UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant.

No. 1:21-cv-00929

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DEFENDANT'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Whether the Detroit/Downriver Chapter of the A. Philip Randolph Institute, the Michigan Alliance for Retired Americans, and Rise Inc.'s motion to intervene as defendants should be denied for failure to meet the requirements for intervention?

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STATEMENT OF FACTS

Plaintiff Public Interest Legal Foundation (PILF) is "a non-partisan, non-profit, public interest organization" that "seeks to promote the integrity of elections in Michigan and other jurisdictions nationwide through research, education, remedial programs, and litigation." (ECF No. 1, Comp., PageID.2, ¶ 3.) PILF "communicates with election officials about problems or defects found in list maintenance practices, and about ways to improve those practices." (*Id.*)

Defendant Secretary of State Jocelyn Benson is Michigan's chief elections officer, Mich. Comp. Laws § 168.21, and in that capacity is responsible for coordinating the list maintenance requirements set forth in the National Voter Registration Act (NVRA). Mich. Comp. Laws § 168.509n.

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As described in Secretary Benson's partial motion to dismiss, from September 18, 2020 through January 13, 2021, PILF engaged in a series of communications with Secretary Benson and/or her staff in the Bureau of Elections expressing its concern that Michigan's list maintenance program for removing deceased voters from the voter roll was unreasonable under the NVRA. (ECF No. 11, Def's MTD Brf, PageID.105-108.) PILF believed that somewhere between 25,000 and 34,000 deceased voters remained on the voter rolls. (*Id.*) PILF also requested to inspect records relating to the state's removal program for deceased voters. (*Id.*)

The parties did not resolve these issues and about 10 months later, PILF filed the instant complaint against Secretary Benson. (ECF No. 1.) In Count I of the complaint, PILF alleges that Secretary Benson has violated the NVRA by failing to implement a reasonable program to remove deceased voters from Michigan's voter

roll, the qualified voter file. (*Id.*, PageID.17, ¶¶ 62-67.) In Count II, PILF alleges that the Secretary has violated the NVRA by failing to accommodate PILF's request to inspect list maintenance records. (*Id.*, PageID.18-19, ¶¶ 68-73.) For relief, PILF seeks (1) a declaration that Defendant has violated the NVRA, (2) an order requiring Defendant to investigate the names of alleged deceased registrants as provided by PILF, (3) an order permitting inspection of records, (4) an order requiring the Secretary to implement a reasonable and effective program of list maintenance, and (5) an order requiring the Secretary to "cross-reference the names of new registrants against the SSDI." (*Id.*, PageID.19-20.)

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On December 13, 2021, Secretary Benson filed a partial motion to dismiss seeking to dismiss Count I of the complaint on the basis that PILF lacks standing to bring this claim and even if it has standing, PILF has failed to state a claim. (ECF No. 11, Def's MTD Brf, PageID.110-121.) Secretary Benson did not move to dismiss Count II related to the request for inspection. PILF responded to the partial motion on January 19, 2022 (ECF No. 16, Plf's Resp, PageID.164), and Defendant filed a reply on February 2, 2022 (ECF No. 26, Corr. Reply, PageID.278), thereby concluding briefing on the motion.

On January 25, 2022, proposed intervenors Detroit/Downriver Chapter of the A. Philip Randolph Institute (APRI), the Michigan Alliance for Retired Americans (MARA), and Rise Inc. (Rise) filed their motion to intervene in this matter. (ECF No. 18, Mtn, PageID.190.) For the reasons below, Secretary Benson opposes the motion to intervene.

ARGUMENT

I. The proposed intervenors fail to meet the requirements for intervention as of right or for permissive intervention.

The proposed intervenors identify themselves as organizations involved in voting rights issues related to their various constituencies, including persons of color, students, the elderly, and disabled. (ECF No. 18, Mtn. & Brf., PageID.199-201.) They argue that they are entitled to intervention as of right, or to at least permissive intervention under Fed. R. Civ. P. 24. In essence, proposed intervenors argue that they must be allowed to intervene to present the "perspectives" of "voters who are at risk of being improperly removed from the voting rolls," particularly in light of PILF's requested relief that the Secretary "'cross-reference the names of new registrants against the SSDI.'" (ECF No. 18, PageID.202-203.) They argue that if their motion is denied "the litigation will proceed without any litigant focused specifically on easing barriers to registration and voting[.]" (*Id.*, PageID.203.) And that they would then have to expend funds ensuring that properly registered voters were not wrongly removed from the voter roll. (*Id.*, PageID.197-198.)

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A. The standards for granting intervention as of right are not met.

With respect to intervention as of right under Fed. R. Civ. P. 24(a)(2), the Sixth Circuit has interpreted the Rule as establishing four requirements that the proposed intervenor must meet: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not

adequately represent the proposed intervenor's interest. *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005). The movant "must prove each of the four factors; failure to meet one of the criteria will require that the motion to intervene be denied." *Id.* (quoting *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989)).

1. Timing

When considering whether a motion to intervene is timely, the Court should consider all the circumstances, including: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Bay Mills Indian Community v. Snyder*, 720 Fed. App'x 754, 758 (6th Cir. 2018) (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)).

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Proposed intervenors note that this case is still in the early stages as the Court has not yet held a scheduling conference nor ruled on any dispositive motion. While that is true, Secretary Benson had already filed her partial motion to dismiss and PILF had responded before the intervenors signaled their interest in moving to intervene. Briefing on the partial motion is now complete, and if the Secretary prevails in obtaining dismissal of Count I, there will be nothing left for intervenors to intervene in, since Count II only involves PILF's request to inspect records—a subject in which the intervenors have not stated any interest at all. Secretary

Benson desires to have her pending motion heard and resolved as efficiently as possible with no unnecessary delay. Under these circumstances, the proposed intervenors' motion to intervene should be heard and resolved only after the motion to dismiss is resolved, should it be necessary to do so.

2. Substantial legal interest

Although the Sixth Circuit " 'subscribe[s] to a rather expansive notion of the interest sufficient to invoke intervention of right,' " its case law requires that the proposed intervenor possess "a significant legal interest in the subject matter of the litigation" is not without meaning. *Reliastar Life Ins. Co. v. MKP Investments*, 565 Fed. App'x 369, 371-372 (6th Cir. 2014) (citing *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999), *Jansen*, 904 F.2d 336). To satisfy this requirement, the proposed intervenor "must have a direct and substantial interest in the litigation," "such that it is a real party in interest in the transaction which is the subject of the proceeding." *Id.* at 372 (quoting *Grubbs*, 870 F.2d at 346; *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005)).

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Intervenors argue that they should be allowed to intervene to protect their voter members' interest in not being wrongfully purged from Michigan's voter rolls. But even if that is a cognizable interest, it cannot be said that the intervenors' interest is substantial here. PILF is alleging that approximately 25,000 voters out of 8 million voters in the qualified voter file are potentially deceased and should be investigated for removal. At this time, there is no reason to believe that any of the organizations' members or constituencies they represent are included in that

number. For example, it is certainly possible that none of the 25,000 voters is a student represented by Rise Inc.

And regardless, the Secretary has the same interest in ensuring that voters are not wrongfully removed from the voter roll, rendering participation by intervenors on behalf of their members or constituents unnecessary. In her brief to dismiss, the Secretary specifically recognized the dual purpose served by NVRA to increase the number of eligible voters participating in the electoral process, but also to ensure the integrity of the process by maintaining accurate voting rolls. (ECF No. 11, Def's Brf, PageID.98-99, citing 52 U.S.C. § 20501(b).) The NVRA imposes certain safeguards against removing voters from the rolls, of which the Secretary, as the party responsible for overseeing NVRA compliance, *see* Mich. Comp. Laws § 168.509n, is aware and required to follow. (*Id.*, PageID.99-101.) The Help America Vote Act also requires the Secretary to ensure that only voters who are not registered or not eligible to register be removed from Michigan's voter roll. (*Id.*, PageID.101, citing 52 U.S.C. § 21083(a).) The Secretary observed in her brief that "acting upon" the information suggested by PILF "would have unreasonably jeopardized Michiganders' voting rights in contravention of NVRA's requirements." (*Id.*, PageID.118.) Thus, the Secretary is keenly aware of her duty to both protect voters and ensure that reasonable efforts are made to maintain an accurate voter roll.

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Intervenors also assert that without their intervention no party will be "focused on easing barriers to registration and voting[.]" (ECF No. 18, PageID.203.)

But this case concerns Michigan's program for removing deceased voters, practically the opposite of a voter registration case. Intervenors seize on PILF's suggestion that the names of new registrants be cross-referenced against the SSDI. But as the Secretary noted in her brief to dismiss, PILF did not give proper notice of this issue (ECF No. 11, PageID.114), nor would it be a list maintenance claim under 52 U.S.C. § 20507.

Under these circumstances, while the proposed intervenors may have an interest in this litigation, they fail to demonstrate that they possess a "direct and substantial interest" for purposes of intervention.

3. Impairment of interest

"To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Grutter*, 188 F.3d at 399 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997)). Because the proposed intervenors do not have a direct and substantial interest in this litigation, they likewise cannot show the possible impairment of such an interest.

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4. Adequacy of representation

A proposed intervenor's burden in showing inadequate representation of its interests is minimal. *Linton v. Commissioner of Health & Evn't,* 973 F.2d 1311, 1319 (6th Cir., 1992). A showing of possible inadequate representation is sufficient to meet such burden. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir., 2000). Despite such a minimal burden, "applicants for intervention must overcome the presumption of adequate representation that arises when they share the same

ultimate objective as a party to the suit." *Michigan*, 424 F.3d at 443-44. Factors to be considered in determining whether a movant meets its burden of demonstrating inadequate representation include (1) the existence or lack thereof of collusion between the existing party and the opposition; (2) whether the existing party has any interests adverse to the intervenor; and (3) whether the existing party has failed in the fulfillment of its duty. *Jordan v. Michigan Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir., 2000). *See also Bradley v. Milliken*, 828 F.2d 1168 (6th Cir. 1987).

Here, the proposed intervenors and the Secretary seek the same ultimate objective—dismissal of this lawsuit. Intervenors have not alleged that the Secretary is colluding with PILF, and the Secretary's interests are not obviously adverse to the intervenors. Intervenors argue they are adverse because they do not believe the Secretary can advance and protect the interests of voters while balancing her dual duty under the NVRA to maintain accurate voter rolls. (ECF No. 18, PageID.210.) Intervenors suggest that they and the Secretary may find themselves "at odds throughout the case" on matters of interpretation and a possible remedy. (*Id.*) But Congress has entrusted the Secretary through NVRA to do just that—to both advance and protect voter interests while maintaining the integrity of the process through list maintenance. The intervenors' concerns appear entirely speculative and unfounded at this time.

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Under these circumstances, the proposed intervenors have not overcome the presumption that the Secretary's representation is adequate. And because the

proposed intervenors fail to meet all the elements for intervention as of right, the motion must be denied as to that request.

B. The proposed intervenors have not met the standards for permissive intervention.

Permissive intervention is governed by Fed. R. Civ. P. 24(b). "On timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." *League of Women Voters of Michigan v. Johnson*, 902 F.3d 572, 577 (6th Cir. 2018). In deciding whether to allow a party to intervene by permission, "'the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.' " *Id.* (quoting Fed. R. Civ. P. 24(b)(3)). " 'So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion.' " *Id.* (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997)). In reviewing a request for permissive intervention, the court may consider the requirements of intervention of right when evaluating whether permissive intervention is appropriate under the circumstances. *See Bay Mills*, 720 Fed. App'x at 759.

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As discussed above, the Secretary is concerned with the timing of the motion to intervene to the extent it will prejudice her interests in having the motion to dismiss resolved, and in light of the fact that intervention may be moot if Count I is dismissed on her motion. And while the intervenors may allege defenses here that share a common question of law with the Secretary's, they have not articulated any

other persuasive rationale for permitting their intervention at this time. As set forth above, the proposed intervenors do not possess any special or distinct interest in the subject matter of this litigation that warrants their intervention. Moreover, it is not clear that their presence in the lawsuit will provide any particular benefit or assistance to the Court since it appears their requested relief and legal arguments will be similar if not the same as that asserted by the Secretary.

Intervenors cite *Public Interest Legal Foundation (PILF) v. Winfrey* in support of their request for permissive intervention. 463 F. Supp. 3d 795, 799-801 (E.D. Mich. 2020) (granting permissive intervention in list maintenance case to voting rights organizations). Defendant acknowledges that the facts in that case are closely aligned to those presented here. There, the court agreed that the intervenors' interest in protecting voters against unreasonable purges or list maintenance procedures was distinct from the government's duty to balance the competing interests of the NVRA, and that was sufficient for permissive intervention. (*Id.* at 799-801.)

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This Court, of course, is not bound by the decision in *PILF*. And the Secretary maintains that the proposed intervenors here have presented only speculation at this time that the Secretary will not adequately defend the interests of voters while defending her list maintenance program. As demonstrated in her brief to dismiss, the Secretary has vigorously defended her removal program for deceased voters and argued that no changes are required to that program.

Under these circumstances, this Court should exercise its significant discretion and deny the proposed intervenors' alternative request that they be permitted to intervene in this matter.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above, Defendant Secretary of State Jocelyn Benson requests that this Court deny the motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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