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9 **UNITED STATES DISTRICT COURT**
 10 **DISTRICT OF ALASKA**

11	JOE MILLER,)	Civil Action No:
12)	
13	<i>Plaintiff,</i>)	3:10-cv-252 (RRB)
14)	
15	v.)	
16)	
17	LIEUTENANT GOVERNOR CRAIG)	
18	CAMPBELL, in his official capacity;)	
19	and the STATE OF ALASKA,)	
20	DIVISION OF ELECTIONS,)	
21)	
22	<i>Defendants.</i>)	
23	_____)	

24 **PLAINTIFF JOE MILLER’S OPPOSITION TO LISA**
 25 **MURKOWSKI’S MOTION TO INTERVENE**

26 This Motion presents an easy question, because the dispositive issue already has been decided against Lisa Murkowski. Murkowski moved to intervene in the state-court lawsuit that this Court ordered Plaintiff Miller to bring to resolve the state-law issues implicated by his federal claims. The standard for intervention in this Court and the Alaska state courts is the same. Among other things, for intervention as of right, a putative intervenor must establish that

1 her interests are not being adequately represented by the existing parties. *Compare* Fed. R.
2 Civ. P. 24(a) *with* Alaska R. Civ. P. 24(a); *see also* *McCormick v. Smith*, 793 P.2d 1042, 1044
3 n.7 (Alaska 1990) (“Federal intervention as of right is governed by Federal Rule of Civil
4 Procedure 24, and requires application of the same test employed under Alaska Civil Rule
5 24.”).

6 The state court initially expressed grave reservations about allowing Murkowski to
7 intervene in that suit, as she could not explain why the State could not adequately represent her
8 interest in opposing Plaintiff Miller’s claims. *See* *Miller v. Campbell*, No. 1JU-10-1007 CI,
9 Order on Motion to Intervene, at 4 (Juneau Sup. Ct. Dec. 2, 2010) (attached as Ex. A to
10 Murkowski’s Motion); *see also* *Gonzales v. Arizona*, 485 F.3d 1041, 1052 (9th Cir. 2007)
11 (“Where the government is acting on behalf of a constituency it represents, as it is here, this
12 court assumes that the government will adequately represent that constituency”) (quotation
13 marks omitted); *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (“[I]t will be presumed
14 that a state adequately represents its citizens when the applicant shares the same interest.”)
15 Murkowski’s only response was that she wished to challenge the Division of Elections’
16 decision to reject approximately 2,016 ballots that she contends should have been counted for
17 her. *Id.* at 5. The court concluded that the State did not adequately represent her interest
18 regarding those ballots, and permitted her to intervene in order to file cross-claims regarding
19 them. *Id.*

20
21
22 Murkowski now tries a similar gambit in this Court. She begins by offering an array of
23 meaningless generalizations and frivolous arguments. First, she broadly alleges that “no

1 existing party may adequately represent her interests.” Mot. at 2. She vaguely contends that
2 her interest is “counter[ing] any attempts to disenfranchise thousands of Alaskans who wrote
3 her name on their ballots,” while the Defendants’ goal is to “defend the constitutionality of
4 their actions.” *Id.* at 8. Crucially, she does not explain how these goals actually differ or
5 diverge from each other, or how the positions that she and Defendants would take regarding
6 any of Plaintiff Miller’s claims differ. Nor does she identify even a single argument that she
7 wishes to raise against Plaintiff Miller’s claims that Defendants would refrain from making.

8 Murkowski also maintains that “the existing parties quite likely will not be able to fully
9 develop the factual record without [her] intervention.” Mot. at 9. To the contrary, Murkowski
10 provides absolutely no evidence that Plaintiff Miller needs or intends to gather to prove his
11 claims. Furthermore, unless Murkowski’s argument is to be taken as a veiled promise to ignore
12 this Court’s subpoenas, there is no reason why the parties would be unable to obtain whatever
13 information they do need from Murkowski through the standard discovery process.
14

15 The Motion further asserts, “After conducting a statewide write-in campaign and
16 providing observers for the ballot-counting process, Senator Murkowski understands what
17 happened.” Mot. at 9. This argument betrays a fundamental misunderstanding of the
18 difference between a party to a case and a witness. The simple fact that someone “understands
19 what happened” in a lawsuit does not mean that he or she should be permitted to intervene.
20

21 Murkowski additionally contends that the State might settle with Plaintiff Miller,
22 thereby “lengthening the process of counting and certification.” *Id.* at 10. The State clearly is
23 not open to the possibility of such a settlement in this case but, even entertaining this desperate

1 hypothetical, her intervention would not bar the State from accepting any such settlement. In
2 any event, if intervention is to be justified on these fanciful, speculative grounds, in light of the
3 virtual certainty that such circumstances will not come to pass, her Motion should not be
4 granted unless and until there is a reasonable basis to believe the State actually would be
5 willing to consider such a settlement.

6 The true gravamen of Murkowski's Motion is that the parties "might not furnish the
7 Court with arguments or briefing that addresses the 2,016 uncounted ballots that Senator
8 Murkowski believes should have been counted." Mot. at 9. Murkowski is absolutely correct—
9 those 2,016 ballots are not the subject of any of Plaintiff Miller's claims. She wishes to
10 intervene in this lawsuit in order to argue that the State erred in refusing to count ballots in
11 which: (i) her name was written in, but the voter had neglected to fill in the "write in candidate"
12 oval, or (ii) the voter wrote "Lisa M." Although the state court permitted her to intervene in
13 that suit in order to pursue those claims, that tactic is doomed to failure here.
14

15 *First*, Murkowski has not stated any valid federal claims regarding the 2,016 uncounted
16 ballots. Count One of her Cross-Claim alleges that "[t]he failure to count these ballots where
17 the intent of the voters was clearly to vote for Lisa Murkowski is contrary to federal law." *See*
18 Proposed Answer and Cross-Claim of Lisa Murkowski, ¶ 14. She does not, and cannot, invoke
19 a single provision of federal law that the State's failure to count those ballots violated. Count
20 Two alleges that Defendants "are obligated by law to administer elections in Alaska in a
21 professional and neutral fashion and to ensure the election results are consistent with state law."
22 *Id.* ¶ 15. Rather than explaining or elaborating on this purported cause of action, the three
23

1 paragraphs that follow are a bizarre, somewhat rambling, self-serving meditation on whether
2 she satisfies the standard for intervention. Thus, there are no valid federal questions among
3 Murkowski's Cross-Claims.

4 **Second**, Murkowski's claims do not fall within this Court's supplemental jurisdiction.
5 *See* 28 U.S.C. 1367. Plaintiff Miller has not challenged—and, indeed, agrees with—the
6 Defendants' decision to reject as invalid, and decline to count, write-in ballots in which the
7 voter either did not fill in the "write in candidate" oval, or wrote "Lisa M." rather than a
8 candidate's surname. None of Plaintiff Miller's claims calls into question any of the ballots
9 that Defendants rejected on those grounds. Thus, although Murkowski's claim relates to the
10 election, it does not arise from the same core nucleus of operative fact as Plaintiff Miller's.

11 **Third**, the Superior Court already has held that there is no basis in Alaska law for
12 counting those 2,016 ballots, and the issue will be before the Alaska Supreme Court by the end
13 of the week. Murkowski fails to explain what will be left of her claim for this Court to
14 adjudicate once the state supreme court rules on the issue (or leaves the lower court's ruling
15 rejecting her claim undisturbed).

16 Thus, Murkowski's Cross-Claims not only are squarely contrary to the plain text of
17 state law—which expressly requires voters attempting to cast write-in ballots to fill in the
18 "write in" oval and write either the candidate's full name or last name on the ballot, *see*
19 15.15.360(a)(10), (a)(11), and (b)—but they fail to raise claims within this Court's federal
20 question or supplemental jurisdiction. In light of the state court's determination that the State
21 adequately can represent Murkowski's interests in opposing Plaintiff Miller's claims, and her
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1 failure to present any substantial arguments here to the contrary, this Court should deny her
2 request for intervention as of right. As Murkowski's request for permissive intervention hinges
3 entirely on the existence of "common question[s] of law or fact" between Plaintiff Miller's
4 claims and her proposed Cross-Claims, *see* Mot. at 10, this Court must deny that portion of her
5 Motion as well.

6 **CONCLUSION**

7 For these reasons, Plaintiff Miller respectfully requests that this Court deny Lisa
8 Murkowski's Motion to Intervene.

9
10 Dated this 13th day of December, 2010.

11 Respectfully submitted,

12
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1 Certificate of Service:

2 The undersigned hereby certifies that a true
3 and exact copy of the foregoing was served
4 this 13th day of December 2010 via:

- 4 () First Class Mail
5 () Hand-Delivery
6 () Facsimile
7 () E-Mail
8 (X) ECF

9 to the following listed individual(s):

10 Michael Barnhill
11 Sarah Felix
12 Margaret Paton-Walsh
13 Timothy McKeever
14 Scott Kendall

15 By: /s/ Thomas V. Van Flein
16 Thomas V. Van Flein