IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JERRY GREEN and LINDA PETROU, Plaintiffs, v. KAREN BRINSON BELL, in her capacity as the Executive Director of the North Carolina State Board of Elections; Defendants, and THE LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA AND THE NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, Proposed Defendant-Intervenors.	Civil Action No. 3:21-cv-00493

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DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF INTERVENTION

Plaintiffs Jerry Green and Linda Petrou oppose intervention by the League of Women Voters of North Carolina's ("LWVNC") and the North Carolina A. Philip Randolph Institute's ("APRI" and, together with LWVNC, "Defendant-Intervenors") in this case by distorting Defendant-Intervenors' significant interest in protecting the rights of its members and other eligible voters, obscuring their own litigation goal of compelling aggressive voter purges of the North Carolina registration rolls, and overstating the ability of Defendant Director Karen Brinson Bell ("Director Bell") to adequately defend Defendant-Intervenors' unique interests. Director Bell, who notably does not oppose permissive intervention, argues solely against intervention as of right on the grounds that, because the State Board of Election adequately defends the interests of *all* North Carolina voters, it must therefore also adequately defend the interests of Defendant-Intervenors.

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Contrary to Plaintiffs' position, the interest of Defendant-Intervenors in preventing the wrongful removal of their members, voters they have registered, and other North Carolinians from the voter rolls is vital to their missions and is protectable under the NVRA. This interest is threatened by the relief requested in the Complaint. This interest cannot be adequately protected by Director Bell, whom Defendant-Intervenors (and others working to prevent wrongful voter purges) have been forced to sue in the past for violating the very law at issue in this case. Accordingly, Defendant-Intervenors respectfully request that this Court grant their motion to intervene as of right or, alternatively, for permissive intervention.

I. The Court Should Grant Intervention as of Right.

a. Defendant-Intervenors' Motion is Timely and Not Premature.

Plaintiffs do not, because they cannot, dispute that the Motion to Intervene is timely. The instant motion was filed two months from the filing of the complaint, prior to the filing of a responsive pleading by Defendant and before any hearings before this Court. Briefing on this Motion will close with the filing of this Reply, well before the twice-extended January 28, 2022, deadline for

Plaintiffs' response to Defendant's Rule 12 motion. Given this early stage, Defendant-Intervenors' Motion is timely.

Plaintiffs strangely claim that this Motion was filed too early, arguing that Defendant-Intervenors' motion is "contingent and premature" because Defendant-Intervenors are focused on "events that have not yet occurred." (Pls.' Opp. 2-4). This argument has no merit. As an initial matter, Rule 24 requires intervention where disposing of the action "may" impair or impede the movant's ability to protect its interest—not only where it "will" or "has" impeded that interest. Fed. R. Civ. P. 24(a). Rule 24 therefore contemplates potential future events as a basis for granting intervention. Moreover, the timeliness requirement in Rule 24(a) and (b) undermines Plaintiffs' position, since a potential intervenor who delays intervention until the later stages of the litigation will inevitably be denied entry. *See, e.g.*, *N.C. State Conference of the NAACP v. Cooper*, No. 1:18CV1034, 2021 U.S. Dist. LEXIS 155390, at *5-10 (M.D.N.C. Aug. 17, 2021) (intervention denied where the movant delayed seeking intervention until the case had reached an advanced stage). Put simply, Plaintiffs would have Defendant-Intervenors delay intervention until after Plaintiffs have proved their case and after the harm is done. There is simply no basis for that approach in the law, which would defeat the very purpose of intervention.

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The case on which Plaintiffs rely for this illogical argument, *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005), supports at best a much narrower principle and, in any event, is inapposite. In *Michigan*, the proposed intervenors were seeking a declaration regarding the Native American Tribes' use of land outside the confines of their reservations with respect to logging, easements, and other specific uses. *Id.* at 442-43. In doing so, they asserted affirmative defenses in their proposed answer that sought to "inject management and regulatory issues that are not yet before the court," given a case management order that effectively bifurcated the case into a declaratory phase and remedial phase. *Id.* at 444-45. The court held that, "[w]hile the proposed intervenors may be

legitimately concerned about these future issues, they are not now, and possibly never will be, before the district court." *Id.* at 444. Here, the interests Defendant-Intervenors assert are directly implicated by the issues Plaintiffs put before the Court in their Complaint, and there is no plausible way to separate those issues into different litigation phases and still allow Defendant-Intervenors an opportunity to protect their interests. If the Court grants the relief Plaintiff seeks, the question is not *whether* that relief will be implemented and Defendant-Intervenors' interests impaired, but *when*.[1]

Plaintiffs are also wrong to suggest that Defendant-Intervenors' legitimate concerns about settlement demonstrate "an exclusive focus on the remedies." (Pls.' Opp. 4). A decision in this case or a court-approved settlement that mandates additional list-maintenance procedures will very likely preclude or complicate Defendant-Intervenors' ability to assert their rights in a separate suit. Even though the NVRA offers a private right of action in 52 U.S.C. § 20510(b), any challenge to a purge of an eligible voter pursuant to a program that has the blessing of this Court will necessarily have to address the *stare decisis* effect of this Court's decisions.[2] Forcing Defendant-Intervenors to go through the arduous process of filing a separate case to protect and vindicate the rights of eligible

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[1] Plaintiffs also cite *Baynes v. Hanson*, No. 3:09-cv-290-RJC-DSC, 2009 U.S. Dist. LEXIS 129752, at *2-*3 (W.D.N.C. Jul. 28, 2009) (Conrad, J), for the proposition that the Court could grant the motion to intervene "'for the limited purpose' of allowing Movants to participate at the remedial stage of this case." (Pls.' Opp. 4). That case, however, came before the Court under a substantially different procedural posture, with the United States moving to intervene solely for the purpose of staying discovery in a civil action because of parallel criminal proceedings. In other words, unlike what Plaintiffs propose, the Court granted intervention as it was requested by the movant.

[2] Although the relief Plaintiffs seek plainly runs counter to the NVRA, Defendant-Intervenors are not presuming that this Court would issue an order or approve a settlement that violates federal law—contrary to Plaintiffs' and Defendant's contentions (Pls.' Opp. 8; Bell Opp. 2). Because States have considerable leeway under the NVRA in how they carry out their list-maintenance obligations, even a permissible program could negatively impact eligible voters, and Defendant-Intervenors' involvement will help ensure that any such impacts are mitigated as much as possible. *See Pub. Interest Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 801 (E.D. Mich. 2020) (discussing the competing goals of the NVRA and the benefits to the court of having "fulsome consideration of both competing interests, vigorously advocated by appropriately interested parties").

voters who may be improperly removed, or challenge the validity of a new Court-approved list-maintenance program, is also a waste of judicial resources when those rights can be protected right now in the present case.

In sum, Defendant-Intervenors' ability to protect its recognized interest requires intervention now, not at some hypothetical future stage of the litigation. Plaintiffs' arguments about the improper timing of this motion should be disregarded.

b. Defendant-Intervenors have a substantial interest in this case that will be impaired if intervention is denied.

Defendant-Intervenors have a significantly protectable interest in ensuring that the NVRA is enforced and interpreted appropriately such that their members and other eligible voters that they have expended their limited resources registering to vote are not removed from the voter rolls. As noted in Defendant-Intervenors' opening brief, courts in this and other circuits have routinely recognized this very interest in NVRA litigation seeking aggressive list-maintenance activity. *See* Mot. 6 (citing cases).

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Plaintiffs' opposition fails to address any of the cited authority meaningfully. Rather, Plaintiffs respond by mischaracterizing Defendant-Intervenors' interest as one about "avoiding overbroad relief," which Plaintiffs contend is an interest shared "by every actor in this case," since Plaintiffs only "want[] North Carolina to follow its existing duty to remove ineligible voters from the rolls." Pls' Opp. 8-9. This argument fails for three primary reasons.

First, this argument merely summarizes the very issues in dispute in this litigation: whether the voter removals Plaintiffs seek are required (or are even permitted) by the NVRA and whether, regardless of the extent to which the removals are lawful, they will improperly sweep in eligible voters. Plaintiffs' self-serving assurances that they will seek nothing that could harm Defendant-Intervenors' interests is speculative and insufficient to defeat intervention.

Second, Plaintiffs' contention is belied by their own allegations and the relief that they seek. In the Complaint, Plaintiffs expressly seek an order requiring Defendants to "develop and implement" a voter removal program that complies with the NVRA, but fail to specify the precise nature of the illegality they allege or the precise contours of the remedial program they seek. Compl. at 15, Prayer for Relief ¶ c. Given that Director Bell already operates a voter removal program that, Defendant-Intervenors contend, satisfies the NVRA, Plaintiffs can only be seeking a new program that would include processes that go beyond those currently implemented and that are therefore "untested" in these jurisdictions. Plaintiffs cannot hide behind the vagueness of their allegations to defeat intervention and thereby benefit from the inadequacy of their own Complaint,which does not plausibly allege a failure of reasonable list-maintenance measures.

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Third, the only case Plaintiffs cite in support of their self-serving argument—that forced compliance with the NVRA will not harm eligible voters—is unpersuasive. As an initial matter, that decision on intervention, *Judicial Watch v. Logan*, Doc. 76, Case No. 2:17-cv-8948 (C.D. Cal. 2018) (Pls.' Opp. 9), was vacated by the Ninth Circuit in *Judicial Watch v. Padilla*, Nos. 18-56102, 18-56105, 2019 U.S. App. LEXIS 8347, at *3 (9th Cir. Mar. 20, 2019), thus negating the limited persuasive weight it otherwise might have offered. Even if that were not the case, the four-page *Logan* decision is short on reasoning and fails to consider (or let alone mention) the goals of the NVRA and the competing interests a court must consider when deciding whether a list-maintenance program is reasonable under the statute. *See, e.g., Winfrey*, 463 F. Supp. 3d at 799-803 (discussing at length the history of the NVRA before granting intervention). Had the *Logan* court considered those interests, the decision would reflect a more effective analysis of the real world consequences on eligible voters of prioritizing increasingly aggressive list-maintenance procedures to remove ineligible voters. *Id*. at 801 ("Undoubtedly, a maximum effort at purging voter lists could minimize the number of ineligible voters, but those same efforts might also remove eligible voters."). Finally,

the *Logan* decision is an outlier that runs contrary to the "liberal intervention" standard endorsed by the Fourth Circuit. *See* Mot. 4 (citing *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986)).

Since Defendant-Intervenors have demonstrated a substantial interest in this case that will be impaired if intervention is denied, Defendant-Intervenors have satisfied those requirements for intervention.

c. Director Bell May Not Adequately Protect the Interests of Defendant-Intervenors.

The Fourth Circuit has explicitly adopted the standard set forth in *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), that a proposed intervenor need only show that "representation of its interest '*may be*' inadequate" and that this threshold is "minimal." *See United Guar. Residential Ins. Co. v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475 (4th Cir. 1987) (quoting *Trbovich*, with emphasis added by the Fourth Circuit). Defendant-Intervenors exceeded this "minimal" threshold in their moving papers. The Fourth Circuit's holding in *N.C. State Conference of the NAACP v. Berger*, 999 F.3d 915, 931 (4th Cir. 2021), on which Plaintiffs rely (Pls.' Opp. 5-10), does not contradict this standard, nor does it support Plaintiffs' argument regarding the adequacy of representation requirement for intervention.

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The Fourth Circuit in *Berger* endorsed the "default" rule established in *Trbovich*, and noted that the standard is a "'liberal' one" that may give way to more specific "standards for the adequacy of representation under Rule 24 based on the context of each case." *Berger*, 999 F.3d at 931. Where the legislative leaders in *Berger* (the proposed intervenors) were found to be advancing the same objective as the Attorney General, and, in fact, intending to represent the same client (the defendant State of North Carolina), the context-specific approach supported applying a heightened presumption of adequacy to the existing parties and denying intervention. *Id*. at 932-34. Of relevance here, the court explained that the "presumption of adequacy" is more appropriate when the intervenor and defendant are both governmental entities because "[a] private party seeking to

intervene can argue that although it seeks the same objective as the state's representative, the state's interests—informed, as they must be, by the concerns of the general public—do not perfectly overlap with his or her more individualized interest". *Id.* at 933 (citing *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 801 (7th Cir. 2019)).

While Plaintiffs contend here that the heightened presumption of adequacy of the governmental defendant forecloses intervention (Pls.' Opp. 5-7), that is simply not the case. As previously explained (Mot. 8-10), Defendant-Intervenors do not have the same objective or the same interests as Director Bell. Defendant-Intervenors have an *individualized interest* in protecting specific eligible voters—their members and voters they have registered—from being improperly and unlawfully removed from the North Carolina voter rolls, whereas Director Bell has competing interests in (a) defending their list-maintenance procedures, (b) limiting liability and costs in litigation to the State and County Boards of Election, and, of course, (c) ensuring that eligible voters are able to register to vote and remain registered. The first two considerations could obviously interfere with the effectuation of the third interest, and Director Bell must therefore balance those interests in a manner at odds with the interests of Defendant-Intervenors.

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Consistent with this, Director Bell's submission identifies the obligations she has to the electorate at large (Bell Opp. 2) but never contends that she has the same objectives as the Defendant-Intervenors. Nor could she: Programs similar to the no-contact list-maintenance system being defended here have been shown to erroneously remove eligible voters, a fact the Director Bell is unlikely to highlight. Indeed, Defendant-Intervenors and other organizations with similar missions have been forced to sue the North Carolina State Board of Elections in the past to compel its compliance with the very law at issue here, the NVRA. *See Action NC v. Strach*, Case No. 1:15-cv-01063-LCB-JEP (Dec. 15, 2015) (lawsuit by Intervenor A. Philip Randolph Inst. and other organizations challenging violations of Sections 5 and 7 of the NVRA); *N.C. State Conference of*

the NAACP v. N.C. State Bd. of Elections, 2016 U.S. Dist. LEXIS 153249, at *4-*8 (M.D.N.C. Nov. 4, 2016) (lawsuit in which defendants the North Carolina State Board of Elections and several county boards of election argued that the purge of eligible voters without notice and during the 90-day quiet period did not violate the NVRA). While Plaintiffs cite *Democracy N.C. v. N.C. State Bd. of Elections*, 2020 U.S. Dist. LEXIS 214153, at *4-*5 (M.D.N.C. Jun. 24, 2020), (*see* Pls.' Opp. 6), this case is distinguishable because the proposed intervenors there did not have a cognizable interest separate from that of the two governmental defendants already in the case.

While it is true that both Defendant-Intervenors and Director Bell seek to dismiss Plaintiffs' suit, that fact alone is in no way dispositive on the issue of adequacy of representation. A recent North Carolina case with similar NVRA claims proves that very point. In *Judicial Watch Inc. v. North Carolina State Board of Elections, et al.*, ECF No. 61 at *20, No. 3:20-cv-211-RJC-DCK (W.D.N.C. Aug. 20, 2021), Magistrate Judge Keesler recommended granting the State's motion to dismiss while noting that Defendant-Intervenors, who had sought intervention to file a Rule 12 motion, had "presented compelling arguments to be allowed to intervene" and recommended the parties be permitted to renew their request if the plaintiff was allowed to file an amended complaint. Thus, regardless of Director Bell's pending Rule 12 motion, Director Bell cannot adequately represent the Defendant-Intervenors' interests because she does not share the same objectives as Defendant-Intervenors and there is a substantial likelihood that her goals will directly conflict with the goals of Defendant-Intervenors as has often happened in the past.[3]

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[3] *See also, e.g., Rutherford Cty. v. Bond Safeguard Ins. Co.*, Case No. 1:09cv292, 2010 U.S. Dist. LEXIS 62878, at *8 (W.D.N.C. May 31, 2010) (upholding the Magistrate Judge's finding that, without the intervention of the proposed intervenor, the plaintiff may make a decision that will result in greater costs for the intervenor); *NISH v. Cohen*, 191 F.R.D. 94, 97 (E.D. Va. 2000) ("[I]n at least one previous case, the Secretary of Defense and the Secretary of the Army have argued for an interpretation of the [Randolph-Sheppard] Act at odds with the construction favored by some of the [proposed intervenors]."); *Alt v. United States Envtl. Prot. Agency*, Case No. 2:12-CV-42, 2012 U.S.

II. Alternatively, Permissive Intervention Should Be Granted.

Under Federal Rule of Civil Procedure 24(b), a court may grant permissive intervention if the intervenor asserts a claim or defense that shares a "common question of law or fact" with the main action. *Diagnostic Devices, Inc. v. Taidoc Tech. Corp.*, 257 F.R.D. 96, 100 (W.D.N.C. 2009). As noted above, Plaintiffs assert in this litigation that Defendant Bell's voter list-maintenance program violates the NVRA's list-maintenance obligations. Defendant-Intervenors contend that, not only does Defendants' program comply with the NVRA, but the more aggressive purges sought by Plaintiffs are unwarranted and in some cases unlawful. *See supra* Section I. Thus, Defendant-Intervenors' defense and the main action share common questions of law, such as "What are the precise contours of the NVRA's list-maintenance requirements?" and "Do the Defendant's list-maintenance procedures satisfy those requirements?" These are the same shared questions of law that provided the basis for permissive intervention in *Voter Integrity Project v. Wake County Board of Election*. See Order, *Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections*, Case No. 5:16-CV-683, ECF No. 26 (E.D.N.C. Dec. 1, 2016) (Ex. A to Mot. To Intervene, ECF No. 16-1).

Given the clear common questions of law or fact, Director Bell tellingly has not opposed permissive intervention by Defendant-Intervenors. Bell Opp. 1. Plaintiffs, however, continue to oppose permissive intervention, rolling out many of the same arguments against permissive

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Dist. LEXIS 194429, at *17 (N.D.W. Va. Oct. 9, 2012) ("[A] mere 'tactical similarity' of the 'present legal contentions' of a plaintiff and a proposed plaintiff-intervenor does not assure adequacy of representation or preclude a plaintiff-intervenor from the opportunity to appear."); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) ("[Courts] have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors [given the government's often broader interests and the aspiring intervenors narrower interest]."); *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 321 (D.C. Cir. 2015) (reversing district court's decision to deny motion to intervene where the district court found governmental representation adequate because that court failed to recognize that "we look skeptically on government entities serving as adequate advocates for private parties").

intervention as they did in opposing intervention as of right. Their arguments against permissive intervention are similarly lacking.

First, Plaintiffs argue that permissive intervention should be denied because of the government's adequate representation (Pls.' Opp. 11-12). As discussed above, Defendant-Intervenors do not have the same objective as Director Bell and have individualized interests they are seeking to protect. Accordingly, because the government cannot adequately represent Defendant-Intervenors' interests, permissive intervention should be granted.

Second, Plaintiffs argue that Defendant-Intervenors' participation in this case would cause undue delay by expanding the number of defendants in the matter from two to three. (Pls.' Opp. 11). These assertions are speculative and would seemingly apply to preclude any proposed intervenor in any matter even without a particularized showing of delay or prejudice. Plaintiffs' argument also fails to account for the benefit of permitting intervention by organizations actively involved in ensuring eligible voters remain on voter rolls. *See* Order, *Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections*, Case No. 5:16-CV-683, ECF. No. 26 at *5 (E.D.N.C. Dec. 1, 2016) (Ex. A to Mot. To Intervene, ECF No. 16-1) ("While Proposed Intervenor-Defendants' participation in the litigation as parties may impose some additional burdens on [Plaintiff], any prejudice it might suffer is outweighed by the benefit to the court from participation of Proposed Intervenor-Defendants' experienced counsel and from more extensive briefing on issues."); *Winfrey*, 463 F. Supp. 3d 795, 801 (E.D. Mich. 2020) ("Any complication of the case must be weighed against the value of resolving all competing legal positions within a single decisive lawsuit setting out the prevailing law for all parties to follow"); *Kobach v. United States Election Assistance Comm'n*, No. 13-cv-4095-EFM-DJW, 2013 U.S. LEXIS 173872 at *14 (D. Kan. Dec. 12, 2013) (noting the intervenors' "experience, views, and expertise . . . will help clarify, rather than clutter the issues of the action, which will in turn assist the Court in reaching its decision").

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Third, Plaintiffs argue that granting intervention here would open the floodgates to intervention for any number of "politically involved organizations in [North Carolina]." (Pls.' Opp. 11). This argument, however, gives short shrift to the requirements of Rule 24 and the gatekeeping role that the district court plays in assessing the specific contexts of each case and each proposed intervenor when deciding intervention. That mechanism provides the court with discretion to determine when intervention may be granted and wouldn't guarantee intervention for any and every "politically involved" organization.

Finally, Plaintiffs' argue that, if intervention is granted, reasonable limits should be placed on Defendant-Intervenors' involvement in the suit. (Pls.' Opp. 12). Although a court may place such limitations on a proposed-intervenor when granting permissive intervention, the decision to do so lies in the discretion of the court and is dependent on the circumstances of the case. The lead case cited by Plaintiffs for this proposition, *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560 (M.D.N.C. 2001), is distinguishable. That case involved three proposed plaintiff-interveners in a complex environmental dispute involving the United States of America as plaintiff, multiple private party defendants, and an independent statutory basis for intervention. By comparison, the instant matter is much more straightforward involving fewer parties, fewer claims, and less expansive discovery. Accordingly, as many courts in NVRA cases have done before, no restrictions should be placed on Defendant-Intervenors if granted permissive intervention.

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III. Conclusion.

For the reasons asserted above and in Defendant-Intervenors' initial Memo in Support of Intervention, the Court should grant Defendant-Intervenors' Motion to Intervene as of right or, in the alternative, for permissive intervention.

This, the 7th day of January, 2022.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of January, 2022 the foregoing document was filed via the Court's CM/ECF filing system, which will send a notification of filing to all counsel of record.

/s/ *Pressly Millen*
Pressly Millen

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