IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. BOST, et al., Plaintiffs,	Civil Action No. 1:22 cv 2754
v.	Hon. John F. Kness
THE ILLINOIS STATE BOARD OF ELECTIONS, et al., Defendants.	

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEMOCRATIC PARTY OF ILLINOIS' MOTION TO INTERVENE AS DEFENDANT

Plaintiffs Michael J. Bost, Laura Pollastrini, and Susan Sweeney ("Plaintiffs") submit this memorandum in opposition to the Democratic Party of Illinois' ("Movant") motion to intervene as defendants in the above-captioned matter.

INTRODUCTION

Plaintiffs in this action are three registered voters including one congressional representative and candidate for office in Illinois' upcoming November general federal election. Plaintiffs bring suit for declaratory and injunctive relief against Defendants, the Illinois State Board of Elections and its Chief State Elections Officer, Bernadette Matthews (collectively, "Defendants"), seeking to enjoin Illinois' unconstitutional ballot receipt deadline that extends the federal Election Day well past Congress' prescribed date. The named Defendants in this action are the only statewide officials responsible for enforcing and administering state election law, including the state ballot receipt deadline at issue here. The Defendants are represented by the

State Attorney General's office, the sole state agency under Illinois law responsible for defending state election officials.

It is settled law that Plaintiffs, as initiators of the complaint, control its scope and named parties, subject only to the rules of joinder. *See Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005). Plaintiffs did so here, bringing claims under the First and Fourteenth Amendment and 42 U.S.C. § 1983 against the two state defendants responsible for enforcing the alleged unconstitutional act. Yet, Movant—a private political party who can never be named as a defendant in a Section 1983 action and is not responsible for administering state election law—seeks to intervene as a defendant here.

As set forth below, Movant's motion to intervene fails at every step. Movant does not show that a likely court order would disenfranchise eligible voters, nor explain why it would cost Movant resources even if this happened. Movant applies the wrong standard for determining whether government Defendants would adequately represent them, and then fails to make the necessary showing to rebut that presumption. Movant's request for permissive intervention fails to identify any specific claim or defense it has, and every discretionary factor weighs against intervention. Accordingly, the Court should deny Movant's request to intervene as of right or permissively under Rule 24.[1]

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ARGUMENT

I. Movant Has Not Met the Standards for Intervention as of Right.

[1] Plaintiffs advised Movant that they consent to their participation as *amicus curiae*. This would allow it to fully apprise the Court of its concerns and avoid the questions regarding how a non-government party can be a defendant on 42 U.S.C. § 1983 claims. *See Michigan v. U.S. Army Corps of Eng'rs*, No. 10-CV-4457, 2010 U.S. Dist. LEXIS 85821, at *7 (N.D. Ill. Aug. 20, 2010) (explaining that intervention should be denied if "the proposed intervenor cannot succeed in its case under any set of facts which could be proved under the complaint." (citing *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995))).

Movant first seeks to intervene as of right under Rule 24(a)(2), which permits intervention if (1) the motion is timely; (2) the movant claims an interest in the property or transaction which is the subject of the action; (3) that interest may as a practical matter be impaired by the action; and (4) that interest is not adequately represented by existing parties.[2] *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000). "Intervention of right will not be allowed unless all requirements of the Rule are met." *Id.* at 946 (citing *Wade v. Goldschmidt*, 673 F.2d 182, 185 n.4 (7th Cir. 1982)). Movant has failed to meet three of the four requirements for intervention as of right.

A. Movant Lacks a Significant Interest in this Litigation.

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Movant must first demonstrate a significant interest that warrants intervention. Intervention as of right requires Movant's interest "be direct, significant, and legally protectable." *Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 101 F.3d 503, 506 (7th Cir. 1996) (citations omitted). While Rule 24 does not define the interest sufficient for intervention, the "interest must be unique to the proposed intervenor." *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (citation omitted). Generally, "[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) (citations omitted).

[2] Plaintiffs concede that the motion is timely. However, the prejudice that results from a delay in seeking leave is separate and distinct from the prejudice that will result in the admission of additional parties under permissive intervention. *See* 6 MOORE'S FEDERAL PRACTICE § 24.21(3) (noting the different analysis between prejudice for timeliness and prejudice for permissive intervention). As discussed below, the addition of more defendants with the same ultimate objective as existing Defendants and who are already adequately represented is reasonably likely to delay resolution at the trial level and any subsequent appeal.

Movant here asserts an interest in allowing Democratic voters to cast vote-by-mail ballots ("VBM") beyond that which is proscribed by federal law. Doc. 13 at 7-9. Movant then pivots to argue that since case law has recognized Movant's associational standing to assert the injuries of Democratic voters, it also has a significant interest that warrants intervention here. *Id.* at 9. But this Circuit "makes clear that more than the minimum Article III interest is required" in order to intervene as of right. *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); *see also Common Cause Ind. v. Lawson*, No. 1:17-cv-03936-TWP-MPB, 2018 U.S. Dist. LEXIS 30917, at *12-*13 (S.D. Ind. Feb. 27, 2018) (finding a non-profit organization's interest in intervening as a defendant to uphold a challenge to state election law insufficient as the interests were "the same for the proposed intervenor as for every registered voter in Indiana").[3]

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Movant also argues that "courts regularly grant intervention to political parties." Doc. 13 at 8. Of course, given that intervention "is a highly fact-specific determination" (*Schipporeit*, 69 F.3d at 1381), the particular facts of the cases granting intervention matter a great deal, and Movant's blanket assertion is meaningless. Movant failed to note, moreover, that the law firm representing Movant, including several of its attorneys here, argued in a Motion just three weeks ago that the Republican National Committee, the Republican Party of Arizona, and several other Republican organizations could not intervene in a § 1983 lawsuit seeking to enjoin the enforcement of an Arizona election statute. *Mi Familia Vota, v. Hobbs*, 2:22-cv-509-SRB (D. Ariz. 2022) (ECF 46). Shortly after the instant Motion was filed, the Arizona District Court agreed with them, denying the Republican party's motion to intervene. *See* Ex. 1, June 23, 2022, Order.

[3] Plaintiffs do not contest the Movant's associational standing to bring a lawsuit on behalf of Democratic voters who were wrongfully denied the right to vote based on a state election law or procedure. Movant's own purported intervention interests are undermined by the arguments in its attached pleading. *See generally* Doc. 13-1 at 4-9 (arguing that Plaintiffs lack standing). According to Movant, there is a sufficient interest for private parties to intervene to defend a state law but not a sufficient interest for private parties to confer standing to challenge it.

Movant does not begin to explain how their associational rights to assert standing on behalf of their members translate into a significant interest that is unique to Movant for purposes of intervention as of right here. If the threat of "subject[ing] the counting of mail-in ballots—including those of Democratic voters—to circumstances entirely outside the voter's control" is a sufficient protectable interest under Rule 24, would all 2,025,662 registered voters in Illinois who voted by mail last election have a sufficiently protectable interest to intervene in this litigation? Would every other political party in Illinois also have an automatic right to intervene? Under Movant's reasoning, such organizations and voters certainly would have a compelling argument. But that is not the standard under Rule 24. Movant's interest in protecting its members' rights through upholding state election law is no different than that of any other political organization in the state and no different than that of any other registered voter who votes by mail. As this Circuit has made clear, the significant protected property interest "must be based on a right that belongs to the proposed intervenor," and that is "so direct that the applicant would have 'a right to maintain a claim for the relief sought.'" *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (citation omitted). Ensuring that voters are not disenfranchised is certainly not an interest that is "unique to the proposed intervenor." *See Walker*, 705 F.3d at 658; *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *12-*13.

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Allowing political organizations, such as Movant here, to intervene as of right without a more significant interest in the litigation risks "turn[ing] the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute (or have the court resolve it expeditiously)." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988). Movant may prefer a particular outcome to the case in order to ensure more Democratic votes, but such an interest is an ideological one, not the significant interest required for

intervention. *See Texas v. U.S.*, 805 F.3d 653, 657 (5th Cir. 2015) ("[A]n intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological … reasons; that would-be intervenor merely prefers one outcome to the other.") (citations omitted).

For all of the foregoing reasons, Movant has failed to state a significantly protectable interest in this case sufficient to justify intervention.

B. Movant Fails to Show How Its Interest Would Be Impaired Absent Intervention.

Impairment of a legally protected interest "depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (citation omitted). Determining whether the Movant's interest is foreclosed "is measured by the general standards of *stare decisis*." *Revelis v. Napolitano*, 844 F. Supp. 2d 915, 925 (N.D. Ill. 2012) (citation omitted).

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Similar as to how Movant cannot demonstrate a significant protectable interest, so too it cannot show that the disposition of this action will impair those interests. Movant bases its impairment argument on speculation, arguing that the relief Plaintiffs *may* seek and this Court *may* adopt *may* result in the disenfranchisement of eligible voters on the "condition" of the "timelines (sic) of the U.S. Postal Service."[4] Doc. 13 at 8. Movant's "parade of horribles" is baseless conjecture at this stage of the litigation and not sufficient to find impairment of its interests.

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[4] Moreover, it is not entirely clear that Movant understands the nature of this lawsuit. *See* Doc. 13 at 8 (claiming incorrectly that "Plaintiffs seek an injunction preventing Illinois from counting any mail-in ballots after 'election day,' regardless of when they are postmarked or dated."). Plaintiffs are not seeking such an injunction. Counting ballots past Election Day is consistent with federal law so long as the ballot is cast *and* received by the election authority by Election Day. Illinois law allows *receipt* of ballots up to 14 days past Election Day, which is inconsistent with federal law and severely burdens Plaintiffs as candidates and voters.

But even if the Court accepts Movant's doomsday scenario, nothing in this action would prevent Movant from bringing a suit on behalf of its members or any registered voter under state and federal voting laws if it ever happens that the voter were wrongfully denied the right to vote. Section 10301(b) of the Voting Rights Act provides voters a remedy to sue state officials if they discriminate on the basis of race and 42 U.S.C. § 1983 provides a cause of action should the state violate the voter's First and Fourteenth Amendment rights. In short, there would be no *stare decisis* or preclusive effect absent Movant's intervention.

C. Movant Cannot Overcome the Strong Presumption of Adequacy by Government Defendants Charged with Defending State Law.

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This Circuit has recognized a three-tiered approach for determining adequacy of representation under Rule 24. *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019). The first, as cited by Movant, is a liberal standard that is satisfied by intervenors whenever representation "may be inadequate." *Id.* (citing *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). This more lenient default standard applies when the proposed intervenor has interests that are "materially different" than the representative party. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 749 (7th Cir. 2020).

But when the Movant and existing parties share "the same goal," there exists a "rebuttable presumption of adequate representation that requires a showing of 'some conflict' to warrant intervention." *Planned Parenthood*, 942 F.3d at 799 (quoting *Walker*, 705 F.3d at 659). Where, as here, the "representative party 'is a governmental body charged by law with protecting the interests of the proposed intervenors'" the "presumption of adequacy becomes even stronger" and can only be rebutted by a showing of "gross negligence or bad faith." *Id.* (quoting *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007)).[5]

[5] The United States Supreme Court recently held that the heightened burden to overcome the

The stronger presumption of adequacy is appropriate here. One of the named Defendants, the Illinois State Board of Elections, is the sole statewide governmental agency in charge of administering Illinois state election law, including the distribution of election information to local election authorities in order for voters to vote-by-mail, and to receive the results of the canvassing and certification of vote-by-mail ballots. 10 Ill. Comp. Stat. Ann. § 5/22-18; 26 Ill. Adm. Code §§ 207.150, 219.10. The other named Defendant is the chief state election official responsible for administering federal election law in Illinois. 26 Ill. Adm. Code § 216.100(b)-(c). Both Defendants are represented in this action by the Attorney General of Illinois, charged by law with defending all actions brought against the State. 15 Ill. Comp. Stat. Ann. § 205/4.

A recent case in this Circuit applied this presumption finding adequate representation when the Democratic Party sought to intervene to defend an election certification, and when the existing defendants were the officials in charge of election administration and with the counting and certifying of all votes. *See Feehan v. Wis. Elections Comm'n*, No. 20-cv-1771-pp, 2020 U.S. Dist. LEXIS 228591, at *19 (E.D. Wis. Dec. 6, 2020). Other cases have found a presumption of adequacy when private parties tried to intervene alongside a governmental agency charged by law with defending the state. *See Keith*, 764 F.2d at 1269 (applying the presumption of adequate representation in denying intervention to private organization who supported abortion restrictions when the State of Illinois was "required to defend and enforce the law of Illinois, including" the relevant abortion statute); *see also Liga*, 478 F.3d at 775 (intervention was not appropriate when

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presumption of adequate representation is not appropriate when the proposed intervenor is itself a governmental legislative body. *See Berger v. North Carolina State Conf. of the NAACP*, No. 21-248, 2022 U.S. LEXIS 3052 (June 23, 2022). The Supreme Court majority noted it did not disturb the presumption of adequate representation "when a private litigant seeks to defend a law alongside the government." *Id.* at *29. The heightened presumption of adequacy set forth in *Planned Parenthood* that whenever *private* litigants seek to intervene alongside a governmental body charged by law to protect the interests of intervenors is still controlling law in this Circuit. *See also Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 393 (7th Cir. 2019).

private intervenors made "no effort to show gross negligence or bad faith on the part of the state defendants" when seeking to intervene alongside state defendants responsible for administering federal programs); *United States v. South Bend Community School Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) (presumption appropriate where the government "is charged by law with representing the interests of the absentee") (citation omitted)); *American Nat'l Bank & Trust Co. v. Chicago*, 865 F.2d 144, 148 (7th Cir. 1989) (same).

Rather than cite this standard and argue why it should not apply in this circumstance, Movant completely ignores it. Movant instead assumes the more liberal standard should apply without any justification and then proceeds to argue that they meet it since Movant has more "specific concerns" than Defendants, namely "ensuring that every Democratic voter in Illinois has a meaningful opportunity to cast a ballot and have that ballot counted." Doc. 13 at 10. But "stronger, more specific interests" do not rebut the presumption of adequacy of representation "since would-be intervenors will nearly always have intense desires that are more particular than the state's." *Stuart v. Huff*, 706 F.3d 345, 353 (4th Cir. 2013). Regardless, the small "differences between the State's interest and those of the [Movant]" do not rebut the presumption of adequacy when both the named Defendants and the Movant "share the same narrow objective: to uphold [the state law]." *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *15.

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Movant makes only broad assertions about how their interests are not shared with Defendants. Doc. 13 at 11. Movant never identifies a material argument that Defendants will not make or refer to a contention Defendants are likely to make that is contrary to Movant's interests. Moreover, a comparison of Movant's proposed Motion to Dismiss (Doc. 13-1) and Defendants' Motion to Dismiss (Doc. 26) shows that both rely on the same dismissal arguments (*i.e.*, Plaintiffs lack standing and failed to state a claim under Rule 12(b)(6)). Indeed, Defendants included two

additional dismissal grounds that Movant did not raise. Accordingly, many of Movant's speculative arguments regarding adequate representation, which were made before Defendants filed their responsive pleading, are unfounded.

Regardless, Movant's interests of ensuring more Democratic voters are counted do not overcome the presumption of adequacy when the named Defendants are already charged with ensuring that all vote-by-mail votes are properly counted. *See Feehan*, 2020 U.S. Dist. LEXIS 228591, at *19 (finding the Democratic National Committee could not overcome the presumption of adequate representation despite being more "concerned about valid *Democratic* votes being disregarded" since "its concern about *any* votes being disregarded aligns with the defendants' interests in defending the legality of the [state law] certification.").

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Movant's more specific interests come nowhere close to the "gross negligence or bad faith" needed in this Circuit to rebut the presumption of adequate representation whenever private parties who share the same ultimate objective (*e.g.*, upholding state law) intervene alongside a governmental agency charged by law with defending the state. *See Keith*, 764 F.2d at 1269.[6]

Movant's authorities in support of finding inadequacy of representation all fail. First, all but one of the cases are from outside this Circuit and not controlling. The sole decision from this Court noted it was specific to "regulatory agencies" because such agencies "do not adequately represent the narrow, parochial interests of regulated entities." *Michigan*, 2010 U.S. Dist. LEXIS 85821, at *20-*21 (citations omitted). The Court made clear the "case is distinguishable from the

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[6] It is worth noting this situation is not one where the current Defendants or those defending the action are adverse to the proposed intervenor. Attorney General Kwame Raoul, whose office is currently representing the named Defendants here, is a member of the Democratic Party and has been recently endorsed for re-election by Movant. "*Press Release: DeVore Takes Circus Act Statewide in Bid for Attorney General*," Democratic Party of Illinois, Feb. 22, 2022, available at https://bit.ly/3PmcqPS (last visited July 13, 2022). Surely, if Movant believes Attorney General Raoul is fit to hold this office, then he is also fit to defend the Movant's interests here.

fairly common scenario in which a lawsuit is filed against a state or a state official to challenge the constitutionality of a statute." *Id.* at *24. In such a circumstance, like here, "the Attorney General alone is presumed to be an adequate representative because he or she is charged by law with defending the statute — and thus upholding the interest of all of those who wish to defeat the challenge." *Id.* at *24-*25 (citing *American Nat'l Bank*, 865 F.2d at 147-48).

The other cases cited by Movant are two unpublished district court decisions out of the Ninth Circuit. *See* Doc. 13 at 10-11, citing *Issa v. Newsom*, 2020 U.S. Dist. LEXIS 102013 (C.D. Cal. June 10, 2020) and *Paher v. Cegavske*, 2020 U.S. Dist. LEXIS 74095 (D. Nev. April 28, 2020). But the Ninth Circuit has adopted a multi-factored test to determine adequacy of representation, which is more lenient than the Seventh Circuit's tiered approach. While the "most important factor" of the Ninth Circuit's test is "how the interest compares with the interest of existing parties," it is not the only factor to determine the presumption of adequacy. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (citation omitted). A proposed intervenor in the Ninth Circuit can still show inadequacy of representation based on the totality of the circumstances, regardless of whether the intervenor is seeking to join alongside a government official. *See Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (noting that the intervention standards in the Ninth Circuit are "guided primarily by practical considerations, not technical distinctions") (citations omitted). Not so in the Seventh Circuit, which as stated above, requires a heightened burden if the goal of the intervenor and state are the same and the government is charged by law with defending the constitutionality of a statute.

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Accordingly, Movant has failed to rebut the presumption of adequacy of representation and its motion to intervene as of right should be denied.

II. Alternatively, Movant's Request for Permissive Intervention Should Be Denied.

In the alternative, Movant seeks to intervene permissively. Doc. 13 at 12. Under Rule 24(b)(1), a district 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." *Planned Parenthood*, 942 F.3d at 803. While a district court may not "deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right," it may consider "the elements of intervention as of right as discretionary factors" in weighing permissive intervention. *Id.* at 804 (citations omitted).

Movant's request for permissive intervention fails the "claim or defense" threshold. Movant, as a private political party, is not the entity in charge of administering state election law in Illinois and can offer no defense to the action except for rehashing the existing Defendants' arguments. As noted previously, Defendants' Motion to Dismiss includes all the grounds relied on by Movant, as well as other grounds such as the Eleventh Amendment. Doc. 26 at 11-13. Movant's own interests for permissive intervention, that they will more expeditiously argue this case "ensur[ing] that every eligible Illinoisan is allowed to cast a ballot and have that ballot counted in the coming election," is virtually identical to the duties charged to existing Defendants. *Feehan*, 2020 U.S. Dist. LEXIS 228591, at *21 (denying permissive intervention to the Democratic National Committee when it could not show "any conflict that would prevent the current defendants from adequately representing its interests."); *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *19 (when "intervention of right is denied because the state is likely to provide adequate representation, the case for permissive intervention is largely eroded" (citing *Menominee Indiana Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996))). Permissive intervention is not appropriate when a party on the same ideological side seeks to intervene to defend interests that the state is already charged by law to defend, unnecessarily cluttering the

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action. *Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992) (affirming the denial of permissive intervention where the addition of parties "would only clutter the action unnecessarily" without adding any corresponding benefit to the litigation); *Bethune Plaza*, 863 F.2d at 533 (courts should avoid intervention when it risks "turn[ing] the court into a forum for competing interest groups, submerging the ability of the original parties to settle their own dispute").

Furthermore, as Movant is a private organization and not a state, Plaintiffs cannot assert a claim against it for violations of 42 U.S.C. § 1983. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (Section 1983 actions are not proper against "merely private conduct, no matter how discriminatory or wrongful"). There can be no claims to resolve between Movants and Plaintiffs. Though Movant claims the goal of mobilizing voters for the upcoming election, Movant has no role in tabulating or certifying the electoral results in Illinois. *See Feehan*, 2020 U.S. Dist. LEXIS 228591, at *19. That responsibility lies solely with the named Defendants in this action. In essence, it "is doubtful whether [Movant] even has a claim or defense in common with the main action" since the federal law "cannot be used to enforce a claim against the [private organization]." *Common Cause Ind.*, 2018 U.S. Dist. LEXIS 30917, at *18.

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CONCLUSION

For the foregoing reasons, Movant's Motion to Intervene should be denied.

July 14, 2022

Respectfully submitted,

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