

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Mark Splonskowski,

Plaintiff,

vs.

Erika White, in her capacity as State Election
Director of North Dakota,

Defendant.

**MEMORANDUM IN RESPONSE TO
MOTION TO INTERVENE**

Case No. 1:23-cv-00123

The Defendant, Erika White, in her capacity as the State Election Director of North Dakota, (“White”), now responds to the Motion to Intervene filed by Proposed Intervenor-Defendant the League of Women Voters of North Dakota (“LWVND”). ECF No. 13. While White agrees with LWVND that Plaintiff’s claims lack merit, she opposes LWVND’s contention that its interests are not adequately represented. As such, White respectfully submits that LWVND has not met the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. As to LWVND’s alternative request for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure, White simply defers to the Court’s discretion.

I. Intervention as of Right.

White’s opposition to LWVND’s request for Rule 24(a) intervention centers on its claim that she inadequately represents its interests. The other requirements of the rule appear to have been met here. That is, White agrees that LWVND has interests in this matter which White herself does not share, such as LWVND’s particular educational efforts and its allocations of organizational resources. Further, White does not dispute that, according to LWVND’s assertions, these interests may be impaired were Plaintiff’s requests to be granted. But White opposes LWVND’s position on the final requirement of Rule 24(a) intervention because the interests asserted by LWVND are adequately represented in the context of this particular case.

Contrary to LWVND’s contention, this case will not require White to balance interests in a way that makes representation of LWVND’s interests inadequate. The case LWVND cites in the

Motion to Intervene – *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003) – is illustratively distinguishable and presents a helpful overview of the relevant law. *Ubbelohde* arose from the decisions of the United States Army Corps of Engineers (the “Corps”) about how to allocate limited water resources during a drought. The Corps was charged with managing the Missouri River as it flowed across seven different states. *Id.* at 1019. In its role, the Corps was required to balance “many interests, including flood control, navigation, and recreation.” *Id.* But when a drought occurred, the Corps was forced to make “hard choices” about the distribution of water between the seven states. *Id.* To maintain downstream navigation, the Corps first attempted to release water from a reservoir in South Dakota, but South Dakota sued to stop the release; the Corps then decided to release water from a lake in North Dakota, but North Dakota sued to stop *that* release. *Id.* at 1021-22. Several downstream users, including the state of Nebraska, moved to intervene in the original case, and the district court denied their motion. *Id.* at 1022. In part, its decision was based on the *parens patriae* doctrine. *Id.* at 1025. This doctrine applies when a government agency is a party to a lawsuit and creates a presumption that the agency “will represent the interests of all citizens in cases raising matters of sovereign interest.” *Id.* citing *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996). The district court applied the presumption and found that the proposed intervenors had not overcome it. *Id.*

The Eighth Circuit reversed the district court and allowed Nebraska and the other entities to intervene as of right. Discussing the application of *parens patriae* in the case, the Court noted that “the government must represent the interests of all its citizens, which often requires [it] to weigh competing interests and favor one interest over another.” The Court went on to explain that if a conflict arises between interests, “the Government cannot always adequately represent conflicting interests at the same time.” *Id.* quoting *Mausolf*, at 1303. Ultimately, the Court held that because the Corps was charged with managing the Missouri River *as a whole* across seven states, it could not possibly represent both downstream and upstream interests; therefore, the *parens patriae* presumption of adequate representation was rebutted, and intervention was warranted by the downstream entities. *Id.*

Ubbeholde is clearly distinguishable from the instant matter. There, the Corps was charged with distributing a limited amount of water to a large amount of people; it faced a situation where it could not represent the interests of all involved. This case is far simpler. White is responding to a unilateral and direct attack on North Dakota law. Her defense *does* protect the interests of all involved because it is focused on protecting a validly-enacted state law. Her defense of state law is not limited to certain individuals; it will benefit all North Dakotans, including members of LWVND. For these reasons, the Court should find that the *parens patriae* presumption applies here and is not rebutted, because LWVND's interest is "subsumed within the general interests of the public." *Id.* citing *Mausolf*, at 1303.

But even if the Court declines to apply the *parens patriae* presumption, LWVND does not meet even the "minimal" burden required to show inadequate representation. *Id.* at 1027. For instance, LWVND suggests that White's purported focus on post-voting activities¹ (as opposed to LWVND's focus on pre-voting activities) has a detrimental effect on her representation of its interests. *See* ECF No. 13, at 14-15. This is incorrect. Pre- and post-voting activities are not interests that White had to, or will have to, weigh against one another in the litigation of this case; both interests are not only subsumed within her defense but are equally served by it, and White has not favored one or the other in her defense of the case.

LWVND also errs by speculating that White may "weigh the interests of the canvassing boards and other election officials" and "the interests of North Dakotans sympathetic to Plaintiff's view." ECF No. 13, at 15. This is meritless. When this lawsuit was filed against her, White did not and could not perform a balancing test to determine her course of action. Rather, her course of action was dictated by the law, which clearly mandates dismissal of Plaintiff's Complaint on both procedural and substantive grounds. *See generally* ECF No. 10. As is abundantly clear from her Motion to Dismiss, she is vigorously defending the validly-enacted laws of the state of North

¹ This argument is also flawed in another sense; as is clear in the Complaint, Ms. White's job duties include training of county officials *before* the election occurs. ECF No. 1.

Dakota, and she rejects the implication that her defense is grounded on anything other than the legal realities of the case.

In short, White's defense against Plaintiff's Complaint adequately represents LWVND's interests, despite the differing effects that dismissal may have on that entity. This matter is analogous to *Curry v. Regents of University of Minnesota*, 167 F.3d 420, 423 (8th Cir. 1999), where the proposed intervenors were student groups who received funding from a university fee system that was under legal attack by a different group of students. *Id.* at 421. The university was the original defendant and defended its fee system in the litigation. *Id.* In their request to intervene in the defense, the student groups attempted to distinguish their interest in *maintaining* funding from the defendant university's interest, which they categorized as "merely" upholding the fee system – i.e., the fee system which provided the funding. *Id.* at 422-23. The Court rejected this attempt, finding that the proposed intervenors did not meet their "minimal" burden of showing that the defendant university would inadequately represent their interests because their harm – the potential loss of funding – would occur "only if the fee system is not upheld." *Id.* at 423. As such, the Court found that the defendant university would adequately represent the student groups' interests. *Id.* Here, the situation is the same: while the downstream effects of a loss or victory on the interests of White and LWVND may differ, those interests require identical protection at the stage of defending and upholding the law. *See also Parrish v. Dayton*, CIVIL NO. 12-149 (SRN/JSM), 2012 WL 12895202, at *5 (D. Minn. Mar. 13, 2012) (where both the existing defendants and proposed intervenor sought to defend constitutionality of order, though in service of different interests, and the litigation was "focused" on the constitutionality question, inadequacy of representation could not be found because interests were "merely different sides of the same proverbial coin.").

In sum, in this straightforward case which raises strictly legal questions, LWVND's interests will be adequately represented by the defense put forth by White. White respectfully submits that LWVND has failed to establish the requirements for intervention as of right pursuant to Rule 24(a).

II. Permissive Intervention.

In regard to LWVND's alternative request for permissive intervention, White recognizes that under Rule 24(b) the Court has broad discretion to grant or deny this relief. *H.J. Martin & Son, Inc. v. Ferrellgas, Inc.*, Case No. 1:20-cv-054, 2020 WL 6122525, *1, (D.N.D. Oct. 16, 2020). While a "minor variable" in the Rule 24(b) calculus, one of the considerations in front of the Court is the adequacy of protection afforded to the prospective intervenors by the existing defendants. *Id.* On this point, White again advances the same arguments as set forth, *see supra* Part I, that LWVND's interests are adequately represented here. As to the remaining considerations under Rule 24(b), White acknowledges the Court's broad discretion under this rule and defers to the Court's discretion concerning the appropriateness of permissive intervention.

Dated this 1st day of September, 2023.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ Jane G. Sportiello
Jane G. Sportiello
Assistant Attorney General
State Bar ID No. 08900
Email jsportiello@nd.gov

/s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email ctitus@nd.gov

Attorneys for Defendant.