UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DCCC,

Plaintiff,

v.

PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections; DOUGLAS A. KELLNER, in his official capacity as Co-Chair of the State Board of Elections; ANDREW J. SPANO, in his official capacity as Commissioner of the State Board of Elections; TODD D. VALENTINE, in his official capacity as Co-Executive Director of the State Board of Elections; and KRISTEN ZEBROWSKI-STAVISKY, in her official capacity as Co-Executive Director of the State Board of Elections,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and NEW YORK REPUBLICAN STATE COMMITTEE,

Proposed Intervenor-Defendants.

Case No. 1:22-cv-1029-RA

REPLY IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

In their opening motion, Movants cited nearly twenty cases—in the last two years alone—where courts allowed the Republican Party to intervene in defense of state election laws. *See* Mot. (Doc. 38-1) 2 n.*. Plaintiff apparently believes that all twenty courts abused their discretion. While it's true that a few of those courts did "not provide a reasoned explanation," Opp. (Doc. 47) 6, that point does not help Plaintiff. No explanation was needed because, in cases challenging the very rules that govern our elections, it's obvious that one of the two major political parties deserves a seat at the table.

Granting the Republican Party intervention is particularly warranted here because this case was brought *by the Democratic Party*. Most of the recent cases where the Republican Party successfully intervened were brought by nonprofits. But in one of those cases, Plaintiff itself moved to intervene. *See Mi Familia Vota v. Hobbs*, Doc. 50, No. 2:21-cv-1423 (D. Ariz. Sept. 24, 2021) (DCCC Ariz. Mot. to Intervene). In its motion, Plaintiff argued that it would be fundamentally unfair to let the Republican Party litigate over the election rules but not the Democratic Party. Excluding "the Democratic Committees" while allowing "the Proposed Republican Intervenors … to intervene," it stressed, would violate "both the standards applicable to permissive intervention and principles of equity." *Id.* at 8. But that observation—which ultimately carried the day—is bipartisan. Because Movants are Plaintiff's "direct counterparts" and "'mirror-image,'" *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020), this Court should grant their motion to intervene.

ARGUMENT

Movants satisfy the criteria for both intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b). Because permissive intervention is the easiest way to resolve this motion, Movants will start there.

I. This Court should grant permissive intervention.

Permissive intervention is warranted when the motion is "timely," the movant's defense shares "a common question of law or fact" with the main action, and intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). Plaintiff does not contest the first two requirements. It asks this Court to deny permissive intervention on two other grounds: undue prejudice (a requirement that appears in Rule 24(b)) and adequate representation (a requirement that does not). Neither argument is persuasive, as legion courts have found in granting the Republican Party intervention. *See* Mot. 2 & n.*. And both arguments fail to appreciate that Rule 24 in general, and Rule 24(b) in particular, are construed liberally. *See Gallagher v. New York State Bd. of*

Elections, 2020 WL 4261172, at *1 (S.D.N.Y. July 23); *Yang v. Kellner*, 2020 WL 2115412, at *1 (S.D.N.Y. May 3); *Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 87 (S.D.N.Y. 2018).

A. Plaintiff gives no specific reason why Movants' intervention would cause prejudice or delay. It instead frets about "crowding" this case with "additional participants": "more complicated" deadlines, more "pages" of briefing, and "more burdensome" discovery. Opp. 13. But Rule 24(b) asks about "*undu*[*e*] delay or prejudice." (Emphasis added.) "'Undue' means not normal or appropriate." *Appleton v. Comm'r*, 430 F. App'x 135, 138 (3d Cir. 2011). Though "any introduction of an intervener in a case will necessitate its being permitted to actively participate, which will inevitably cause some 'delay,'" that kind of prejudice or delay is irrelevant under Rule 24(b). *Id.* The entire point of intervention, after all, is to add parties to a case.

Movants' intervention will cause no delay or prejudice, undue or otherwise. Plaintiff concedes that Movants' motion was timely. As Plaintiff pointed out in its recent motion to intervene, "[i]ntervention motions that take place before any substantive rulings"—like this one—"generally do not prejudice the parties in the lawsuit." DCCC Ariz. Mot. to Intervene 15 (citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)). And Plaintiff's fears of prejudice are unfounded because Movants will "comply with the schedule that would be followed in their absence." *Nielsen v. DeSantis*, 2020 WL 6589656, at *1 (N.D. Fla. 2020). Movants also pledge to avoid duplication in their briefs, oral arguments, and elsewhere. Nor could Movants' arguments "materially increase[] either delay or prejudice" because, as Plaintiff concedes, Movants can still raise them as *amici*. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

Notably, Plaintiff points to no delay or prejudice in the many cases where the Republican Party intervened last cycle, even though those cases were litigated on an expedited basis. Plaintiff should be able to do so, had any prejudice occurred, since it or its attorneys were involved in most of those cases. By all accounts, the courts in those cases found the Republican Party's unique perspective and

expertise useful in reaching the right result. *E.g.*, *League of Women Voters of Minn. Educ. Fund v. Simon*, 2021 WL 1175234, at *1 & n.1 (D. Minn. Mar. 29, 2021).

B. Plaintiff's argument that the Republican Party cannot permissively intervene because the State adequately defends its interests fails at the outset "because Rule 24(b) does not have the same inadequate representation requirements that Rule 24(a)(2) does." *Black Voters Matter Fund v. Raffensperger*, Doc. 42 at 5, No. 1:20-cv-4869 (N.D. Ga. Dec. 9, 2020). Rule 24(b) does not require the intervenor to have an "interest" at all, let alone an interest that the parties inadequately represent. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996); *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 n.4 (7th Cir. 2019). Instead, courts grant permissive intervention even when the movant is "completely and adequately represented," will merely "enhance[]" the government's defense, or will provide a "secondary voice in the action." *Ohio Democratic Party v. Blackwell*, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005); *100Reporters LLC v. DOJ*, 307 F.R.D. 269, 286 (D.D.C. 2014); *Alabama v. U.S. Dep't of Commerce*, 2018 WL 6570879, at *3 (N.D. Ala. Dec. 13, 2018).

Using adequate representation to deny permissive intervention would be particularly inappropriate here. Movants have concrete interests at stake that Defendants do not adequately represent. *See infra* II; Mot. 7-9. As the "direct counterparts" to Plaintiff, Movants are "uniquely qualified"—and better positioned than Defendants—to represent "'mirror-image' interests" in any dispute over election laws. *Bostelmann*, 2020 WL 1505640, at *5. At the very least, these questions are so close that they should not drive the Court's analysis.

Plaintiff's insistence that Movants will bring nothing to the table here is unpersuasive. Opp. 13. The state and national Republican parties "are not marginally affected individuals; they are substantial organizations with experienced attorneys who might well bring perspective that others miss or choose not to provide." *Nielsen*, 2020 WL 6589656, at *1. With respect, Movants have at least as much at stake

in New York's elections and at least as much expertise in New York Election Law and other relevant issues as Plaintiff or Defendants. The Republican Party has litigated these same constitutional and statutory issues in many cases across the country. Last year, for example, the Party defeated a constitutional challenge to a Minnesota law on legal grounds that the secretary of state would not advance. *See League of Women Voters of Minn. Educ. Fund*, 2021 WL 1175234 & n.1. Allowing Movants to intervene here would similarly serve "'the interest of a full exposition of the issues.'" *South Carolina v. North Carolina*, 558 U.S. 256, 272 (2010).

The "rationale for intervention" has "particular force" here because "the subject matter of the lawsuit is of great public interest," Movants have "a real stake in the outcome," and their "intervention may well assist the court in its decision." *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 116 (1st Cir. 1999) (Lynch, J., concurring); *accord Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1479 (11th Cir. 1993) ("The substantial public interest at stake in the case is an unusual circumstance militating in favor of intervention."). Plaintiff's apparent belief that the Democratic Party can participate in litigation over New York's election rules—but the other major political party cannot—is untenable. Permissive intervention should be an easy call.

II. Alternatively, Movants are entitled to intervene as of right.

This Court should grant intervention as of right, too. That form of intervention requires timeliness, an interest, impairment, and inadequate representation. Fed. R. Civ. P. 24(a)(2). Prejudice to the parties is not a factor. *Clark v. Putnam Cty.*, 168 F.3d 458, 462 (11th Cir. 1999). Plaintiff concedes timeliness but disputes the other criteria. Their arguments are not persuasive; indeed, Plaintiff omits any discussion of the Second Circuit's decision from just last month, reversing a denial of intervention that rested on similar arguments. *In re NYC Policing*, 27 F.4th 792, 799 (2d Cir. 2022).

A. Movants have substantial interests at stake in this case. Movants want Republican voters to vote, Republican candidates to win, and Republican resources to be spent wisely and not wasted on

diversions. *See* Mot. 5-6. These interests "are routinely found to constitute significant protectable interests" under Rule 24. *Issa v. Newsom*, 2020 WL 3074351, at *3 (E.D. Cal. 2020). Most plaintiffs don't bother disputing them. *See Citizens United v. Gessler*, 2014 WL 4549001, *2 (D. Col. 2014); *Ohio Democratic Party*, 2005 WL 8162665, *2. Plaintiff does, but they fail to cite a single case where a court said the Republican Party lacked an interest in maintaining electoral safeguards.

The Fifth Circuit's recent decision—ordering the district court to grant intervention as of right to the Republican Party—recognized the Party's interest in protecting their "ability to participate in and maintain the integrity of the election process." *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022). The particular rules governing participation at issue here and in *La Union* may differ, but the principle is the same: parties that participate in elections—whether by fielding candidates, supporting voters, organizing volunteers, or otherwise—have an interest in ensuring those elections are conducted according to lawful procedures. Plaintiff's suggestion that this case somehow weighs against Movants is puzzling. *See* Opp. 6-7. After finding that the Republican Party had one "sufficient" interest, the Fifth Circuit reserved the question of whether the Party had other "more election-specific interests" that could support intervention. 29 F.4th at 306 n.5. But in noting that it "need not address" those interests, the Fifth Circuit cited three cases where courts *recognized* them and granted intervention to the Republican and Democratic parties. *See id.*

Plaintiff's sparse cases to the contrary are distinguishable because they denied intervention to *individual* voters, candidates, and officeholders—not the Republican Party itself. *See* Opp. 4. Interventions by individuals, as opposed to party organizations who represent all such individuals at once, arguably present different concerns. *Cf. Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 259 (D.N.M. 2008) (citing the lack of a limiting principle with individuals because "[i]f [the court] lets one voter, or one legislator … intervene, it may need to let others"); *Ansley v. Warren*, 2016 WL 3647979, at *3 (W.D.N.C. 2016) (citing the difficulties of "additional government actors" purporting

to speak for the state). One of Plaintiff's cases denied intervention to the Republican Party, but not because the Party lacked an interest in the case. That court, in fact, held that the Republican Party of New Mexico *did* "have an interest" under Rule 24(a): "To the extent that the RPNM asserts generalized interests in fair election, it does not have a protectable interest …. *What is unique about the RPNM is that it is running candidates in the upcoming election*." *Herrera*, 257 F.R.D. at 258 (emphasis added).

Plaintiff's suggestion that Movants' interests are "generalized" and "shared by *all* New Yorkers" is neither true nor relevant. Opp. 7, 5. Not "all New Yorkers" have an interest in electing *Republicans* or conserving the resources of the *Republican Party*. As the Democratic Party has explained, Movants "have specific interests and concerns—from their overall electoral prospects to the most efficient use of their limited resources—that neither Defendants nor any other party in this lawsuit share." *Wood v. Raffensperger*, Doc. 13 at 16, No. 1:20-cv-5155-TCB (N.D. Ga. Dec. 21, 2020). Further, Plaintiff incorrectly assumes that Movants' interests in this case must be "unique." *Citizens United*, 2014 WL 4549001, at *2 n.1. Rule 24(a)(2) requires "an interest that is *independent of* an existing party's, not *different from* an existing party's." *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring); *accord id.* at 798 (majority op.). If voter participation and resource diversion are not too generalized to give Plaintiff standing, Compl. (Doc. 1) ¶¶18-20, then they are not too generalized to justify Movants' intervention. *See Meek*, 985 F.2d at 1480.

B. This litigation "may" impair Movants' interests. Fed. R. Civ. P. 24(a)(2). Plaintiff does not contest that it seeks to invalidate *existing* New York laws—routine regulations of absentee voting that legislatures around the country have implemented to maintain election integrity. If Plaintiff convinces this Court to strike those laws down, then the legislature's goals will be frustrated. The resulting loss of confidence may make it less likely that Movants' voters will vote and that Movants' candidates will win. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (opinion of Stevens, J.). These concerns are magnified by the likelihood that such an order could come shortly before the 2022

election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Federal court orders overturning longstanding election rules, particularly as the election "draws closer," will "result in voter confusion and consequent incentive to remain away from the polls." *Id.* That result directly harms the Republican Party, who "will have to expend resources to educate their members on the shifting situation in the lead-up to the 2022 election" and to motivate them to still turn out. *La Union*, 29 F.4th at 307.

Plaintiff's contrary arguments are misguided because they assume that Plaintiff, not Movants, will win this case on the merits. *See* Opp. 8-9. When resolving a motion to intervene, courts cannot "assume … that Plaintiffs will ultimately prevail on the merits" or prejudge "the ultimate merits of the claims which the intervenor wishes to assert." *Pavek v. Simon*, 2020 WL 3960252, at *3 (D. Minn. July 12, 2020); *SEC v. Price*, 2014 WL 11858151, at *2 (N.D. Ga. 2014). To repeat, Movants are not intervening to defend New York's "*errors*" or its failures to apply existing law. Opp. 8. They are intervening to defend New York's existing laws from being *changed*—something Plaintiff does not deny that large portions of its complaint try to do. *See* Mot. 6-7. Thus, the question is not whether Movants have an interest in maintaining "illegal[l]" laws that "wrongfully den[y]" the right to vote. Opp. 9. The question is whether Movants have an interest in preventing a federal court from overturning *valid* laws that *increase* voter confidence and *improve* election administration. *See Clark*, 168 F.3d at 462. They do.

Indeed, the Second Circuit—in a case Plaintiff passes over in silence—has explicitly rejected Plaintiff's attempt to smuggle the merits into this debate over the motion to intervene. "This reasoning begs the question to be decided in the litigation—whether the challenged policies are in fact unlawful—and thereby confuses the merits of the litigation with the standard for intervention under Rule 24(a)(2)." *NYC Policing*, 27 F.4th at 800. The court further emphasized that "an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention." *Id.* So too here.

C. Movants also clear the low bar of proving inadequate representation. Movants need only show that representation of their interests "'*may* be' inadequate," which is a "minimal" burden. *Id.* at 803. This element is met unless existing parties' interests are "so similar" to Movants' own interests "that 'adequacy of representation' is 'assured.'" *Id.* at 804. Adequacy is far from assured here for three main reasons.

First, Defendants take no position on Movants' intervention. *See* Doc. 45. As many courts have stressed, the government's "silence on any intent to defend [the movant's] special interests is deafening." *Conservation Law Found. of N.E., Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992); *accord Utahns for Better Transp. v. DOT*, 295 F.3d 1111, 1117 (10th Cir. 2002) (same). Because the State "nowhere argues . . . that it will adequately protect [Movants'] interests," Movants "have raised sufficient doubt concerning the adequacy of [its] representation." *U.S. House of Representatives v. Price*, 2017 WL 3271445, at *2 (D.C. Cir. 2017).

Second, as state actors, Defendants' interests inherently clash with Movants'. *See* Mot. 7-9. To quote the Democratic Party again, inadequacy is a "'light'" burden here because Defendants' "'views are necessarily colored by [their] view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it.'" *Ga. Republican Party v. Raffensperger*, Doc. 29 at 9-10, No. 2:20-cv-135 (S.D. Ga. Dec. 18, 2020) (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998)). In other words, Defendants necessarily "represent interests adverse to [Movants]" because they also represent "the plaintif[f]." *Clark*, 168 F.3d at 461. Their concerns with all New Yorkers, as well as the public "coffers" and their own reelection, make Defendants less likely to make the same arguments, less likely to exhaust all appellate options, and more likely to settle. *Id.* at 461-62. This "divergence of interest" is "sufficient" to "entitle [Movants] to intervene." *Id.* at 461.

Lastly, Movants and Defendants have a "difference of interests" in this case. *Stone*, 371 F.3d at 1312. Defendants are concerned with "properly administer[ing New York's] election laws," while

Movants "are concerned with ensuring their party members and the voters they represent have the opportunity to vote," "advancing their overall electoral prospects," and "allocating their limited resources to inform voters about the election procedures." *Issa*, 2020 WL 3074351, at *3. Even if "similar," these interests are not "identical"—a deviation that might inspire different "approaches to [this] litigation." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989). "[T]his possibility sufficiently demonstrates that [Movants'] interests are not adequately represented." *Id.* at 1215. These possibilities are not "speculative" or based only on "the interests of government entities in *other cases*." Opp. 12. They reflect the obvious truth that "private interests are different in kind from the public interests of the State or its officials," and that "[n]either the State nor its officials can vindicate [the Republican Party's] interest while acting in good faith." *La Union*, 29 F.4th at 308.

CONCLUSION

This Court should grant Movants' motion and let them intervene as defendants.

Respectfully submitted,

Dated: April 22, 2022

s/ James P. McGlone

Paul DerOhannesian II (PD0523)
DEROHANNESIAN & DEROHANNESIAN
159 Wolf Road, Suite 305
Albany, NY 12207
(518) 465-6420
Fax: (518) 427-0614
paul@derolaw.com

Tyler Green (pro hac vice forthcoming)
Cameron T. Norris (pro hac vice forthcoming)
James P. McGlone (pro hac vice)
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22201
(703) 243-9423
tyler@consovoymccarthy.com
cam@consovoymccarthy.com
jim@consovoymccarthy.com

Counsel for RNC, NRCC, and NYGOP

CERTIFICATE OF SERVICE

I, James P. McGlone, declare under penalty of perjury that I served a copy of this motion and all attached exhibits via email to counsel for Defendants.

Dated: April 22, 2022 *s/ James P. McGlone*