The Honorable Tiffany M. Cartwright

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WASHINGTON STATE ALLIANCE FOR RETIRED AMERICANS,

Plaintiff,

v.

STEVE HOBBS, in his official capacity as Washington State Secretary of State, MARY HALL, in her official capacity as Thurston County Auditor, and JULIE WISE, in her official capacity as King County Elections Director,

Defendants.

Case No. 3:23-cv-06014-TMC

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

NOTED FOR HEARING:
October 11, 2024 at 10:00 AM

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INTRODUCTION

It has been almost a year since this lawsuit was initiated and more than six months since the Court entered the parties' carefully negotiated consent decree and closed the case. Now, Jim Walsh and Matt Beaton ("Proposed Intervenors") attempt to pry that closed door open and wedge themselves through it. Reopening this matter at this juncture would be highly prejudicial by forcing the parties to litigate a dispute that both sides mutually agreed can be—and properly was—resolved by way of a consent decree well in advance of the 2024 general election. Unable to justify their delay in seeking intervention, Proposed Intervenors instead turn to completely baseless conspiracy theories about the motivations of the parties, attempting to distract the Court from Proposed Intervenors' own lack of due diligence and action.

Proposed Intervenors' motion fails every step of the intervention analysis: it is patently untimely and otherwise fails to meet the well-established rules for intervention, all in an effort to press a motion to dismiss that is baseless on its face. The Court should reject Proposed Intervenors' motion and leave this closed case closed.

ARGUMENT

I. Proposed Intervenors do not satisfy the standard for intervention as of right.

Proposed Intervenors fail to carry their burden of demonstrating that they satisfy each of the necessary requirements to intervene as a matter of right: (1) that the application is timely; (2) that the applicant has a "significantly protectable" interest relating to the transaction that is the subject of the litigation; (3) that the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) that the applicant's interest is inadequately represented by the parties before the court. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996); Fed. R. Civ. P. 24(a)(2).

The first factor, timeliness, is a "threshold requirement." *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir.1990), *cert. denied sub nom.*, *Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991) (mem.). Thus, this Court need not consider the remaining elements—none of which

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Proposed Intervenors even bothered to brief—if it determines Proposed Intervenors' motion was untimely.

A. Proposed Intervenors' motion is untimely.

Proposed Intervenors' motion should be denied outright because it is untimely. Courts consider three primary factors to assess timeliness: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *W. Watersheds Project v. Haaland*, 22 F.4th 828, 835–36 (9th Cir. 2022) (quoting *Smith v. L.A. Unified School Dist.*, 830 F.3d 843, 854 (9th Cir. 2016)). Each of these factors weighs decidedly against Proposed Intervenors here.

1. Proposed Intervenors seek to intervene months after this case has been fully resolved.

The "stage of th[is] proceeding" is not just late, it is *long over*. *Id.* at 836. This case was initiated a year ago, and this Court entered the parties' carefully negotiated consent decree and subsequently *closed* the case six months ago. Delays of this magnitude preclude attempts to intervene. *See GemCap Lending I, LLC v. Taylor*, 677 F. App'x 351, 352 (9th Cir. 2017) (affirming lower court's denial of a motion to intervene that was filed fourteen months after the lawsuit was initiated and four months after the parties had settled the case). Indeed, Proposed Intervenors do not cite a single case—let alone one analogous to the present case—in which a motion to intervene was granted months after a case was closed.

Even if the case had not been long closed, Ninth Circuit precedent—which Proposed Intervenors ignore—establishes that attempts to intervene into a case *after* the court has entered a consent decree are typically futile because the case is already in its final stage. *See, e.g.*, *Oregon*, 913 F.2d at 588 ("We have held in other contexts that waiting until after entry of a consent decree weighs heavily against intervention" and in fact even "intervention on the eve of settlement may be untimely.").

Proposed Intervenors cannot and do not dispute these basic realities of their dilatory

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motion. Instead, they argue that the terminal stage of this case should not matter because "[n]one of the existing parties did any substantive work on the matter." Mot. to Intervene at 4, ECF No. 38. But Proposed Intervenors offer no authority to support their position that an arbitrary and speculative assessment of a would-be intervenor as to the amount of "substantive work" that the parties put into a case somehow absolves them from acting diligently to intervene. To the contrary, the Ninth Circuit has made clear that parties who attempt to intervene "only after the original parties have reached an acceptable settlement[]" should not be able to do so, without exceptionally good reason. *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1217, 1219 (9th Cir. 1995).

Here, "[s]ince the motion was filed after the consent decree was approved" and months after the case was closed, "the first [timeliness] factor weighs heavily against" Proposed Intervenors. *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978).

2. Allowing intervention at this stage would be extremely prejudicial.

Allowing Proposed Intervenors to intervene in this case at this exceedingly late date would be highly prejudicial to the parties and the public at large. It would force both Plaintiff and Defendants to spend time, energy, and resources on prosecuting and defending a case they thoughtfully resolved by way of consent decree instead of litigation months ago. And it would force Plaintiff to further defend against Proposed Intervenors' attempts to rewind the case back to its infancy and dismiss this case at the threshold. Such briefing would be entirely unnecessary if intervention is denied.

Plaintiff would also be prejudiced by Proposed Intervenors' attempts to undo the substance of the parties' negotiated consent decree. *See Empire Blue Cross*, 62 F.3d at 1220 (finding "potential prejudice to the parties" based on the possibility that intervention "would 'unravel' the original settlement"). The consent decree was negotiated at arm's length and resulted in a compromise that gave Plaintiff some (but not all) of the relief it sought. *Compare* Am. Compl. ¶¶ 7, 22, ECF No. 16 (alleging that the Washington Constitution's durational residency requirement

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was inconsistent with federal law and the U.S. Constitution), *with* Consent J. & Decree, ECF No. 37 (enjoining only state statutes codifying the state's durational residency requirement). Plaintiff agreed to the consent decree "for the purpose of resolving disputed claims, avoiding the burdens and costs associated with litigating this matter through final judgment, and ensuring that the fundamental right to vote is protected." Consent J. & Decree at 5. In exchange for forgoing a fulsome adjudication and declaration of its constitutional rights, Plaintiff obtained an injunction of the challenged statutory provision in time for practical relief during the 2024 election cycle. *See* Order Granting Joint Mot. for Entry of Consent J. & Decree at 2, ECF No. 36. The prejudice Plaintiff would suffer if Proposed Intervenors were allowed to relitigate this already-resolved case is plain and palpable.[1]

The prejudice from granting intervention at this stage is not just limited to the parties. Reopening the case now would also inject unnecessary confusion into the state's upcoming elections. It is beyond dispute that the voting rules ahead of election day in November are cemented in place by both the consent decree and the Secretary's subsequent rulemaking to further codify the changes to the state's Durational Residency Requirement.[2] Proposed Intervenors do not contend otherwise, nor do they even purport to seek relief that could have a meaningful impact on the voting rules in advance of the election. Proposed Intervenors' extremely belated attempt to re-open a closed case on the eve of a major election, however, threatens to sow unnecessary voter confusion. Proposed Intervenors' attempt to call those rules into question just weeks before election day would be highly prejudicial to voters and election officials alike. *Cf. Alaniz*, 572 F.2d at 659 (finding prejudice where "the decree is already being fulfilled" and "to countermand it now

[1] The Secretary, for his part, rightly evaluated the merits and likelihood of success of Plaintiff's claims and determined that the consent decree "will avoid significant litigation expenses at public expense, including significant potential liability for attorneys' fees and costs that can be recovered by a successful plaintiff in a federal civil rights lawsuit." Consent J. & Decree at 4.

[2] The Court may take judicial notice of this agency rulemaking as a matter of public record, available here: *Minutes of Public Hearing*, Wash. Sec'y of State — Elections Div. (June 25, 2024), https://www.sos.wa.gov/sites/default/files/2024-07/WAC%20Hearing%20Minutes_6_25_24.pdf. *See* Fed. R. Evid. 201; *Mack v. S. Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

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would create havoc").

Against all this, Proposed Intervenors offer a single case citation regarding the timeliness of their motion, *see* Mot. to Intervene at 4 (citing *Martin v. Wilks*, 490 U.S. 755, 765 (1989)), but their reliance on that case misses the mark. Most notably, *Martin* was not a case about timely intervention. *Martin* was a "reverse discrimination" case brought by a group of white firefighters in Alabama who alleged they were being denied promotions because of government consent decrees addressing discriminatory employment practices. 490 U.S. at 758, 760. The question before the U.S. Supreme Court was whether the plaintiffs' challenge to the consent decrees was precluded as an impermissible collateral attack. *Id.* at 762. The Court held it was not. *Id.* at 761–62.[3] The excerpt of *Martin* quoted by Proposed Intervenors, Mot. to Intervene at 4, simply notes that the plaintiffs there were *not required* to intervene in the underlying lawsuit that resulted in the consent decrees, 490 U.S. at 765—a far cry from any suggestion that intervention at this more-than-late stage will not prejudice the parties.

To the extent Proposed Intervenors suggest that they should have been joined as defendants in this litigation, they (1) fail to cite any authority indicating that joinder is relevant to the prejudice analysis for untimely intervention, Mot. to Intervene at 4; (2) fail to offer any avenue for the Court to even make a determination on joinder, *see* Intervenors' Proposed Mot. Dismiss, ECF No. 38-1 ("Mot. to Dismiss") (failing to raise the issue of joinder in their proposed motion to dismiss); (3) fail to cite any authority in support of the proposition that Plaintiff was required to sue every county election official and Republican Party official in the state; and (4) ignore authority that indicates the opposite, *see, e.g.*, *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006) (concluding the Secretary of State of Washington, as the state's chief election officer, was the proper defendant in lawsuit challenging the state's voter "matching" statute governing who can register to vote, despite counties having a role in registering voters); *see also Ariz. Democratic*

[3] That holding was subsequently superseded by the Civil Rights Act of 1991. *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 251 (1994) (noting Section 108 of the law responds to *Martin v. Wilks*).

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Party v. Reagan, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *7 (D. Ariz. Nov. 3, 2016) (concluding that "[t]he interests of the Secretary are aligned with the counties and she is capable of presenting arguments on behalf of the absent county officials").

For all of these reasons, Plaintiff would obviously be prejudiced by Proposed Intervenors' untimely intervention. Proposed Intervenors offer no authority remotely meeting their burden to establish otherwise.

3. Proposed Intervenors fail to adequately explain why their delay in seeking intervention should be excused.

Proposed Intervenors provide no adequate justification for their inordinate delay in seeking intervention. The "rule is clear" in the Ninth Circuit on this point: "[a] party must intervene when he 'knows *or has reason to know* that his interests might be adversely affected by the outcome of litigation.'" *United States v. Alisal Water Corp.*, 370 F.3d 915, 923 (9th Cir. 2004) (emphasis added) (quoting *Oregon*, 913 F.2d at 589).

Proposed Intervenors purport to have been "blindsided" when they learned from unnamed "constituents" at some undefined time about a publicly-available federal case filed nearly a year ago. Mot. to Intervene at 1. But "delay is measured from the date the proposed intervenor *should have been aware* that its interests would no longer be protected adequately by the parties, *not the date it learned of the litigation*." *Kalbers v. U.S. Dep't of Just.*, 22 F.4th 816, 823 (9th Cir. 2021) (first emphasis added) (quoting *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996)). Proposed Intervenors provide no explanation for why a county election official and chairman of one of the state's two major political parties should not have known that a lawsuit had been filed that—in Proposed Intervenors' view—sought "a momentous change to state law and the state Constitution," Mot. Intervene at 2, and raises such "[w]eighty issues," Mot. to Dismiss at 1. At the very least, the information contained in that complaint—which was publicly accessible to anyone with interest in the case from the time it was filed—gave Proposed Intervenors "constructive notice" of both the matter and their potentially adverse interests in it. *See Alisal Water Corp.*, 370

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F.3d at 922–23; *see also Ohio Cas. Ins. Co. v. Chugach Support Servs., Inc.*, No. C10-5244 RBL, 2011 WL 3924820, at *3 (W.D. Wash. Sept. 6, 2011) (noting proposed intervenor was put on "constructive notice" of other party's potentially adverse interest when the lawsuit was first filed). Proposed Intervenors entirely fail to explain how their "concerned constituents" had access to information that Proposed Intervenors purportedly lacked. Mot. to Intervene at 1.

Indeed, Proposed Intervenors' entire theory for intervention acknowledges that they should have known (at least under their own telling of it) of the potential for inadequate protection from the parties from the outset of the case. Proposed Intervenors' argument is that, because the existing defendants in the case are elected officials affiliated with the Democratic Party—who Proposed Intervenors allege share the same political goals as the non-partisan Plaintiff—they must have colluded in settling this case without contest. *See* Mot. to Intervene at 1–2. This is completely false, but in the world of Proposed Intervenors' imagining, the need for intervention was clear from the start. The identity of all the parties in this case were all publicly known pieces of information as early as one year ago when Plaintiff first filed its complaint.

To the extent Proposed Intervenors profess ignorance that Defendants "declined to assert any defense—including standing—to the pending claim," Mot. to Intervene at 5, it is again contradicted by the publicly-available record. Each of the Defendants publicly filed an Answer by January 2024, instead of a motion to dismiss on standing or any other grounds. ECF Nos. 23 (Mary Hall), 24 (Julie Wise), 28 (Steve Hobbs). That litigation choice should have put Proposed Intervenors on notice that Defendants' and Proposed Intervenors' litigation strategies may diverge. Still, Proposed Intervenors failed to act. *See NAACP v. New York*, 413 U.S. 345, 367 (1973) (faulting appellants for not moving to intervene sooner when the contents of an answer filed by the defendant suggested the parties would consent to the entry of judgment instead of oppose summary judgment).

In any event, Proposed Intervenors concede that they should have known that intervention was necessary by March 8 because that was the day it became clear the Defendants were resolving

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the case by consent decree. Mot. to Intervene at 5. Proposed Intervenors utterly fail to explain how their motion is timely when they waited six more months to file their motion to intervene.

In sum, because Proposed Intervenors have failed to state a satisfactory reason for their delay in attempting to intervene, their motion should be denied as untimely.

B. Proposed Intervenors fail to demonstrate any impairment to their interests necessary for intervention.

The Court can and should reject this motion on the threshold question of timeliness. But even if their motion was timely, Proposed Intervenors have wholly neglected to discuss—much less demonstrate they satisfy—the remaining elements of intervention as of right. As the party seeking entry into this case, Proposed Intervenors "bear[] the burden of showing that *all* the requirements for intervention have been met." *Alisal Water Corp.*, 370 F.3d at 919. Proposed Intervenors' failure to even attempt to carry their burden requires that the Court deny their motion.

Proposed Intervenors could not satisfy the remaining elements if they tried. Proposed Intervenors do not dispute that Matt Beaton, as the Franklin County Auditor, has the same interest in the subject matter of this action as his county counterpart Defendants. *See* Mot. to Intervene at 2. And proposed intervenor Jim Walsh, the Washington Republican Party Chair, has identified no interest at stake in this matter that would be harmed. *See generally* Mot. to Intervene. Under such circumstances, the existing parties are presumed to adequately represent Proposed Intervenors' interests unless there is a "compelling showing" to the contrary. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011). Here, they offer *no* showing, let alone a compelling one.

Proposed Intervenors argue they should be granted entry into this case because the existing Defendants settled the case rather than defended the state Constitution's residency requirement and challenged Plaintiff's standing. *See* Mot. to Intervene at 2. But their argument on this point, too, is misplaced. The consent decree negotiated between the parties focuses solely on the state's *laws* reflecting the Durational Residency Requirement and does not "eras[e]" anything in the state

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Constitution. *See id.* at 1; *see generally* Consent J. & Decree. As noted above, Plaintiff's complaint asserted that the Washington Constitution also violates federal law, but the parties did not agree on that claim for purposes of the consent decree.

Proposed Intervenors' standing arguments also miss the mark. Plaintiff more than adequately pled standing in its Amended Complaint. The allegations in that pleading detail how Washington's Durational Residency Requirement affects the Alliance's members, including specifically members who move into or across the state. *See* Am. Compl. ¶¶ 17–18. It is settled Ninth Circuit law that Plaintiff is not required to identify in its complaint specific members that will be injured by the state's law. *See Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1100 (9th Cir. 2024) (when "standing is challenged on the basis of the pleadings," "general factual allegations of injury resulting from the defendant's conduct may suffice" (first quoting *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988), then quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992))). Nor is a plaintiff required to wait to bring suit until it has suffered the harm it seeks to prevent. A law can be challenged if it presents a certainly impending threat or risk of injury on a party. *Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023). Plaintiff's Amended Complaint sufficiently alleged ways in which the state's Durational Residency Requirement creates such an injury for its members, and any questions regarding Plaintiff's standing would be fact issues for trial.

Instead of spending time, money, and effort litigating these issues in front of the court over several months, however, the parties made the reasonable and intentional decision to choose a different path—namely, to efficiently resolve this case through consent decree in a manner that was satisfactory for all parties. While Defendants—in Plaintiff's view—ultimately saw the writing on the wall and resolved the case instead of futilely litigating it, Defendants surely shared Proposed Intervenors' interests.

In any event, even if Proposed Intervenors were correct that Defendants failed to make the same arguments they would in this case, this is best understood as a dispute over litigation strategy

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or tactics. That is not enough to justify intervention as a matter of right. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009).

II. Proposed Intervenors do not satisfy the standard for permissive intervention.

Proposed Intervenors do not even attempt to argue that they satisfy the standard for permissive intervention. But even if this Court were inclined to sua sponte consider permissive intervention, it should find that Proposed Intervenors fail to meet the standard. Among other deficiencies, "[a] timely motion is required for the granting of intervention, whether as a matter of right or permissively." *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015); *see also Lending Club Corp. ex rel. Stadnicki v. Laplanche*, 804 F. App'x 519, 522 (9th Cir. 2020) ("[B]ecause timeliness is analyzed even more strictly for a motion for permissive intervention, [proposed intervenor's] alternative request for permissive intervention is necessarily untimely."). Here, Proposed Intervenors failed to timely intervene, and this fact is fatal to permissive intervention for the same reasons discussed above. *See supra* Section I.A.

CONCLUSION

For the foregoing reasons, Proposed Intervenors' motion for leave to intervene should be denied.

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The Washington State Alliance for Retired Americans

Dated: October 7, 2024

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CERTIFICATE OF COMPLIANCE

I certify that this memorandum contains 3,509 words, in compliance with the Court's Minute Order on September 18, 2024, ECF No. 39.

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