IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

MARK SPLONSKOWSKI,

Plaintiff,

v.

ERIKA WHITE, in her official capacity as State Election Director of North Dakota,

Defendant,

and

LEAGUE OF WOMEN VOTERS OF NORTH DAKOTA,

Proposed Intervenor-Defendant.

Case No. 1:23-cv-00123-DMT-CRH

PROPOSED INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF MOTION TO INTERVENE

INTRODUCTION

On August 18, 2023, the League of Women Voters of North Dakota (LWVND) moved to intervene in this matter as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), or, in the alternative, by permission under Rule 24(b)(1). Mot. to Intervene, ECF No. 13 ("Mot."). On September 1, Defendant White filed her opposition to the motion,[1] which rests solely on her assertion that LWVND is not entitled to intervention as of right under Rule 24(a) because she can adequately represent LWVND's interests in this matter. White Opp. to Mot. to Intervene, ECF No. 16 ("White Opp."). In so doing, Defendant misconstrues the standard for adequacy of representation. LWVND has more than met its minimal burden under this prong. Regardless, Defendant does not oppose LWVND's permissive intervention pursuant to 24(b)(1), *see* White Opp. at 5, and thus the Court should grant LWVND's motion to intervene.

ARGUMENT

I. LWVND Is Entitled to Intervention as of Right

Defendant White concedes that LWVND has met four of the five factors applied by courts to determine whether a party is entitled to intervene as of right: LWVND has Article III standing, it has a recognized interest in the litigation, its interests would be adversely affected by a finding for Plaintiff in this suit, and its motion to intervene was timely filed. *See* White Opp. at 1; *see also*, *e.g.*, *Mausolf v. Babbitt,* 85 F.3d 1295, 1300 (8th Cir. 1996) (setting out the factors for intervention as of right). The final prong is whether the proposed intervenor's interests are adequately represented by the existing parties. *See Mausolf*, 85 F.3d at 1300. Defendant White erroneously

[1] Plaintiff Splonskowski opposes LWVND's motion to intervene but under the extension granted by this Court, his response is not due until September 15, 2023. Order, ECF No. 15. LWVND will reply to any further points raised by Plaintiff in his response within the time set forth by the local rules, *see* L. Civ. R. 7.1(B).

asserts that she can adequately represent LWVND's interests and therefore LWVND is not entitled to intervention as of right. But the burden to show inadequacy of representation is minimal, and LWVND has satisfied it here. Contrary to Defendant's assertions, her status as a government actor does not give rise to a presumption of adequate representation, and even if it did, that presumption is rebutted.

A. LWVND meets the minimal burden of demonstrating lack of adequate representation.

"The 'inadequate representation' condition is satisfied if the proposed intervenor shows that the representation of its interests by the current party or parties to the action 'may be' inadequate." *Sierra Club v. Robertson*, 960 F.2d 83, 85-86 (8th Cir. 1992) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). "The burden for making this showing 'should be treated as minimal.'" *Id.* at 86; *see also Mausolf*, 85 F.3d at 1303. Defendant contends that LWVND has not met its "minimal" burden here despite the fact that, as Defendant acknowledges, the parties are defending disparate interests in this action. *See* Mot. at 2; White Opp. at 1 ("White agrees that LWVND has interests in this matter which White herself does not share."). Moreover, Defendant's motion to dismiss makes clear that Defendant asserts interests here that are not shared by LWVND, including the state's immunity from suit under the Eleventh Amendment. *See* White Mot. to Dismiss at 12-13, 14-15, ECF No. 10. Thus, even if Defendant's interests are not adverse to LWVND's, they are "sufficiently disparate" such that LWVND's interests "may not be adequately represented." *Sierra Club*, 960 F.2d at 86; *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993) (finding proposed intervenors' interests were inadequately protected even where their legal arguments were "almost identical" to the state's arguments); *Nat'l Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 977 (8th Cir. 2014) (finding inadequacy of representation where proposed intervenor could not be

assured that the government's position would "remain static or unaffected by unanticipated policy shifts.") (quoting *Kleissler v. U.S. Forest Service*, 157 F.3d 964, 974 (3rd Cir. 1998)).

B. The *parens patriae* presumption does not apply.

Defendant contends that LWVND's burden to establish inadequacy of representation is more than "minimal," *cf. Sierra Club*, 960 F.2d at 86, because as a state actor, she is presumed to adequately represent the interests of the public, including LWVND and its members. Defendant is correct that where a government agency with a responsibility for protecting all citizens is an existing party, a presumption of adequate representation may arise under the doctrine of *parens patriae*. S*ee Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). But this presumption is "triggered only 'to the extent [the proposed intervenor's] interests coincide with the public interest.'" *Nat'l Parks*, 759 F.3d at 977 (quoting *Chiglo*, 104 F.3d at 187–88). Where, as is the case here, the would-be intervenor's interests cannot be "subsumed" within the interests shared by all citizens of the state, or where the would-be intervenor "stands to gain or lose from the litigation in a way different from the public at large," the state agency is not assumed to adequately represent the intervenor, and the *parens patriae* presumption does not apply. *See United States v. Union Electric Co.*, 64 F.3d 1152, 1169 (8th Cir. 1995); *Chiglo*, 104 F.3d at 188. In those instances, a party moving for intervention need only carry the "minimal burden" of showing inadequate representation. *Mille Lacs*, 989 F.2d at 1001.

Here, Defendant White concedes that LWVND has interests that are not shared by her office, or the public at large, including the detrimental impact this suit will have on LWVND's organizational resources if Plaintiff's claim is successful. White Mot. to Dismiss, ECF No. 10, at 1. It is indisputable that the potential injury to LWVND's organizational resources is not shared by Ms. White, her office, nor the public at large. As such, this case is distinguishable from *Curry*

v. Regents of the University of Minnesota, because LWVND is defending interests different from those held by Defendant or the public she represents. *Cf.* 167 F.3d 420 (8th Cir. 1999) (finding that student groups facing funding reductions were adequately represented by university in challenge to student fee allocation because the reduction in funding to proposed intervenors was the same harm faced by all student groups).

Defendant White also claims that she will not be required to balance different interests in defending this action, unlike the Army Corps of Engineers in *South Dakota v. Ubbelohde,* 330 F.3d 1014 (8th Cir. 2003). *See* White Opp. at 2-3. There, the court found that the government agency at issue could not adequately represent the interests of intervenors who had interests in only part of a disputed river system, where the agency had responsibility for all aspects of the river. *See Ubbelohde*, 330 F.3d at 1025. But, as discussed above, Defendant asserts several jurisdictional arguments in her Motion to Dismiss that go to whether she is properly named as a Defendant in this suit. If she succeeds in those arguments, Defendant may be forced to balance her interest in being dismissed from this action with her interest in defending the law on the merits. This is precisely the type of situation where the government must "weigh competing interests and favor one interest over another" such that the *parens patrie* presumption does not apply. *Id*.

C. Even if the *parens patriae* presumption applies, it is rebutted here.

Even assuming the *parens patriae* presumption applies—it does not—LWVND has sufficiently rebutted this presumption. The presumption of adequate representation can be rebutted "by a showing that the applicant's interest cannot be subsumed within the shared interest of the citizens." *Union Elec.,* 64 F.3d at 1169. As discussed *supra*, LWVND's interests in voter education and other programmatic activities, as well as its allocation of organizational resources, are distinct

from interests shared by all North Dakotans, and so cannot be completely subsumed within the interests represented by Defendant.

Defendant's assertion that the presumption is not rebutted here fails. Defendant contends that she is "responding to a unilateral and direct attack on North Dakota law" and if her defense is successful, she will have "protect[ed] the interests of all involved" by "protecting a validly-enacted state law." White Opp. at 3. But this argument confuses alignment on litigation goals with identical interests and adequate representation. Agreement on litigation strategy or outcome does not mean that a would-be intervenor's interests are adequately represented. *See Mausolf*, 85 F.3d at 1303; *see also Sierra Club*, 960 F.2d at 86 ("The tactical similarity of the legal contentions of a current party with that of a proposed intervenor, however, does not assure adequate representation."). Instead, courts "determine the adequacy of representation primarily by comparing the interests of the proposed intervenor with the interests of the current parties to the action." *Id.* (internal quotation marks and citations omitted). Defendant concedes that she asserts disparate interests from LWVND in this action. As such, even if the *parens patrie* presumption applies, LWVND has rebutted it here.

II. The Court Should Grant Permissive Intervention Under Rule 24(b)

Regardless of whether LWVND is entitled to intervention as of right—it is, *see supra*—Defendant does not oppose LWVND's permissive intervention under Rule 24(b)(1), and thus the Court should grant LWVND's motion. As Defendant acknowledges, White Opp. at 5, courts have broad discretion to grant permissive intervention, so long as the requirements of 24(b)(1) are met. Here, Defendant concedes that LWVND's motion is timely and that LWVND raises a common question of law and fact. *See* Fed. R. Civ. P. 24(b)(1). Moreover, Defendant does not identify any prejudice that would accrue to the parties if LWVND's motion were granted, which is the

"principal consideration" when evaluating permissive intervention. *See Coffey v. C.I.R.*, 663 F.3d 947, 951 (8th Cir. 2011). Although adequacy of representation may be a "minor variable" in consideration of permissive intervention, White Opp. at 5, it is error for a court to deny permissive intervention without finding undue delay or prejudice. *Coffey*, 663. F.3d at 951. As such, even in the event the Court finds that LWVND's interests are adequately represented, it should nonetheless grant LWVND's motion to intervene.

CONCLUSION

For the foregoing reasons, and those stated in its Motion to Intervene, ECF No. 13, LWVND respectfully requests that this Court grant its Motion to Intervene in this matter.

September 8, 2023

Respectfully submitted,

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