No. 21-51145

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LA UNION DEL PUEBLO ENTERO; FRIENDSHIP-WEST BAPTIST CHURCH; THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TEXAS IMPACT; MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS; TEXAS HISPANICS ORGANIZED FOR POLITICAL EDUCATION; JOLT ACTION; WILLIAM C. VELASQUEZ INSTITUTE; JAMES LEWIN; FIEL HOUSTON, INCORPORATED; MI FAMILIA VOTA; MARLA LOPEZ; PAUL RUTLEDGE;

Plaintiffs-Appellees
(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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(*Continuation of caption*)

v.

GREGORY W. ABBOTT, in his official capacity as Governor of Texas; *et al.*,

Defendants

HARRIS COUNTY REPUBLICAN PARTY; DALLAS COUNTY REPUBLICAN PARTY; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN NATIONAL COMMITTEE,

Movants-Appellants

OCA-GREATER HOUSTON; LEAGUE OF WOMEN VOTERS OF TEXAS; REVUP-TEXAS; TEXAS ORGANIZING PROJECT; WORKERS DEFENSE ACTION FUND;

Plaintiffs-Appellees

v.

JOSE A. ESPARZA, in his official capacity as Deputy Secretary of the State of Texas; *et al.*,

Defendants

HARRIS COUNTY REPUBLICAN PARTY; DALLAS COUNTY REPUBLICAN PARTY; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN NATIONAL COMMITTEE,

Movants-Appellants

(*Continuation of caption*)

HOUSTON JUSTICE; DELTA SIGMA THETA SORORITY, INCORPORATED; HOUSTON AREA URBAN LEAGUE; THE ARC OF TEXAS; JEFFREY LAMAR CLEMMONS;

Plaintiffs-Appellees

v.

GREGORY WAYNE ABBOTT, in his official capacity as Governor of Texas; *et al.*,

Defendants

HARRIS COUNTY REPUBLICAN PARTY; DALLAS COUNTY REPUBLICAN PARTY; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN NATIONAL COMMITTEE,

Movants-Appellants

LULAC TEXAS; VOTE LATINO; TEXAS ALLIANCE FOR RETIRED AMERICANS; TEXAS AFT;

Plaintiffs-Appellees

v.

JOSE ESPARZA, in his official capacity as the Texas Deputy Secretary of State; *et al.*,

Defendants

HARRIS COUNTY REPUBLICAN PARTY; DALLAS COUNTY REPUBLICAN PARTY; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN NATIONAL COMMITTEE,

Movants-Appellants

(*Continuation of caption*)

MI FAMILIA VOTA; MARLA LOPEZ; MARLON LOPEZ; PAUL RUTLEDGE

Plaintiffs-Appellees

v.

GREGORY ABBOTT, in his official capacity as Governor of Texas; *et al.*,

Defendants

HARRIS COUNTY REPUBLICAN PARTY; DALLAS COUNTY REPUBLICAN PARTY; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN NATIONAL COMMITTEE,

Movants-Appellants

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF TEXAS; *et al.*,

Defendant

HARRIS COUNTY REPUBLICAN PARTY; DALLAS COUNTY REPUBLICAN PARTY; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; REPUBLICAN NATIONAL COMMITTEE,

Movants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to oral argument if the Court believes it would be helpful to resolve this appeal.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-51145

LA UNION DEL PUEBLO ENTERO; *et al.*,

Plaintiffs-Appellees

v.

GREGORY W. ABBOTT, in his official capacity as Governor of Texas; *et al.*,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from the district court's denial of the motion to intervene as defendants filed by the Harris County Republican Party, Dallas County Republican Party, Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee (together, Committees). Plaintiffs have alleged violations of federal law and the United States Constitution, and the district court has jurisdiction under 28 U.S.C. 1331, 1345 and 52 U.S.C. 10308(f). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly denied the Committees' motion for intervention of right to defend Senate Bill 1, Texas's recently enacted voting law, both because the Committees state only generalized interests in the rules governing partisan elections and because the existing defendants will adequately defend any interests the Committees might have in whether S.B. 1 is lawful.

STATEMENT OF THE CASE

a. This appeal is from a district court action involving six consolidated challenges to S.B. 1, Texas's recently enacted voting law that restricts eligible voters' ability to cast a ballot and have that ballot counted, among other features. See *La Unión del Pueblo Entero, et al.* v. *Abbott, et al.*, No. 5:21-cv-844 (W.D. Tex.) (*LUPE*) (lead case); *OCA-Greater Houston, et al.* v. *Esparza, et al.*, No. 1:21-cv-780 (W.D. Tex.); *Houston Justice, et al.* v. *Abbott, et al.*, No. 5:21-cv-848 (W.D. Tex.); *LULAC Texas, et al.* v. *Esparza, et al.*, No. 1:21-cv-786 (W.D. Tex.); *Mi Familia Vota, et al.* v. *Abbott, et al.*, No. 5:21-cv-920 (W.D. Tex.); and *United States* v. *State of Texas*, No. 5:21-cv-1085 (W.D. Tex.). The named defendants in the litigation include the State of Texas, Texas Secretary of State John B. Scott, Texas Attorney General Warren K. Paxton, and Texas Governor Gregory W. Abbott (together, the state defendants), and various local election officials

(together, the local defendants). See ROA.4167, 4227-4229, 4295-4300, 4395-4398, 4504-4511.

The complaints collectively allege that S.B. 1 violates several federal laws and constitutional provisions: Sections 2 and 208 of the of the Voting Rights Act of 1965, 52 U.S.C. 10301 and 10508; Section 101 of the Civil Rights Act of 1964, 52 U.S.C. 10101; Title II of the Americans with Disabilities Act, 42 U.S.C. 12132; Section 504 of the Rehabilitation Act, 29 U.S.C. 794; and the First, Fourteenth and Fifteenth Amendments of the United States Constitution. ROA.4165-4184, 4218-4280, 4281-4357, 4366-4493, 4494-4588 (plaintiffs' amended complaints).[1] Plaintiffs have sought both declaratory and injunctive relief. ROA.4182, 4276-4278, 4354, 4489, 4584-4585.

The private plaintiffs filed their actions soon after S.B. 1 was passed in August 2021, and on September 30, 2021, the district court granted defendants' motion to consolidate all five cases. ROA.474-478. The United States filed its complaint on November 4, 2021 (ROA.5640-5657), and then successfully moved to consolidate its case with the *LUPE* action (ROA.5680-5683, 5685).

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[1] "ROA.___" refers to the electronic record on appeal. "Br. __" refers to pages of appellants' opening brief. "Doc. ___" refers to the docket entry number of filings in Consolidated Case No. 5:21-cv-844 (W.D. Tex.) that are not included in the ROA.

b. After the private cases were consolidated but before the United States filed its complaint, the Committees filed a motion to intervene in the litigation under Federal Rule of Civil Procedure 24.[2] ROA.846-860. The Committees argued generally that S.B. 1 "advances the right to vote, accommodates voters, and protects the integrity of Texas elections" (ROA.847) and stated that they sought to intervene in the case to "preserve the structure of competitive electoral environment and to ensure that Texas carries out free and fair elections" (ROA.849). As relevant here, the Committees argued that they satisfied the criteria for intervention of right under Rule 24(a) because: (1) they filed a timely motion; (2) as political entities, they have a unique and legally protectable interest in voting procedures and election-law litigation; (3) denial of intervention would hinder their ability to protect their interests, particularly in "winning elections"; and (4) the existing defendants would not protect the Committees' particular interests because government entities have a general interest in upholding the law that is balanced against other considerations such as cost and divisiveness. ROA.850-857.[3]

[2] The Public Interest Law Foundation, a private interest group, also filed an opposed motion to intervene (ROA.523-535), which the district court denied (ROA.4132-4137). The organization did not appeal.

[3] The Committees also argued below for permissive intervention under Rule 24(b) (ROA.849, 857-858) but have abandoned that argument on appeal.

All of the private plaintiffs opposed the motion.[4] The private plaintiffs made several arguments regarding the second and third criteria for mandatory intervention, including that the Committees cited vague concerns pertaining to political advantage, not clearly linked to the challenged law, and also that the Committees offered only speculation as to how an adverse ruling would impair their desire for partisan political success. See ROA.1567-1571, 1584-1587. As for the final factor, the private plaintiffs argued, among other things, that the state defendants are presumed to—and would—adequately represent the Committees' interests, both because the defendants are government entities charged with defending the law and because they share the same ultimate objective as the Committees: upholding S.B. 1. See ROA.1571-1576, 1587-1589, 1606-1610.

In reply, the Committees reiterated their interest in the rules governing partisan elections and the adverse impact that any changes to these rules might have on Republican candidates' success. ROA.1843-1846. They also continued to

[4] The private plaintiffs filed three separate briefs. ROA.1560-1580 (LULAC Texas); ROA.1581-1594 (Houston Justice); ROA.1602-1614 (LUPE). The Mi Familia Vota plaintiffs joined in the responses of the LULAC Texas and Houston Justice plaintiffs. ROA.1599-1601. The OCA-Greater Houston plaintiffs also joined in Houston Justice's response. ROA.1615-1618. The United States did not submit a response to the motion, which predated the filing of the United States' complaint and the case's consolidation with the private litigation. Because the Committees seek to defend S.B. 1 in its entirety—and because their intervention would substantially complicate the litigation without representing any new interest not shared with the state defendants—the United States files this brief as appellee in opposition to the Committees' intervention in the consolidated case.

assert that the existing defendants would not adequately represent their interests. ROA.1846-1849.[5]

c. At a November 16, 2021 status conference, the district court denied the Committees' intervention motion. ROA.4633-4683. The district court stated that it would permit the Committees to submit an amicus brief but found that the State would "ably" defend S.B. 1. ROA.4637.

In a subsequent written order (ROA.4138-4145), the court determined that the Committees timely moved to intervene but failed to meet the other three requirements for intervention of right. First, as to their interest in the subject of the litigation, the court explained that the Committees' "generalized interest in 'free and fair elections'" was "ideological" rather than "concrete, personalized, and legally protectable," and thus did not support intervention. ROA.4140 (quoting ROA.849 (Committees' Mot.); *Texas* v. *United States*, 805 F.3d 653, 657 (5th Cir. 2015)). The court further explained that the Committees did not show that this purported interest was "unique to them" rather than one "presumably shared by all

[5] As grounds for inadequacy of representation, the Committees asserted for the first time in reply that some of the local defendants admitted S.B. 1's illegality or otherwise appeared uncommitted to vigorously defending the law. ROA.1849. The Committees did not argue below, and do not argue on appeal, that the *state* defendants will not vigorously defend the law. Thus, the discussion here focuses on whether the state defendants will adequately represent the Committees' interests (as well as the Committees' further argument that if the state defendants were dismissed from the suit on certain jurisdictional or procedural grounds, only the local defendants would remain to defend their interests, see p. 27 n.7, *infra*).

Texans"—a basis on which other courts had denied intervention to partisan entities. ROA.4140-4141 (collecting cases). As for the Committees' interest in partisan success, the court found that the Committees failed to connect that aim to any outcome in "*these proceedings*." ROA.4141 (citing *Edwards* v. *City of Hous.*, 78 F.3d 983, 1004 (5th Cir. 1996) (en banc)).

The court next found that the Committees failed to explain how a court order enjoining S.B. 1's enforcement "would adversely impact the electoral prospects of Republican candidates." ROA.4141. The court reasoned that any political party might be affected by changes to the electoral system. ROA.4141. Yet, Rule 24(a) does not allow intervention simply based on an "interest in a particular area of law" or based on contingent or speculative concerns. ROA.4141-4142.

Finally, the court concluded that, even if the case's disposition might hinder the Committees' ability to protect their interests, they had not shown why the state defendants would fail to adequately represent whatever legally protectable interest the Committees might have. ROA.4142. The court recognized that although the burden to show inadequate representation is minimal, adequate representation nevertheless is presumed where the putative intervenor "has the same ultimate objective as the party to the suit." ROA.4142 (quoting *Bush* v. *Viterna*, 740 F.2d 350, 355 (5th Cir. 1984)). The court explained that "[t]he presumption is especially strong where the putative representative is a governmental body or

officer charged by law with representing the interests of the intervenor." ROA.4142 (citing *Texas*, 805 F.3d at 661; *Veasey* v. *Perry*, 577 F. App'x 261, 263 (5th Cir. 2014)). In such circumstances, overcoming this presumption requires showing "adversity of interest, collusion, or nonfeasance." ROA.4142 (quoting *Haspel & Davis Milling & Planting Co*. v. *Board of Levee Comm'rs,* 493 F.3d 570, 578-579 (5th Cir. 2007)). The court stated that the committees could not demonstrate adversity by pointing to the state defendants' "more extensive" interests. ROA.4142 (citation omitted). Nor was the Committees' particular interest in winning elections at issue in the case. ROA.4142-4143.

Although the district court denied their motion to intervene, it stated that the Committees "may file an amicus brief * * * should they wish to do so." ROA.4144.

d. The Committees filed a notice of appeal the same day the district court issued its written order denying their motion. ROA.4146.

Proceedings in the district court are accelerated. As relevant to this appeal, the district court entered a scheduling order requiring amended pleadings by December 1, 2021, and setting a trial date of July 5, 2022. ROA.4149-4152. All plaintiffs submitted amended complaints, which the state defendants again moved to dismiss on grounds including lack of standing, sovereign immunity, and failure

to state a claim upon which relief may be granted. See Docs. 145, 175, 176, 177, 182. The motions are pending briefing in the district court.

SUMMARY OF ARGUMENT

The district court correctly concluded that the Committees did not meet three of four requirements for intervention of right under Rule 24(a)(2). Because the Committees must satisfy all four requirements to intervene in this case, their failure to satisfy any one of those three requirements dooms their appeal.

Although the Committees filed a timely motion to intervene, they did not establish a direct, substantial, and legally protectable interest in plaintiffs' challenge to S.B. 1. At most, they articulated a generalized concern for knowing and operating within the rules that govern partisan elections. They cite no authority holding that such a desire is sufficient for intervention of right. The Committees also failed to show that the outcome of these proceedings "may as a practical matter impair or impede" their "ability to protect [their] interest[s]." Fed. R. Civ. P. 24(a)(2).

Moreover, the Committees cannot show that the state defendants will fail to adequately represent their purported interests. As governmental entities, the state defendants are presumed to mount a good-faith defense of Texas's laws and to adequately represent the interests of Texas's citizens. Their vigorous defense to this point in the litigation shows that that presumption is sound. In addition, the

Committees and state defendants share the same ultimate objective: ensuring S.B. 1 is upheld. Where a would-be intervenor shares the same objective as a party, adequate representation by the existing party is presumed. The Committees have not offered the types of facts that this Court has required to overcome the especially strong presumptions applicable in this case.

Finally, the district court already has authorized the Committees to participate in the consolidated case as amicus curiae. This will provide them a sufficient opportunity to share with the district court whatever unique perspective they might have on plaintiffs' claims without unnecessarily complicating the proceedings by adding another set of defendants.

ARGUMENT

THE DISTRICT COURT CORRECTLY DENIED THE COMMITTEES' MOTION TO INTERVENE

A. Standard Of Review

This Court reviews *de novo* a district court's order denying intervention of right. *Texas* v. *United States*, 805 F.3d 653, 656 (5th Cir. 2015) (citing *Edwards* v. *City of Hous.*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc)). The movant bears the burden of establishing the right to intervene under Rule 24, which this Court construes liberally. *Id.* at 656 (quoting *Brumfield* v. *Dodd*, 749 F.3d 339, 341 (5th Cir. 2014)).

B. The District Court Correctly Concluded That The Committees Did Not Satisfy The Criteria For Intervention Of Right

Absent an unconditional right to intervene by federal statute, a district court can grant a motion to intervene only where the movant satisfies four requirements: (1) the movant files a timely motion; (2) the movant has an interest relating to the property or transaction that is the subject of the underlying action; (3) the action's disposition may, as a practical matter, impair or impede the movant's ability to protect its interest; and (4) the existing parties do not adequately represent the movant's interest. See Fed. R. Civ. P. 24(a)(2); *Texas*, 805 F.3d at 657 (quoting *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) (*NOPSI*) (en banc), cert. denied, 469 U.S. 1019 (1984)). "Failure to satisfy any one requirement precludes intervention of right." *Edwards*, 78 F.3d at 999.

Notably, a would-be intervenor who "presents no new questions" usually can contribute "most effectively and always most expeditiously by a brief [as] amicus curiae and not by intervention." *South Carolina* v. *North Carolina*, 558 U.S. 256, 288 (2010) (Roberts, C.J., concurring in judgment in part and dissenting in part) (citation omitted).

1. The Committees Fail To Establish An Interest In These Proceedings That Is Direct, Substantial, And Legally Protectable

a. A movant must establish a "direct, substantial, legally protectable interest in the proceedings" for intervention of right under Rule 24(a)(2). *Texas*, 805 F.3d

at 657 (quoting *Edwards*, 78 F.3d at 1004). The "touchstone" of this inquiry is whether the asserted interest is "legally protectable." *Wal-Mart Stores, Inc.* v. *Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 566 (5th Cir. 2016). The interest must "be one that the substantive law recognizes as belonging to or being owned by the applicant." *Edwards*, 78 F.3d at 1004.

Whether a would-be intervenor has a sufficient interest to support intervention "turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out in a certain way." *Texas*, 805 F.3d at 657. A party lacks the requisite interest when it seeks to intervene "solely for ideological, economic, or precedential reasons," or because it "merely *prefers* one outcome to the other." *Ibid.* Only interests that are "concrete, personalized, and legally protectable" are sufficient to support intervention of right. *Id.* at 658.

Additionally, this Court has explained that the movant should be "the real party in interest." *Ross* v. *Marshall*, 426 F.3d 745, 757 & n.46 (5th Cir. 2005), cert. denied, 549 U.S. 1166 (2007); see also *NOPSI*, 732 F.2d at 464. When seeking to participate as a defendant-intervenor, this means that "the suit was intended to have a direct impact on the intervenor." *Ross*, 426 F.3d at 757 n.46 (internal quotation marks omitted).

b. Here, the Committees can show no direct, substantial, and legally protectable interest in this litigation, which concerns whether S.B. 1 violates statutory and constitutional rights and is unlawfully discriminatory. Rather, before the district court, the Committees asserted only a generalized interest in the rules governing partisan elections. In their own words, their interest is in "the rules under which the Committees" and "their voters, candidates, and volunteers" may "exercise their constitutional rights to vote and to participate in elections in Texas." Br. 20-21; see also Br. 2, 15; ROA.847. The Committees' "participation" includes expending resources on voter education, voter registration, and voter turnout. Br. 21. They aver an interest in leveraging Texas's voting rules for the purpose of "advancing the overall electoral prospects of Republican candidates in Texas, and in winning elections in the state." Br. 21.

The Committees claim to support S.B. 1 because it ostensibly "advances the right to vote, accommodates voters, and protects the integrity of Texas elections" (Br. 2, 10; ROA.847; see also Br. 41), but they identify no nexus between S.B. 1, their claimed interests in the electoral process, and plaintiffs' challenges to the law. Nor do they point to any specific provision of S.B. 1 that promotes or supports their purported interest in leveraging Texas's voting rules to advance their candidates' success. This is unsurprising, as the Committees do not directly represent or advocate for voters or voting rights; nor do they claim to have played a

specific role in S.B. 1's passage or to carry any legal obligation to defend the law. Rather, their brief merely confirms that they are partisan entities that support candidates for office and encourage voters to elect those candidates. Br. 3-7. See Br. 2, 15, 20-21. In no way are the Committees the "real party in interest" in plaintiffs' challenges to S.B. 1, nor are the challenges to S.B. 1 "intended to have a direct impact" on the Committees. *Ross*, 426 F.3d at 757 & n.46 (internal quotation marks omitted).

The Committees further assert (Br. 21-22) that they are entitled to intervene based on an interest in the "competitive environment" of partisan elections in Texas and "adherence" to the "challenged rules." They rely on *Shays* v. *FEC*, 414 F.3d 76 (D.C. Cir. 2005), but their reliance is misplaced. There, Members of Congress challenged FEC interpretive rules that they claimed effectively undid campaign finance laws that otherwise applied to elections in which they were candidates. *Id.* at 82. Drawing on case law involving procedural rights and competitor standing, the D.C. Circuit held that the Members had Article III standing because "when regulations illegally structure a competitive environment * * * parties defending concrete interests (*e.g.*, retention of elected office) in that environment suffer legal harm." *Id.* at 87. This case differs from *Shays* in at least two respects: (1) while the Committees prefer the legal regime of S.B. 1 to other voting laws, they do not assert that invalidating S.B. 1 will render the playing field

disadvantageous to them, much less "illegal" (they do not allege, for example, that they were suffering any cognizable injury from Texas's electoral regime prior to the enactment of S.B.1); and (2) while incumbents like the *Shays* plaintiffs may have a concrete interest in elected office, it does not follow that the Committees have a legally protectable interest in the offices of the candidates they support or in the competitive environment of election campaigns.

The Committees also rely on unpublished district court decisions to argue that federal courts have granted intervention of right to political entities like theirs in similar cases (Br. 23-24), but these decisions only highlight the deficiency of the Committees' articulated interests. In those cases, district courts allowed political party entities to intervene of right where they sought to defend state laws for mail-in voting that they claimed, in part, would enable their voters to vote safely during the COVID-19 pandemic. See *Issa* v. *Newsom*, No. 2:20-cv-01044, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020); *Paher* v. *Cegavske*, No. 3:20-cv-00243, 2020 WL 2042365, at *2-3 (D. Nev. Apr. 28, 2020).[6] Here, by contrast, the Committees assert only a general interest in the "competitive environment" for

[6] The Committees also cite an unpublished summary order in which a three-judge court allowed the Texas Democratic Party to intervene of right in a redistricting suit. Order, *Perez* v. *Perry*, No. 11-cv-00360 (W.D. Tex. July 13, 2011), Doc. 31. The order indicates only that the intervenors had met Rule 24(a)(2)'s requirements and that the motion was granted as unopposed. *Ibid.*

voting and electoral outcomes, not enforcement of a particular provision of S.B. 1 that will help or hurt their interests.

The Committees' attempts to invoke this Court's decisions in *Brumfield* and *Texas* (Br. 19-20, 24) also are unavailing. Those cases involved intervenors with concrete, personalized interests in the subject of the litigation—indeed, the intervenors were the "intended beneficiaries" of the challenged programs. And those intervenors stood to gain or lose a particular right or benefit in the proceedings. *Brumfield*, 749 F.3d at 344 (parents of children eligible for school vouchers were the "primary intended beneficiaries" of the challenged program); *Texas*, 805 F.3d at 660 (deferred action recipients were the "intended beneficiaries of the challenged federal policy" and had a "[legally protectable,] concrete, personalized interest" in "avoiding deportation"). Similarly, the intervenors in *Edwards* and *Black Fire Fighters Association of Dallas* were employees who stood to gain or lose access to a specific benefit—promotion opportunities—that was at issue in discrimination actions, and thus they had sufficient interests to participate. *Edwards*, 78 F.3d at 1004; *Black Fire Fighters Ass'n* v. *City of Dall.*, 19 F.3d 992, 994 (5th Cir. 1994).

The other Fifth Circuit cases the Committees cite involved would-be intervenors with similarly personalized and concrete interests in the disposition of the litigation. In *League of United Latin American Citizens, District 19* v. *City of*

Boerne, a voter who sought to intervene in a Voting Rights Act challenge had a sufficiently particular and concrete interest because he sought "to protect his right to vote in elections to choose all five city council members, a right which the [consent] decree abrogates." 659 F.3d 421, 434 (5th Cir. 2011). And in *American Traffic Solutions*, the intervenors had spent hundreds of thousands of dollars of their own money to secure the passage of the law being challenged, an outcome they had an interest in "cementing." *City of Hous.* v. *American Traffic Sols., Inc.*, 668 F.3d 291, 293 (5th Cir. 2012). In none of these cases did this Court endorse the mere value of knowing the rules or preserving the legal landscape as a basis for intervention of right.

c. In an attempt to show that they have a direct, substantial, legally protectable interest in the litigation, the Committees for the first time on appeal highlight a "second" purported interest: S.B. 1's "regulation" of the "conduct" of the Committees' volunteer poll-watchers. Br. 25-26, 31-32 (quoting *Texas*, 805 F.3d at 658). But they never presented this interest to the district court. Thus, this Court should disregard this argument because, as a "general principle," the Court "refuse[s] to consider issues not raised below." *Conley* v. *Board of Trs.*, 707 F.2d 175, 178 (5th Cir. 1983); see also, *e.g.*, *Richter* v. *Carnival Corp.*, 837 F. App'x 260, 263 (5th Cir. 2020).

Even if the Court were to consider this belatedly asserted interest, it should affirm the denial of intervention. The Committees' argument draws from language in *Texas* regarding "regulat[ion] [of] conduct" as a basis for intervention. Br. 25 (quoting *Texas*, 805 F.3d at 658). But that language does not support the proposition that merely being subject to regulation under a challenged law confers an interest sufficient to justify intervention of right, as the Committees imply. Quite the opposite: the cited portion of the *Texas* decision explains when a stated interest is *deficient* and cannot support intervention—when it is ideological in nature and the suit does not "in any respect" involve "regulation" of the putative intervenors' "conduct." *Texas*, 805 F.3d at 658 (citation omitted). Indeed, construing *Texas* to hold that operating under a challenged law confers an interest sufficient to justify intervention of right might permit *any* entity whose conduct is regulated by law to intervene in *any* challenge to that law.

Because the Committees fail to establish that they have any "direct, substantial, legally protectable interest" in the proceedings below, the district court correctly denied intervention of right.

2. The Disposition Of This Litigation Will Not Impair Or Impede The Committees' Ability To Protect The Interests They Assert, Which Are Generalized Interests In The Rules Governing Elections

Even if the Committees could show a direct, substantial, and legally protectable interest in the subject of the underlying action, they cannot establish the

second criterion for mandatory intervention: that the litigation below "may as a practical matter impair or impede" their ability to protect that interest. Fed. R. Civ. P. 24(a)(2). In fact, the Committees' brief sheds no light on how the outcome of this case might impair or impede their ability to support candidates for office in Texas.

This Court has explained that a would-be intervenor must show that the litigation's outcome may impair the intervenor's ability to protect its interests as a "practical" matter, not merely as a "theoretical" one. *Brumfield*, 749 F.3d at 344 (citation omitted). But the Committees identify only theoretical impairments to their ability to protect their purported interests based on the outcome of this case. Although the Committees might favor S.B. 1 as an election "integrity" measure (see Br. 2, 10; ROA.847; see also Br. 41), they have not shown that a decision enjoining the law will impair or impede their stated interests in "participating" in Texas's contests to elect Republican candidates or maintaining the "competitive environment" for doing so. See Br. 28-29.

Although a district court decision enjoining S.B. 1 might change how the Committees carry out their mission, the same is true for any political entity or public interest organization that must alter its approach in light of new judicial decisions or changes to governing law. Unsurprisingly, having successfully supported Republican candidates before S.B. 1's enactment, the Committees fail to

explain how their interest in supporting such candidates will be impaired as a practical matter if S.B. 1 is enjoined, and Texas returns to its preexisting electoral regime. At most, they may need to train volunteers and educate voters—many of whom surely are aware of both S.B. 1 and plaintiffs' challenge to the law—on the applicable rules. See Br. 28. But training volunteers and educating voters will be equally necessary whether the newly adopted rules contained in S.B. 1 are sustained or they are struck down in this lawsuit.

The Committees also raise fears of an "eleventh-hour order changing rules on the eve of an election" that might sow voter confusion and loss of confidence, which in turn might reduce turnout for the candidates the Committees support. Br. 31. But the Committees do not explain how this attenuated chain of events would flow from being denied participation *as a party* in this action. See Br. 31. Nor do they explain why this detriment might flow to them but not to their competitors, rendering suspect their claim of disadvantage. See Br. 31. Nor, as we explain below, do they offer any argument as to why the state defendants will not raise such arguments, should the plaintiffs establish liability.

Because the Committees failed to establish that they have any legally cognizable interest in the district court proceedings that would be impaired absent intervention, the district court correctly denied their motion to intervene.

3. The State Defendants Adequately Represent The Committees' Claimed Interests In The Litigation

Even if the Committees had some legally cognizable interest in these proceedings—which they do not—their intervention attempt would founder on the fact that, as the district court properly found (ROA.4142-4143), the Committees failed entirely to meet their burden of showing that the state defendants would fail to adequately represent those interests.

a. A movant seeking to intervene of right must establish that there is a "serious possibility" an existing party's representation of its interest "may be" inadequate. *Texas*, 805 F.3d at 661 (quoting 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (3d ed. 2007); *Trbovich* v. *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). This requirement "cannot be treated as so minimal as to write the requirement completely out of the rule." *Ibid.* (quoting *Edwards*, 78 F.3d at 1005). It "must have some teeth." *Veasey* v. *Perry*, 577 F. App'x 261, 263 (5th Cir. 2014); see *Brumfield*, 749 F.3d at 345 (same).

This Court presumes adequate representation in two scenarios, both of which apply here: first, where the existing representative party is a governmental entity or a legal representative of the would-be intervenor; and, second, where the existing representative party and would-be intervenor share the same objective. See *Texas*, 805 F.3d at 661 (quoting *Edwards*, 78 F.3d at 1005); *Brumfield*, 749

F.3d at 345 (similar). The movant must make a similar showing to rebut either presumption. *Texas*, 805 F.3d at 662 (citing *Edwards*, 78 F.3d at 1005). To rebut the first presumption, the aspiring intervenor must show that its interest "is in fact different from that of the governmental entity and that the interests will not be represented by it." *Ibid.* (citation and brackets omitted). To overcome the second presumption, the movant must show "adversity of interest, collusion, or nonfeasance on the part of the existing party." *Id.* at 661-662 (citation omitted). This Court has explained that to show adversity of interest, a putative intervenor must establish a divergence of interest that is "germane to the case." *Id.* at 662.

The Committees have failed to rebut either presumption.

b. i. The first presumption applies here because the Committees seek to intervene as defendants alongside a "*governmental body* or officer charged by law with representing the interests of the intervenor." *Texas*, 805 F.3d at 661 (emphasis added; brackets omitted) (quoting *Edwards*, 78 F.3d at 1005). The Committees therefore must satisfy a "heightened showing" that their "interest is in fact different from that of the governmental entity and that the interest will not be represented by it." *Edwards*, 78 F.3d at 1005 (brackets and citation omitted). As this Court long ago explained, "a much stronger showing of inadequacy is required" in such circumstances. *Hopwood* v. *Texas*, 21 F.3d 603, 605 (5th Cir. 1994). This heightened showing applies because "the public entity must normally

be presumed to represent the interests of its citizens and to mount a good faith defense of its laws." *American Traffic Sols., Inc.*, 668 F.3d at 294; see also *Cotter* v. *Massachusetts Ass'n of Minority Law Enf't Officers*, 219 F.3d 31, 35 (1st Cir. 2000) (explaining that when "the existing defendant is a governmental entity, this court and a number of others start with a rebuttable presumption that the government will defend adequately its action"), cert. denied, 531 U.S. 1072 (2001).

Both below and on appeal, the Committees improperly dismiss the first presumption as inapplicable because the existing defendants are not their "legal representative[s]." ROA.856, 1846; Br. 34 (quoting *Brumfield*, 749 F.3d at 345). They fail to engage at all with this Court's precedent stating they carry a heightened burden when a governmental entity is the party defending the same law they seek to defend. Although *Brumfield*, on which they rely, did not expressly discuss this aspect of the first presumption, this Court has invoked it numerous times, both before and after *Brumfield* was decided, including when sitting en banc in *Edwards*. See 78 F.3d at 1005. The Committees offer no reason why the first presumption does not pertain here, where the State of Texas and numerous state officials named in their official capacity are included as defendants in a challenge to a law the Committees also seek to uphold, nor do they attempt to make any sort of "heightened showing" of inadequacy.

Moreover, there is nothing to suggest the state defendants will not vigorously defend S.B. 1 and thus adequately represent any legally protectable interest the Committees may have. For this reason, the Committees apparently prefer to ignore this Court's repeated invocation of the first presumption rather than attempt either to explain why it does not apply or to proffer facts to rebut it. Indeed, as discussed in greater detail below, they cannot rebut it.

ii. The second presumption of adequate representation also applies in this case, because the Committees have "the same ultimate objective as a party to the lawsuit," *i.e.*, the state defendants. *Texas*, 805 F.3d at 661 (quoting *Edwards*, 78 F.3d at 1005). The Committees and state defendants both seek the same end: shielding S.B. 1 from plaintiffs' challenges and ensuring it remains valid Texas law. Indeed, they assert many of the same grounds in its defense. Compare, *e.g.*, Br. 2 (discussing the Committees' objective of upholding S.B. 1), and ROA.861-902, 903-946, 947-989, 990-1011, 1012-1047 (Committees' proposed answers to the complaints asserting defenses including lack of standing, lack of subject-matter jurisdiction, and failure to state a claim upon which relief may be granted), with Docs. 145, 175, 176, 177, 182 (state defendants' motions to dismiss plaintiffs' amended complaints on grounds including lack of standing, lack of subject-matter jurisdiction, and failure to state a claim upon which relief may be granted). The Committees admit as much, asserting that the state defendants "generally share the

Republican Committees' objective of upholding S.B. 1," despite going on to speculate that their interests might conceivably be misaligned in some respects. Br. 37 (internal quotation marks omitted). Thus, the second presumption of adequate representation also applies.

The Committees rely entirely on adversity of interest (rather than collusion or nonfeasance) in an attempt to rebut this presumption of adequate representation, but they offer little more than theoretical and insubstantial arguments about how their interests diverge from those of the state defendants. The Committees attempt to rely on aspects of this Court's decision in *Brumfield* to argue that the second presumption is overcome where a governmental entity's interest in representing its citizenry does not "align precisely" with the more particular interests of the would-be intervenor, particularly because the government's interests are "more extensive." Br. 35, 37-38 (citing *Brumfield*, 749 F.3d at 345). But *Brumfield* did not articulate a general rule that a government entity's "more extensive" interests alone overcome the presumption; rather, this Court's decision was driven by the specific facts of that case and the competing interests of the governmental defendant as reflected in litigation conduct.

In *Brumfield*, unlike here, the State of Louisiana had specific interests that diverged from the intervenor-parents' limited interest in protecting their access to vouchers: maintaining the challenged scholarship program as well as the state's

"relationship with the federal government and with the courts that have continuing desegregation jurisdiction." *Brumfield*, 749 F.3d at 346. The legal positions of the state and the intervenor-parents also differed, because the state conceded in the district court that its voucher program was subject to the long-standing desegregation orders and decrees that the federal government sought to enforce, while the parents challenged that notion. *Ibid.* Thus, this Court concluded that under the specific facts of the case, "[t]he lack of unity in all objectives, combined with real and legitimate additional or contrary arguments, [sufficed] to demonstrate that the representation may be inadequate." *Ibid.* (emphasis omitted).

Here, however, the Committees identify no adversity of interest and, despite their attempt to do so (Br. 34, 37-38), can in no way analogize the parties' roles and interests in this case to those of the parties in *Brumfield*. Nor do the Committees specify any differences of legal position between themselves and the state defendants as to the subject matter of this litigation. See Br. 38. The Committees speculate (Br. 36-38) (citations omitted) about a wide range of differing incentives that the state defendants may or may not possess—*e.g.*, a lack of interest in "electing particular candidates," their need to "consider a broad spectrum of views," "the expense of defending" S.B. 1, "social and political divisiveness," preservation of executive authority and sovereign immunity—but

they offer nothing to suggest an actual difference of interests or legal position, as was the case in *Brumfield*.[7]

This Court rejected similar arguments to the ones the Committees make here in *Veasey*, where a private interest group, True the Vote, sought to intervene in the United States' challenge to a Texas photo-identification requirement for in-person voting that the group had supported and sponsored. *Veasey*, 577 F. App'x at 262. Relying on *Brumfield*, True the Vote argued that Texas would not adequately

[7] The Committees argue (Br. 38-39) that the state defendants have taken a "significantly different" position from the Committees by moving to dismiss on the grounds that the state defendants lack enforcement authority over S.B. 1 (or that plaintiffs' allegations in this regard are deficient). The Committees assert that victory on this point could mean that the state defendants would be dismissed from the litigation and only the local defendants—some of whom challenge or decline to defend S.B. 1—would remain. Br. 38-39. The Committees do not argue that they disagree with the state defendants' substantive position, only that their interests in the litigation would not be represented adequately if only the local defendants remained in the case. Br. 39-40.

The Committees cite no authority supporting the proposition that they should be permitted to intervene *now* on the mere chance that the state defendants' representation might *later* become inadequate based on the outcome of dubious arguments. The appropriate recourse is not to permit intervention at this time, but instead for the Committees to renew their motion under changed circumstances should they come to pass. As this Court advised in *Sierra Club*, "[c]ourts should discourage premature intervention that wastes judicial resources." *Sierra Club* v. *Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994) (permitting intervention of right several years after case's inception once it became clear that the intervenor's interests no longer would be represented by the original parties); see also *Ross*, 426 F.3d at 754-755 (post-judgment intervention for purposes of appeal was proper where intervenor's interests had been represented adequately prior to judgment) (citing *Sierra Club*, 18 F.3d at 1205-1206; *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977)).

represent its interests because of its relationship with the federal government and courts and further claimed that, as defendant-intervenor, it would offer *specific* evidence and arguments regarding intentional discrimination and remedies that Texas, in its view, would be disinclined to present. *Id.* at 263.

In affirming the district court's decision to deny True the Vote intervention of right, this Court stated that "[i]n all of our cases permitting intervention, the incongruity of interests was far more pronounced" than what True the Vote presented. *Veasey*, 577 F. App'x at 262-263 (pointing to *American Traffic Sols.*, 668 F.3d at 294; *Sierra Club* v. *Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994); *Edwards*, 78 F.3d at 1005). The Court then explained that True the Vote's reliance on *Brumfield* also was misplaced, highlighting, among other considerations, the unique context of "continuing jurisdiction of a desegregation court" that shaped the state's incentives in that case—incentives that were not similarly present in voting-rights litigation. *Id.* at 263. The Court also rejected True the Vote's argument that Texas would not put forth the evidence and specific legal positions it sought to assert as intervenor in defense of the challenged law, finding these concerns contradicted by Texas's conduct in other litigation and its defense of the challenged law thus far. *Ibid.*

This Court's observations and conclusions in *Veasey* apply just as strongly here. The Committees have done nothing to explain why they are less likely than

True the Vote was to have their interests represented adequately by Texas and the state officials who are already defendants in this suit. And they have done nothing to explain why they more closely resemble the parents in *Brumfield* than the putative intervenor in *Veasey*. Thus this Court should reach the same conclusion as it did in *Veasey*: the would-be intervenor's "ultimate objective is the same" and the Committees have "not shown a sufficient disalignment of interest to warrant intervention." *Veasey*, 577 F. App'x at 263. And just as in *Veasey*, the Committees here "will be able to assist the district court and promote [their] interests" as amicus curiae. *Ibid.*; see also *South Carolina*, 558 U.S. at 288 (noting that where a movant "presents no new questions," it usually can contribute "most effectively and always most expeditiously by a brief [as] amicus curiae and not by intervention") (Roberts, C.J., concurring in judgment in part and dissenting in part) (citation omitted); *Hopwood*, 21 F.3d at 604-606 (noting that Black student organizations might assist in defense of state higher education affirmative action program through their authorized role as amicus curiae despite failing to meet the requirements for intervention).

C. The Committees Also Fail In Their Final Attempts At Reversal

The Committees conclude their brief (Br. 40-45) with a list of what they call the district court's "six main assertions," which, according to the Committees, "contravene[] this Court's controlling precedents" and are "tainted by legal error."

The Committees are incorrect on all accounts, and this Court easily can dispose of their arguments—if it even feels the need to reach them, given the Committees' failure to satisfy three of the four criteria for intervention of right.

The first and fifth purported reversible errors concern statements the district court made during the November 16, 2021 status conference. Br. 41 (claiming that the district court incorrectly "suggested" that "standing" was a prerequisite for intervention under Rule 24) (quoting ROA.4636), Br. 44 (referencing the district court's statement that *Texas* is "ably represented" by its Attorney General's Office) (citation omitted). Neither statement appears in the district court's written order or provides the basis for the district court's denial of intervention of right. As explained previously, the district court correctly applied this Court's precedents in evaluating whether the Committees satisfied Rule 24(a)(2)'s requirements. The Committees' assertion of error, therefore, is easily dismissed.

The second claimed error—that the district court construed the Committees' interest as "ideological" because it ignored their assertion of "unique and specific interests" in participating in and winning elections (Br. 41) (emphasis and citation omitted)—also falls flat. The district court did discuss the Committees' ideological interest in "free and fair elections" (ROA.4140), presumably because the Committees themselves asserted this below as a primary basis for intervention (ROA.847, 849, 850). But the court also considered the Committees' interests in

participating in and winning elections and found them to be deficient based on this Court's en banc decision in *Edwards*. ROA.4141. This was not error, either.

Seemingly in conflict with its argument about the second asserted error, the Committees assert (Br. 42) as a third error that the district court *did* acknowledge that the Committees' interests in electing particular candidates might be "direct, substantial, [and] legally protectable," but that the court overlooked their explanation of how the proceedings affected these interests. Not so. The district court simply found their explanation deficient: the Committees did not "explain how a court order enjoining SB 1's enforcement would adversely impact the electoral prospects of Republican candidates" and instead focused only on an interest in the "competitive environment" that was shared by "any political entity." ROA.4141-4142 (citation omitted). As already discussed, the district court was correct to hold that the Committees' claimed interest in the rules governing partisan elections was not sufficient to support intervention of right.

The fourth error the Committees assert is that the district court was incorrect to state that their position, "[t]aken to its logical conclusion," would permit "any political entity" to intervene in election-law cases. ROA.4141; Br. 42-43 (quoting ROA.4141). The Committees argue that this is not so because any intervenor of right must satisfy Rule 24(a)'s requirements, which many political entities cannot do unless they support specific candidates or engage in activities like poll

watching. Br. 42-43. But context makes clear the district court's overarching point that the Committees' asserted interests are general and widely-shared rather than concrete, personalized, and legally protectable. ROA.4141.

Finally, the Committees argue (Br. 44-45) that the district court erred in holding that they failed to show the state defendants would not adequately represent their interests. Their first point in support of this argument—that the district court failed to account for how this litigation impacts their interest in electing particular candidates—fails for the reasons discussed before. The Committees also argue that the district court applied an incorrect legal standard regarding adequacy of representation, requiring the Committees to show that the state defendants' representation "would" (rather than "may") be inadequate and that the parties "are" adverse. Br. 44-45 (citation omitted). But the district court appears to have relied primarily on the very same precedent that the Committees invoke—this Court's decision in *Brumfield*—and correctly applied that authority to deny intervention of right in this case. ROA.4142. Regardless, the Committees' failure to satisfy at least one, if not two, of Rule 24(a)(2)'s other requirements renders any supposed legal error harmless.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of intervention of right.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 19, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katherine E. Lamm
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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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Date: January 19, 2022