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

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 TO PLAINTIFF 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. Mot. to Intervene, ECF No. 13 ("Mot."). Plaintiff filed his opposition to LWVND's intervention on September 15, ECF No. 23 ("Pl. Opp'n").[1] Plaintiff's opposition provides no basis to deny LWVND's participation in this case. The Court should grant LWVND's motion.

ARGUMENT

I. LWVND Is Entitled to Intervention as of Right.

Plaintiff does not dispute that LWVND's motion is timely and his contention that LWVND lacks both standing and a recognized interest in the subject of the litigation that may be impaired by the relief sought disregards both the facts and the relevant law. Plaintiff also repeats Defendant's erroneous arguments about adequacy of representation and asserts a non-existent procedural deficiency in LWVND's motion. LWVND meets the requirements of Rule 24(a) and (c) and is entitled to intervention as of right.

A. LWVND's injury is sufficiently concrete and imminent to establish standing.

With respect to standing, Plaintiff contests only whether the injuries asserted by LWVND are sufficiently concrete and imminent. But "[i]t is well-established that an organization has standing in its own right to challenge an election law when it expends or diverts resources to educate voters about the new law or assist them in complying with the new law." *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2020 WL 625279, at *4 (D.N.D. Feb. 10, 2020) (citing multiple cases). Here, LWVND asserts that if Plaintiff succeeds in eliminating the standardized

[1] On September 1, Defendant separately opposed LWVND's intervention as of right, based solely on the adequacy of representation prong, and LWVND replied on September 8. Def. Opp'n. to Mot. to Intervene, ECF No. 16; LWVND Reply to Def. Opp'n, ECF No. 18 ("Reply to Def."). Defendant did not oppose permissive intervention. *See id.*

deadline for submitting absentee ballots, LWVND will be forced to expend additional resources to educate its members and other voters about the change in the law and assist them in complying with the same, which will require them to reduce resources dedicated to, or forgo entirely, other organizational priorities. Mot. at 8. And though Plaintiff claims that LWVND has offered "no evidence" that these harms will come to pass, Pl. Opp'n at 5, LWVND's assertions are supported by the sworn testimony of its President. Decl. of B. Headrick, ECF No. 13-2. This evidence is sufficient to establish standing. *See Spirit Lake Tribe*, 2020 WL 625279 at *4.

Moreover, courts should "consider the effect that an ultimate ruling . . . might have," in determining whether a proposed intervenor has standing. *See South Dakota v. Ubbelohde,* 330 F.3d 1014, 1025 (8th Cir. 2003). Here, the standardized mail-in ballot deadline provides voters with reasonable certainty that their ballot will be counted so long as it is mailed before Election Day. The Court should reject Plaintiff's baseless assertion that changing this law will have no effect on either voters or organizations like LWVND. *Cf. Walen v. Burgum*, 1:22-cv-31, 2022 WL 1688746, at *5 (D.N.D. May 26, 2022) ("[F]ederal court orders impacting elections may themselves result in uncertainty and hardship for voters, candidates, and election officials.") (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)). Indeed, Plaintiff's unsupported claim that voters will simply "adjust to a different ballot deadline," Pl. Opp'n at 5, ignores the fact that if Plaintiff succeeds, there will no longer *be* a standardized deadline for voters to rely on, and instead each voter will be required to determine individually when they must mail their ballots back in order to ensure they are received before Election Day. Because this harm would flow directly from a ruling in Plaintiff's favor, it is sufficiently imminent to confer standing. *See, e.g.*, *ACLU of Minnesota v. Tarek ibn Ziyad Academy*, 643 F.3d 1088, 1092 (8th Cir. 2011) (finding

proposed intervenors' injury to be sufficiently imminent where success on the merits of the plaintiff's claim would necessarily result in denying intervenors an existing benefit).

B. LWVND has distinct and particularized interests in the litigation.

Intervention must be granted where, as here, a would-be intervenor demonstrates interests in the subject matter of the litigation that are "direct" and not "tangential or collateral." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995). Contrary to Plaintiff's assertion, the impact on LWVND's interests is not contingent on an attenuated "sequence of events," nor is the "subject matter of the proceeding"—the validity of North Dakota's mail ballot submission deadline—at all "remote" from interests core to LWVND. *Cf. Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998) (internal quotations omitted). Plaintiff seeks a change to North Dakota's election laws, and LWVND has submitted testimony by affidavit demonstrating that this change would directly impact its members and its organizational interests, including by requiring it to divert resources away from other organizational priorities and towards educating voters about the change in the law and assisting them in complying with the same. *See* Decl. of B. Headrick, ECF 13-2. By contrast, in *Standard Heating*, the impact on would-be intervenors' interests was deemed speculative because the would-be intervenors failed to present affidavits or other evidence of the alleged harm and because the injury depended on a hypothetical sequence of events involving actions by third parties. 137 F.3d at 571-72. There is no such speculation here. Moreover, Plaintiff's reliance on *Curry v. Regents of the University of Minnesota* is inapposite, because there the Court found that the proposed intervenors lacked standing. 167 F.3d 420, 422 (8th Cir. 1999). But here, LWVND has asserted a prototypical injury sufficient to establish standing. *See Arkansas United v. Thurston*, 626 F. Supp. 3d 1064, 1078 (W.D. Ark. 2022) (citing *Havens Realty Corp. v.*

Coleman, 455 U.S. 363 (1982) for proposition that diversion of resources is sufficient to establish standing). *Cf. Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (finding that an intervenor "need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a)").

C. LWVND's interests will be impaired if Plaintiff succeeds in this litigation.

An intervenor need only show that its interests "may be" impaired by the disposition of pending litigation. *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 60 F.3d 1304, 1307 (8th Cir. 1995). The *Kansas Public Employees* court emphasized repeatedly that the standard is "may," and not the more definite "would" or "will be." *Id.* at 1307-08 (citing cases). Here, where LWVND's organizational and associational interests are served by the current standardized mail voting deadline, this litigation directly bears on those interests.

Current law provides a specific deadline by which mail ballots must be postmarked to be counted. Though the exact date changes from election to election, the specificity of the date does not: otherwise, legal votes postmarked by the day before Election Day will be counted. This clarity allows LWVND to provide uniform guidance to voters and reasonably ensures that its members' votes will count so long as their ballots are mailed by the deadline. If Plaintiff is successful, this clarity will be replaced by uncertainty. If the only ballots that will count are those *received* by Election Day, then voters must mail their ballots some unknown (and nonuniform) number of days *before* that. Plaintiff's assertion that LWVND can merely refer voters to the "new deadline," Pl. Opp'n at 9, hides the ball on this critical point. If Plaintiff succeeds, the safe harbor of North Dakota's election law would be eliminated and there would be *no* clear deadline that LWVND can communicate to voters, requiring LWVND to expend additional resources to ensure voters mail their ballots in time to be counted.

D. LWVND has distinct interests not otherwise adequately represented.

LWNVD incorporates by reference its reply to Defendant in support of its motion to intervene, Reply to Def., as Plaintiff largely repeats Defendant's arguments with respect to adequacy of representation. Notably, groups with a long-standing commitment to voting rights, like LWVND here, often are found to have interests in voting laws distinct from governments or the public at large. *E.g.*, *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095-EFM-DJW, 2013 WL 6511874, at *4 (D. Kan. Dec. 12, 2013) (applicants showing interests in protecting voter rights may have interests diverging from the public interest of defendant Election Assistance Commission); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *3 (D. Nev. Apr. 28, 2020) (proposed intervenor political groups had distinct interests in election law matter). And Plaintiff's reliance on *Bost v. Illinois State Board of Elections* is unavailing. Intervention was denied in *Bost* because the would-be intervenor provided *no* arguments that the existing defendant had not already made and could not point to even a hypothetical conflict between its position and the defendant's. *See* 75 F.4th 682, 690 (7th Cir. 2023). The *Bost* court noted that even "one potential difference" between the would-be intervenor and the defendant would be sufficient to meet the "lenient" standard. *Id.* at n.6. As previously explained, Defendant White's interest in preserving the state's sovereign immunity is one interest that is not shared by LWVND, which is sufficient to clear this bar. *See* Reply to Def.

E. LWVND's proposed motion to dismiss satisfies Rule 24(c).

The purpose of the pleading requirement in Rule 24(c) is to ensure that the court and the parties have sufficient notice of the intervenor's claims and interests. *See United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009). So long as the parties have sufficient notice of intervenor's interests, Rule 24(c)'s pleading requirement need not conform to the

definitions in Rule 7(a) but may instead be satisfied by a sufficient statement of interests in the motion to intervene, in an accompanying affidavit, in a motion to dismiss, or—as is the case here—all three. *Id.*; *accord Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (Rule 24 satisfied where legal and factual grounds for intervention are fully stated in motion to intervene); *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) (petition and affidavit provided "sufficient facts and allegations to apprise [plaintiff] of [proposed intervenor's] claims"); *Caballero v. Fuerzas Armadas Revolucionarias de Columbia*, No. 4:19-CV-04011-KES, 2019 WL 13222189, at *6 (D.S.D. July 11, 2019) ("proposed motion to dismiss, while not a pleading, is sufficient for Rule 24(c) purposes"). LWVND makes its interests clear in its motion to intervene and accompanying affidavit. Mot.; Decl. of B. Headrick, ECF No. 13-2. And contrary to Plaintiff's assertions, there can be no doubt as to what legal defenses LWVND intends to make. Failure to state a claim upon which relief can be granted is a legal defense under Rule 12(b)(6), and this is precisely what LWVND asserts in its proposed motion to dismiss. LWVND Proposed Mot. to Dismiss, ECF No. 13-1 at 6. Plaintiff's ability to respond to LWVND's motion to intervene was not hampered by the lack of a pleading separate from this motion and the motion to dismiss. *Cf. ALPS Prop. & Cas. Ins. Co. v. Durick*, No. 1:15-cv-90, 2015 WL 12803618, at *4 (D.N.D. Nov. 2, 2015). Where this is true and the filings give sufficient notice of intervenors' interests, courts routinely find Rule 24(c) satisfied. *See e.g.*, *Glenn Golden v. Stein,* No. 4:18-cv-00331-JAJ-CFB, 2021 WL 3087861, at *4 (S.D. Iowa Feb. 3, 2021); *WaterLegacy v. U.S. E.P.A.*, 300 F.R.D. 332, 340 (D. Minn. 2014).

II. The Conditions Are Appropriate for Permissive Intervention Under Rule 24(b).

Permissive intervention under Rule 24(b) is at the discretion of the Court, but the "main considerations" in making that decision are 1) the motion's timeliness, 2) whether the movant's

claim shares a question of law or fact in common with the main action, and 3) whether intervention will unduly delay or prejudice the existing parties. *H.J. Martin & Son, Inc. v. Ferrellgas, Inc.*, No. 1:20-cv-054, 2020 WL 6122525, at *1 (D.N.D. Oct. 16, 2020) (internal citations and quotations omitted). Importantly, "[p]rejudice to the existing parties is measured by prejudice caused by the intervenors' delay—not by the intervention itself." *Kobach*, 2013 WL 6511874 at *3 (internal citations and quotations omitted).

Plaintiff does not dispute that LWVND's motion was timely, nor that there are common questions of fact and law. Finally, LWVND's participation will not cause undue delay or prejudice Plaintiff. Prejudice can arise where a movant attempts to intervene when motions practice and discovery are already well underway. *See ACLU of Minn.*, 643 F.3d at 1094. That is not the case here, as briefing on Defendant's motion to dismiss is ongoing, *see* Order, ECF No. 22; and Plaintiff has agreed to seek an expedited schedule on LWVND's motion to dismiss in the event that intervention is granted, to ensure it can be heard on the same timeline as Defendant's motion. *See* Ex. 1 (N. Johnson Email, Aug. 29, 2023). As such, Plaintiff's unspecified assertions of prejudice are unfounded and outweighed by the benefit of LWVND's unique viewpoint. Following the Eighth Circuit's practice of construing Rule 24 liberally, with any doubts resolved in favor of the proposed intervenor, *Kansas Pub. Emps. Ret. Sys.*, 60 F.3d at 1307, this Court should exercise its discretion and grant intervention.

CONCLUSION

For the foregoing reasons, as well as those stated in its Motion to Intervene, ECF No. 13, and its previous reply in support of that motion, ECF No. 18, LWVND respectfully requests that this Court grant its Motion to Intervene in this matter.

September 22, 2023 Respectfully submitted,

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