IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB

JUDICIAL WATCH, INC., *et al.*

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, *et al.*,

Defendants.

REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Proposed Intervenors, Voto Latino and Vote.org, submit this Reply to Plaintiffs' Opposition ("Opp.") [ECF No. 36] to their Motion to Intervene [ECF No. 17].

I. INTRODUCTION

Proposed Intervenors are two organizations dedicated to registering and mobilizing voters—particularly young and Latino voters—to vote in Colorado. Just as they have an interest in registering these voters, they also have a direct, substantial, and legally protectable interest in ensuring that these eligible voters are not improperly threatened with removal from the voter registration rolls as a result of Judicial Watch's attempt to use the judiciary to force Colorado to modify its list-maintenance procedures to Judicial Watch's satisfaction. To be clear, Judicial Watch alleges that Colorado's current voter registration list-maintenance procedures are not "reasonable" under the NVRA, because Judicial Watch feels that the number of voters routinely removed from those rolls is too low, and the state should be forced to remove more voters, with greater frequency. Compl. ¶¶ 35, 42, 47, 48, 57, 73. But as Congress recognized when it enacted the NVRA, overly aggressive purge systems regularly result in the improper removal of lawful

voters, particularly those from the minority communities that Proposed Intervenors serve. Proposed Intervenors have a clear interest in protecting those voters, who they have worked hard to register and mobilize so that they may have a voice in Colorado's elections, against the threat of their improper removal that is directly raised by this lawsuit.

In arguing otherwise, Judicial Watch must re-characterize its own Complaint, resort to arbitrary distinctions between cases involving eligible voters versus those involving ineligible voters, and distort the relevant authority on intervention, inventing rules that are simply not required by Federal Rule of Civil Procedure 24. When Judicial Watch's Complaint is accurately construed, and the law is properly applied, it is plain that Proposed Intervenors have every right to participate in this suit. Moreover, their intervention will aid this Court in navigating critical facts as it makes its determination of "reasonableness" as to Colorado's list-maintenance program. Thus, at a minimum, permissive intervention is warranted. Numerous courts have found the same in similar litigation. This Court should grant intervention here.

II. ARGUMENT

A. Proposed Intervenors have a right to intervene.

Proposed Intervenors have a right to intervene. First, as Plaintiffs concede, the motion to intervene is timely. *See* Opp. at 3 n.1. Second, Proposed Intervenors have a direct, substantial, and legally protectable interest in this case that will be impaired by Judicial Watch's requested outcome. And, third, Proposed Intervenors' interest is not adequately represented by the state defendants (the "State"). In other words, they meet all of Rule 24(a)'s requirements and intervention as of right should be granted.

1. Proposed Intervenors have a direct, substantial, and legally protectable interest in this litigation.

Judicial Watch's argument that Proposed Intervenors have no interest in this case should be rejected. In fact, Judicial Watch does not contest that Proposed Intervenors have an interest in eligible voters remaining on the rolls. Their opposition is based on an unsustainable presumption that list-maintenance procedures intended to remove ineligible voters never mistakenly remove eligible ones. Specifically, Judicial Watch asserts that because it only seeks removal of *ineligible* voters, Proposed Intervenors' interest in ensuring that the *eligible* voters they have registered remain registered is not implicated.

But the removal of eligible and ineligible voters is inextricably linked. Judicial Watch expressly seeks to implement a voter registration list-maintenance "program that makes a reasonable effort *to cancel [] registrations.*" Compl. ¶ 73, Prayer for Relief ¶ c (emphasis added). The reality of list maintenance programs is that they *always* risk the removal of eligible voters—by, for example, making the same mistake that Judicial Watch has in its Complaint by assuming that any person who has moved has become ineligible, when in reality a voter may have just moved to a different residence in the same jurisdiction. *See* Compl. ¶¶ 38-39; *see also* [Proposed] Intervenors-Defendants' Mot. to Dismiss 15, ECF No. 17-3. As a result, these programs commonly remove eligible, registered voters from the rolls, with disproportionately negative impacts on the very minority communities that Proposed Intervenors serve.

Proposed Intervenors' interest in ensuring that their constituents—who are disproportionately likely to be removed from the rolls even if eligible—are not removed as a result of this litigation is directly implicated here. Judicial Watch leans heavily on the non-precedential decision in *Judicial Watch v. Logan*, No. CV 17-8948-R (C.D. Cal. July 12, 2018) (Order Denying

Motion to Intervene, ECF No. 76), to support its argument, but that reliance is misplaced. In *Logan*, the court, without analysis, ignored the linkage between removal of ineligible and eligible voters and presumed—apparently based on the mistaken assumption that voter purges are carried out with 100% accuracy and thus do not affect eligible voters—that the case "pertain[ed] only to *ineligible* voters." *Id.* at 3. But where courts have fully considered how more aggressive voter purging may affect eligible voters—and it is plain that what Judicial Watch seeks here is more aggressive purging, *see* Opp. at 1—they have consistently allowed intervention by voter-registration organizations like the Proposed Intervenors. *See, e.g.*, *Bellitto v. Snipes*, No. 16-cv-61474, 2016 WL 5118568 at *3 (S.D. Fla. Sept. 21, 2016) (Order Granting Motion to Intervene, ECF No. 29); *Pub. Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 799 (E.D. Mich. 2020) (granting intervention, though permissively).

In *Bellitto*, for example, the plaintiff sought the exact relief Judicial Watch seeks here, contrary to Judicial Watch's characterization, Opp. at 5—declaratory relief that the defendant was in violation of Section 8 of the NVRA and an order to implement a list maintenance program that makes a "reasonable" effort to remove the registrations of ineligible voters. *Compare Bellitto v. Snipes*, No. 16-cv-61474, 2016 WL 8813179, (S.D. Fla. Aug. 4, 2016) (First Amended Complaint, ECF No. 12), *with* Compl. ¶ 73, Prayer for Relief ¶ c (seeking "reasonableness" determination under the NVRA). The court found that a union representing healthcare workers who were eligible to vote had an interest in the "court-ordered 'voter list maintenance' sought by Plaintiffs." *Bellitto*, 2016 WL 5118568 at *2. Similarly, in *Winfrey*, the Court explained that proposed intervenors there had a "facially legitimate" interest in ensuring that the state adopts "no unreasonable measures . . . that could pose an elevated risk of removal of legitimate registrations," 463 F. Supp. 3d at 799.

For these same reasons, Proposed Intervenors' concerns are not speculative. Opp. at 5; *see Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (explaining intervenors only need show that the "impairment of its substantial legal interest is *possible* if intervention is denied. This burden is minimal."). Even where a list-maintenance program seeks only to remove ineligible voters, eligible voters are at severe risk of removal. Indeed, Congress recognized as much when it enacted the NVRA. S. Rep. No. 103-6, at 18 (1993). Proposed Intervenors have a concrete interest in ensuring that the legitimate registrations of the very voters that they have spent substantial resources securing are not placed at risk of removal as a result of this litigation. Judicial Watch does not contest that interest.

Finally, Proposed Intervenors also have a direct, substantial, and legally protectable interest in this litigation because, as explained in Proposed Intervenors' Motion to Intervene, if Plaintiffs are successful in requiring the implementation of a far more aggressive list maintenance program, Proposed Intervenors will have to spend substantial additional resources educating their constituencies about these purges and re-registering eligible voters that they have already registered. Mot. to Intervene at 5-6. This, in and of itself, provides ample reason to find that Proposed Intervenors have an interest in this litigation sufficient to confer upon them a right to intervene.

3. Proposed Intervenors' interests are not adequately represented.

Judicial Watch's assertions that the State adequately represents Proposed Intervenors interests is also misplaced. Despite acknowledging that Proposed Intervenors need to make only a "minimal showing" that existing representation "*may* be inadequate," Opp. at 7-8 (quoting *Tri-State Generation & Transmission Ass'n v. N.M. Pub. Reg. Comm'n*, 787 F.3d 1068 (10th Cir.

2015)), Judicial Watch does not argue that no such showing has been made. Rather, it asserts that intervention is foreclosed because the adequacy of the State's representation here is presumed. Opp. at 8.

But in *Tri-State*, the case Judicial Watch cites for this proposition, the court made clear that adequacy is only presumed where proposed intervenors and the existing defendant have *identical* objectives. 787 F.3d at 1072 ("Under such circumstances [where the objective of the applicant for intervention is identical to the parties], we presume representation is adequate." (citations omitted)). That is not the case here. To be sure, both entities share the objective of ensuring that Colorado's list maintenance program is lawful. But Proposed Intervenors' objective does not end there; they aim to protect the voting rights of their constituencies—including voters from marginalized communities—by ensuring that they remain on the registration rolls. While the State might in theory share that objective, it must also balance it in practice with the interests of its other citizens and its objectives based on administrative and budgetary needs. In so doing, just like the county defendant in the *Logan* case that Judicial Watch relies so heavily upon, the State might make decisions that would not serve Proposed Intervenors' objective. *See, e.g.*, Press Release, Judicial Watch, *California and Los Angeles County to Remove 1.5 Million Inactive Voters from Voter Rolls–Settle Judicial Watch Federal Lawsuit* (Jan. 3, 2019) (describing settlement as requiring removal of names that "*may be* invalid") (emphasis added).[1] The result would be not only injury to the voters that Proposed Intervenors work so hard to register, but also Proposed Intervenors' budget—a subject in which the State clearly does not share the same interest.

[1] *Available at* https://www.judicialwatch.org/press-releases/california-and-los-angeles-county-to-remove-1-5-million-inactive-voters-from-voter-rolls-settle-judicial-watch-federal-lawsuit/

Accordingly, unlike *Tri-State*, this "is [] a case where the governmental agency must account for a 'broad spectrum' of interests that may or may not be coextensive with the intervenor's particular interest" and determine the "reasonableness" of an agency's determination. 787 F.3d at 1073. Answering that question requires "a balancing of divided and competing interests that the Court will be called on to consider when weighing whether the defendants ought to be compelled to modify their list maintenance process." *Winfrey*, 463 F. Supp. 3d at 801. As such, adequacy of representation is not presumed.

In any event, *even if* Proposed Intervenors and the State's objectives were identical, the result would not change. Judicial Watch's discussion of the presumption of adequacy, Opp. at 8-10, neglects to mention that where, as here, "the purportedly adequate representative of the proposed intervenor's interest is a *governmental entity*, 'this presumption [of adequacy] can be rebutted by the fact that the public interest the government is obligated to represent may differ from the would-be intervenor's particular interest.'" *Kane Cnty. v. United States*, 928 F.3d 877, 892 (10th Cir. 2019) (quoting *Utah Ass'n of Cntys.*, 255 F.3d at 1255) (emphasis added). The "public interest" the State must represent includes administrative concerns that are outside of, and could directly conflict with, Proposed Intervenors' interests here: ensuring that their constituents remain on the registration rolls now and in the future, and that those rights are not put in jeopardy no matter the cost. Courts recognize these as meaningful distinctions. *See, e.g.*, *Winfrey*, 463 F. Supp. 3d at 799; *Bellitto*, 2016 WL 5118568, at *2; *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095-EFM-DJW, 2013 WL 6511874, at *4 (D. Kan. Dec. 12, 2013). In sum, these interests sufficiently rebut the adequacy presumption, and make the "minimal showing" that the State's representation is not adequate.

Finally, Judicial Watch's unsupported argument that the intervention will cause undue delay, Opp. at 11-12, is wholly premised on its contention that the State adequately represents Proposed Intervenor's interests. But as discussed above, that is not the case. Proposed Intervenors' motion to intervene should be granted as of right.[2]

B. In the alternative, the Court should grant permissive intervention.

Judicial Watch's argument against permissive intervention is similarly unavailing. Judicial Watch asserts that Proposed Intervenors should not be granted permissive intervention because they are not government entities subject to the NVRA. Opp. at 10-11. But that is irrelevant. Permissive intervention is granted based on proposed intervenors' interests in the outcome of the litigation and on the common questions of law and fact. Fed. R. Civ. P. 24(b).

Courts *routinely* grant permissive intervention to non-governmental organizations in litigation against governmental agencies, *see, e.g.*, *Utah Ass'n of Cntys.*, 255 F.3d at 1252-53, and, in fact, courts routinely allow permissive intervention by organizations like the Proposed Intervenors in cases just like this one. *See, e.g.*, *Winfrey*, 463 F. Supp. 3d at 796 (granting permissive intervention in list maintenance case to voter registration organization); *Kobach*, 2013 WL 6511874, at *4 (granting permissive intervention when movants had "clearly shown their interests in either increasing participation in the democratic process, or protecting voting rights, or both, particularly amongst minority and underprivileged communities"). This is because, among

[2] Plaintiffs' slippery slope argument that allowing "one ideological organization to intervene" would necessarily lead to others intervening, Opp. at 7, is wholly unsupported by Tenth Circuit case law. In *American Association of People With Disabilities v. Herrera*, 257 F.R.D. 236 (D.N.M. 2008), the case upon which Plaintiffs rely, the court was focused on the need to rule on the plaintiffs' motion for preliminary injunction as soon as possible without delaying the ruling for other potential intervenors. *Id.* at 259. This case has no such time constriction, and Proposed Intervenors are the only parties seeking to intervene in this case.

other things, "a fulsome consideration of both competing interests, vigorously advocated by appropriately interested parties concerned with each side of the balancing test, unquestionably will be helpful to the Court when it is called upon to strike the required balance and decide whether the defendants' program of list maintenance is "reasonable" within the meaning of the statute." *Winfrey*, 463 F. Supp. 3d at 801.[3]

In this case, Proposed Intervenors have "made clear that they intended to raise common questions of law and fact." *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018); *see also* Mot. to Intervene at 14. That is all they need to show to intervene.

C. Amici briefing or intervention at the remedial stage is not sufficient.

Judicial Watch's argument that Proposed Intervenors' participation in this matter should be limited to *amici* briefing or intervention only at the final stages of litigation, should be rejected. The Tenth Circuit takes a "'liberal' approach to intervention and thus favors the granting of motions to intervene." *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017). Proposed Intervenors have each of the elements set forth in the Federal Rules to entitle them to intervention and their interests in this litigation can be maintained only by full participation. Although the Court can impose conditions and restrictions on intervenors as a matter of efficiency, that efficiency cannot extend to excluding intervenors where their proven interests are not adequately represented. *See, e.g.*, *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505-RB-SCY, 2020 WL 672836 at

[3] Judicial Watch's related argument that Proposed Intervenors "possess no expertise as defendants regarding the issues in this case," Opp. at 10, seeks to improperly add a new requirement to permissive intervention. It is also untrue. Proposed Intervenors bring valuable information about their constituencies and the difficulties of voter registration and maintaining that registration for minority and young voters. *See, e.g.*, *Bellito*, No. 16-cv-61474-BB (S.D. Fla. Mar. 30, 2018) (Order, ECF. No. 244) (recognizing critical expert evidence brought forth by voter registration intervenor).

*5 (D.N.M. Feb. 11, 2020) (declining to impose requested conditions where it would "defeat the purpose of intervention as of right"). As Proposed Intervenors have shown, they have an interest in this case that is not adequately represented by the State. For that reason, their participation should not be limited.

CONCLUSION

For the aforementioned reasons, Proposed Intervenors respectfully request that the Court grant their motion to intervene.

DATED this 14th day of January 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following individuals:

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