CM/ECF system, which
6. will send notification of such filing to the following:

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34. _____
35. s/Timothy A. McKeever

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