IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

JUDICIAL WATCH, INC.; ILLINOIS FAMILY ACTION; BREAKTHROUGH IDEAS; and CAROL J. DAVIS,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS; and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections,

Defendants.

No. 1:24-cv-01867

Hon. Sara L. Ellis

ILLINOIS AFL-CIO AND ILLINOIS FEDERATION OF TEACHERS' REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

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INTRODUCTION

The Supreme Court and Seventh Circuit have repeatedly held that Federal Rule of Civil Procedure 24 must be construed liberally in favor of intervention. Rule 24(a) "is straightforward: the court *must* permit intervention if (1) the motion is timely; (2) the moving party has an interest relating to [the subject matter] at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020). Because Proposed Intervenors satisfy each of these requirements, their motion to intervene should be granted as a matter of right. Plaintiffs' attempt to avoid this result runs afoul of both well-established and recent binding precedent.

There is no dispute that the motion to intervene is timely. Accordingly, to determine whether Proposed Intervenors have a right to intervene, the Court need only decide (1) whether they have interests that satisfy Rule 24(a)'s requirements, and (2) whether those interests are adequately represented by the current parties. The Seventh Circuit's decision in *Bost v. Illinois State Board of Elections*, 75 F.4th 682 (7th Cir. 2023), answers the first question: Proposed Intervenors assert the same interests that the court found satisfied Rule 24(a)'s requirements there. Plaintiffs' attempts to differentiate this case are easily rejected and their new assertion that they will not seek relief before the 2024 election makes no difference. As Proposed Intervenors have explained—supported by data, precedent, and recent events—their unique interests in their members' voting rights and their organizational resources are threatened *whenever* a state is forced to increase its efforts to label certain voters as "ineligible" and cancel more voter registrations—and that is precisely the relief that Plaintiffs seek.

Bost also requires rejection of Plaintiffs' arguments related to adequacy of representation. As that decision makes clear, Proposed Intervenors need only show that the existing parties *may*

not represent their interests. That standard is easily satisfied here. As several courts have recognized, when a plaintiff attempts to use the NVRA to remove voters from the registration rolls, there is a significant risk that governmental defendants will not adequately represent the interests of organizations—like the labor unions here—who seek to protect their members' voting rights and the resources they would need to expend to address that harm. That is because the NVRA subjects states to dual (and often competing) duties that can easily put them at odds with these interests. *See, e.g.*, *Bellitto v. Snipes*, No. 16-CV-61474, 2016 WL 5118568, at *2 (S.D. Fla. Sept. 21, 2016). Accordingly, Proposed Intervenors are entitled to intervene.

That said, since this is not—by Plaintiffs' own concession—a time-sensitive matter, the Court need not decide whether Proposed Intervenors are entitled to intervention as of right and may instead exercise its discretion to grant permissive intervention. While Plaintiffs once again offer a confused and patently incorrect reading of the applicable legal standard, there is no serious dispute that Proposed Intervenors meet the low threshold for permissive intervention. Proposed Intervenors' involvement would also aid this Court's understanding of key issues pertinent to the resolution of the case, such as how Plaintiffs' requested relief would lead to an ineffective method of identifying ineligible voters and would put at risk the registration of lawful voters, including among Proposed Intervenors' extensive, statewide memberships. Plaintiffs should not be permitted to exclude this critically important perspective from this litigation.

ARGUMENT

I. Proposed Intervenors have unique, protectable interests in this litigation that will be impaired absent intervention.

Although Plaintiffs frame their lawsuit as seeking compliance with the NVRA, the relief they pursue is unmistakable: fewer people on Illinois's voter rolls. Compl. at 22, ECF No. 1. As a result, this lawsuit directly threatens the rights of Proposed Intervenors' members—a large and

diverse body of Illinois voters registered to vote at higher rates than the general population—as well as Proposed Intervenors' legally protected interest in preserving their limited resources.

The Court need not linger long on the question of whether these interests are sufficient to intervene as of right under Rule 24(a): in its recent decision in *Bost*, the Seventh Circuit found that they are. There, the proposed intervenor asserted two interests in support of its intervention—(1) "an interest as an organization that would have to expend additional resources . . . should Illinois election law change," and (2) "an associational interest on behalf of its members, Illinois voters [who stood to be disenfranchised], should the law change." *Bost*, 75 F.4th at 687. These are the same interests that Proposed Intervenors have in this litigation. As explained in the declarations submitted in support of the motion to intervene, if Plaintiffs are successful, Proposed Intervenors will be forced to divert resources away from their planned activities toward ensuring that their members remain registered to vote. *See* Drea Decl. ¶¶ 17–20, ECF No. 15-1; Montgomery Decl. ¶¶ 15–18, ECF No. 15-2. And because Proposed Intervenors share a common mission to protect and advance their members' voting rights, they also have a legal interest in representing their members in this lawsuit. *See* Drea Decl. ¶ 10; Montgomery Decl. ¶ 7; *see also* Mot. to Intervene at 9, ECF No. 15 ("MTI") (citing cases recognizing similar interests as sufficient to warrant intervention).

The Court should reject Plaintiffs' attempts to distinguish *Bost*. Plaintiffs emphasize that *Bost* involved a challenge to a state law while this lawsuit seeks to enforce compliance with federal law, Resp. 7–8, ECF No. 34, but they never explain why that matters for Rule 24(a)'s interest inquiry. It doesn't.[1] In both this case and *Bost*, Plaintiffs sued to force a change to Illinois's

[1] This "distinction" also mischaracterizes the claims in *Bost*. There, the plaintiffs challenged Illinois's statutory ballot receipt deadline, which allowed for the counting of ballots cast by election day and received in the mail by election officials within a specified period afterward, *on*

election-related practices, seeking relief that would impact lawful, eligible voters' ability to exercise their fundamental right to vote. It was because of that potential *change* in election administration that the proposed intervenor in *Bost* asserted its interest in protecting its members' voting rights and avoiding having to spend additional resources on voter education about the change, were plaintiffs to succeed. *See* 75 F.4th at 689. The same is true here. Plaintiffs bring this case seeking to change Illinois's list maintenance practices; as Proposed Intervenors explain in their motion to intervene and supporting declarations, should Plaintiffs succeed, it would threaten many of Proposed Intervenors' members' access to the franchise, requiring Proposed Intervenors to divert resources toward education about the new procedures and, critically, to help ensure their members remain registered to vote. As in *Bost*, Proposed Intervenors' interests in preserving their organizational resources and protecting their members' voting rights "satisfy [this Circuit's] requirement for a direct, significant and legally protectable interest." *Id.* at 687 (quotation marks omitted).

Plaintiffs' argument that it is "speculative" that any eligible voters would get swept up in their requested purge of "ineligible" voters, Resp. at 5–7, misses the mark. It is well established that "intervention of right does not require an absolute certainty that a party's interests will be impaired." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011). Indeed, that much is clear from the Rule's plain language; Rule 24(a) *entitles* a movant to intervention as of right if a case's disposition "*may as a practical matter* impair or impede" its interests. Fed. R. Civ. P. 24(a)(2) (emphasis added). Moreover, here, it is entirely foreseeable that Plaintiffs' requested relief *will* purge eligible voters. As Proposed Intervenors detailed in their

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the ground that it was pre-empted by federal law. *See Bost v. Illinois State Bd. of Elections*, 684 F. Supp. 3d 720, 724 (N.D. Ill. 2023). In other words, although it is true that the target of *Bost*'s challenge was a state law, Plaintiffs ignore the fact that the *Bost* plaintiffs' claims were premised on the argument that *federal law required* Illinois to disregard its own state law. *Id*.

motion, studies show that eligible voters are frequently removed from voter rolls when states increase their efforts to identify and remove "ineligible" voters. MTI at 3–4; *see also* Lydia Hardy, *Voter Suppression Post-Shelby: Impacts and Issues of Voter Purge and Voter ID Laws*, 71 Mercer L. Rev. 857, 866 (2020) (explaining how "voter purges have often had the effect of clearing eligible voters from the state registration lists [] in a manner that tends to discriminate by race and nationality"). There is a very recent example of this happening just this past year in Michigan, when a county clerk, at the demand of a conservative activist, purged over 1,000 voters from the rolls, including an active-duty Air Force officer whose eligibility to vote had not changed. *See* Peg McNichol, *Voter rolls targeted in run-up to November election, highlighted by recent efforts in Waterford*, The Oakland Press (Mar. 18, 2024).[2] It is precisely because of this risk that courts have found that organizations like Proposed Intervenors have interests that entitle them to intervene as of right in cases where plaintiffs seek to have states more aggressively remove voters from the rolls. *See, e.g.*, *Bellitto*, 2016 WL 5118568 at *2. Remarkably, in their opposition to the motion to intervene, Plaintiffs ignore all of this. As a result, their repeated assertion that their lawsuit cannot possibly harm Proposed Intervenors' interests rings hollow.

As for Plaintiffs' assertion that their requested relief is necessary to bring Illinois into compliance with federal law, it not only puts the cart before the horse by assuming that Plaintiffs are correct on the merits of their claims, it is wrong. As Proposed Intervenors explain in their proposed motion to dismiss, ECF No. 14-1, Plaintiffs' complaint fails to identify any legal insufficiency in Illinois's existing list maintenance requirements or its efforts to implement them. Additionally, Proposed Intervenors' declarations explain how their members who lack regular access to mail will face a heightened risk of erroneous de-registration, refuting Plaintiffs'

[2] Available at https://www.theoaklandpress.com/2024/03/18/voter-rolls-targeted-in-run-up-to-november-election/.

conclusory claim that their requested relief will flawlessly remove ineligible voters in accordance with the NVRA, putting no lawful voter at risk. *See* MTI at 3–5. Proposed Intervenors' arguments and declarations also demonstrate why intervention is proper here: indeed, the entire purpose of intervention, and the reason courts "construe Rule 24(a)(2) liberally and . . . resolve doubts in favor of allowing intervention," *Michigan v. U.S. Army Corps of Eng'rs*, No. 10-CV-4457, 2010 WL 3324698, at *2 (N.D. Ill. Aug. 20, 2010), is to allow intervenors with unique interests, like those Proposed Intervenors assert, to defend those interests and present their own evidence and argument so that the Court has a full, robust record before it in adjudicating the merits. *Cf. Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993) (explaining that intervention "allows the court to resolve all related disputes in a single action"). Here, Plaintiffs seek to mandate that Defendants take specific actions regarding Illinois's voter rolls, yet they argue vociferously that the hundreds of thousands of Illinois voters represented by Proposed Intervenors should have no voice in these proceedings. Although Plaintiffs may wish to ignore the impact their lawsuit will have on eligible, registered voters, Rule 24(a) establishes that this Court cannot.[3]

II. Proposed Intervenors have demonstrated that the existing parties do not adequately represent their interests, entitling them to intervention as of right.

[3] Plaintiffs' reliance on *Judicial Watch, Inc. v. Griswold*, No. 1:20-cv-02922, 2021 WL 4272719 (D. Colo. Sept. 20, 2021) and *Judicial Watch v. Logan*, 2:17-cv-8948 (C.D. Cal. 2017)—two out-of-circuit, unpublished opinions—is misplaced. Most glaringly, neither of those courts were bound by the Seventh Circuit's decision in *Bost*, which makes clear that, in this jurisdiction, an organization is entitled to intervention based on its interest in preserving its organizational resources and protecting its members' voting rights. *See Bost*, 75 F.4th at 687. Furthermore, in *Griswold*, the court denied intervention because the proposed intervenors did not show how their concern—that eligible voters would get swept up in a purge—"would materialize in [that] particular case." 2021 WL 4272719 at *4. Here, Proposed Intervenors explain why this will happen if Plaintiffs obtain their requested relief: relying solely on address confirmation notices to identify ineligible voters—as Plaintiffs do here—is an inherently flawed method that often results in the removal of eligible voters. *See* Mot. to Intervene at 3–5. And, in *Logan*, there was no discussion of the fact that an increased effort to remove ineligible voters from the rolls often causes eligible voters to be unlawfully purged. Here, Proposed Intervenors have presented precisely this issue. *See* MTI at 3–5.

Plaintiffs also misstate and misapply the standard for determining adequacy of representation. Although Plaintiffs are correct that the Seventh Circuit employs a three-tiered approach to this element of Rule 24, their accurate recitation and application of that well-established framework ends there. As the Seventh Circuit emphasized in *Bost*, the level of scrutiny applied to the adequacy-of-representation analysis is determined by a "discriminating comparison" of the proposed intervenors' and the existing parties' interests. 75 F.4th at 688. This is critical because a proposed intervenor is entitled to intervene unless *their unique interests* are adequately represented. *See* Fed. R. Civ. P. 24(a). But Plaintiffs conduct no such comparison and, as a result, invite the Court to misapply the law.

First, Plaintiffs erroneously conclude that the strictest test applies here because, they argue, Defendants are "charged by law" with representing Proposed Intervenors' interests. Resp. at 10. But Plaintiffs jump to this conclusion without considering Proposed Intervenors' specific interests in this litigation: preserving their limited organizational resources and preventing their members from being unlawfully removed from the voter rolls. Simply put, Defendants are "not legally required to represent [these] interests." *Bost*, 75 F.4th at 688 ("rul[ing] out" the strictest adequacy test because the State Board of Elections was not legally required to represent the interests of political party) (quotation marks omitted). Plaintiffs attempt to support this assertion by citing a series of statutes defining the Board's and Director Matthews's duty to supervise and administer election laws. Resp. at 10. But nothing they cite requires Defendants to represent *Proposed Intervenors' interests* in avoiding the need to divert their scarce resources or ensuring their members remain registered to vote. This includes the Board's power to "disseminate information," "require . . . statistical reports," "review and inspect procedures," "report violations of election laws," "adopt, amend, or rescind rules," and "recommend legislation" related to the conduct of

elections. *See id.* (cleaned up). The same is true of Defendant Matthews's duty to "maintain the Illinois centralized voter database" or "issue . . . opinions" related to the uniform application of election laws. *Id.* at 10 (cleaned up).

Indeed, a governmental defendant "would shirk its duty were it to advance the narrower interest of a private entity." *Nat'l Parks Conservation Ass'n v. U.S. E.P.A.*, 759 F.3d 969, 977 (8th Cir. 2014) (quotation marks omitted). It is accordingly no surprise that Plaintiffs fail to cite a single case where the heightened standard for which they advocate was actually applied, let alone in a case comparable to this one. On the contrary, courts across the country have "often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003); *accord Citizens for Balanced Use*, 647 F.3d at 899 ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009))); *U.S. Army Corps of Eng'rs*, 2010 WL 3324698, at *7 ("[T]he government only represents the citizen to the extent his interests coincide with the public interest. If the citizen stands to gain or lose from the litigation in a way different from the public at large, the *parens patriae* would not be expected to represent him." (quoting *Chiglo v. City of Preston*, 104 F.3d 185, 187–88 (8th Cir. 1997))).

Second, Plaintiffs alternatively argue that the intermediate standard should apply because "[Proposed Intervenors'] goals and those of Defendants are the same." Resp. at 11. Specifically, Plaintiffs point to the fact that that Proposed Intervenors, like Defendants, seek to "defend Illinois's compliance with the NVRA and seek dismissal of the complaint." *Id*. Once again, this argument is directly contrary to binding precedent in *Bost*. There, the Seventh Circuit was clear that the

intermediate standard *does not apply* whenever a proposed intervenor and an existing party "seek the same outcome in the case," recognizing that "a prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail." *Bost*, 75 F.4th at 688 (quotation marks omitted). As the court explained, the lenient "default rule" applies in all cases unless a proposed intervenor and an existing party have "*genuinely identical*" interests. *Id*. (quotation marks omitted) (emphasis added). This is not such a case. Proposed Intervenors—organizations with unique interests in preserving their resources and advocating for their members' voting rights—have distinct interests from Defendants, who are government entities required to enforce the NVRA and administer election laws. Because Proposed Intervenors' and Defendants' interests are not "genuinely identical," the default standard applies and there is no presumption of adequate representation.

Third, Plaintiffs attempt to rewrite the "lenient" default rule to impose a much higher burden than the law requires. As the Seventh Circuit explained in *Bost*, the default rule imposes only a "minimal" burden and is met whenever a proposed intervenor shows that the existing parties' representation of their interests "*may be*" inadequate. 75 F.4th at 688, 689 (quotation marks omitted). This standard is satisfied by demonstrating that there is "a possible conflict" between an intervenor and an existing party. *Id.* at 690. *Bost* does not require a present, existing conflict, nor does it make a distinction between "possible conflicts" and "hypothetical conflicts," as Plaintiffs suggest. Resp. at 12. Rather, the Seventh Circuit underscored that *both* possible and hypothetical conflicts *would* satisfy the lenient default rule—the problem for the intervenor in that case was that it failed to identify either type of conflict in its briefing. *Bost*, 75 F.4th at 690. That is not the case here, where Proposed Intervenors have identified a foreseeable conflict sufficient to satisfy

the lenient default rule: given the state Defendants' dual and competing obligations under the NVRA, there is a significant possibility that they will settle this case on terms adverse to Proposed Intervenors' interests or otherwise take positions adverse to their specific, unique interests. *See* MTI at 12–13.

In this way, this case is unlike *Bost*, which involved a challenge to a state statute that the defendants were required to enforce in a singular, straightforward manner. *See Bost*, 75 F.4th at 686 (explaining that plaintiffs challenged Illinois's ballot receipt deadline, which requires election officials to count absentee ballots that are postmarked by election day if they arrive within a specified time thereafter). This case, by contrast, arises under the NVRA—a federal statute that requires election officials to adhere to "twin objectives" of "easing barriers to registration and voting, while at the same time protecting electoral integrity and the maintenance of accurate voter rolls." *Bellitto v. Snipes*, 935 F.3d 1192, 1198 (11th Cir. 2019). As several courts have recognized, this obligation to balance competing objectives is enough to show that state officials may not adequately represent the interests of civic organizations like Proposed Intervenors. *See, e.g.*, *Bellitto*, 2016 WL 5118568, at *3 (granting a labor union intervention as of right in NVRA case); *Pub. Int. Legal Found. v. Winfrey*, 463 F. Supp. 3d 795, 801 (E.D. Mich. 2020) (similar); *cf. Kobach v. U.S. Election Assistance Comm'n*, No. 13-CV-4095-EFM-DJW, 2013 WL 6511874, at *4 (D. Kan. Dec. 12, 2013) (explaining in NVRA litigation "the existing government Defendants have a duty to represent the public interest, which may diverge from the private interest of" intervenors). Indeed, because the NVRA requires states to implement their own procedures to accomplish these goals, with no formula for how to balance them, there is a high likelihood of conflict between governmental defendants and organizations like Proposed Intervenors on the proper weight to give each of the NVRA's two goals. Under binding precedent

in this jurisdiction, that is enough to demonstrate that Defendants "may not" adequately represent Proposed Intervenors' interests. *Bost*, 75 F.4th at 690.[4]

III. In the alternative, the Court should grant permissive intervention.

Although Proposed Intervenors are entitled to intervention as of right for all of the reasons already discussed, the Court need not resolve that question because Plaintiffs' response disclaims the most common reason that courts deny permissive intervention—*i.e.*, concerns about prejudice or delay. There is no possibility that Plaintiffs will be prejudiced by Proposed Intervenors' participation because, as Plaintiffs now make clear, they do not seek relief before the 2024 election, meaning that resolution of this case *is not time sensitive*. Resp. at 3–4. Thus, even if there was a possibility that Proposed Intervenors' participation would slow down these proceedings, Plaintiffs have waived any argument that such a delay would prejudice them.[5]

Having waived any credible assertion of prejudice, Plaintiffs erroneously suggest that permissive intervention can only be granted if Proposed Intervenors will present a unique "defense to liability" that the current defendants will not. *Id.* at 14. But that argument gets the standard for permissive intervention backwards. Permissive intervention is appropriate when a proposed intervenor "has a claim or defense *that shares* with the main action *a common* question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This is because the purpose of permissive intervention is to promote "the efficiency and consistency that result from resolving related issues in a single proceeding." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995).

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[4] Notably, when state defendants settle NVRA cases, the terms of the settlements often require them to identify additional "ineligible" voters and cancel registrations more aggressively. *See, e.g.*, Stip. of Dismissal, *Daunt v. Benson*, No. 1:20-cv-522-RJJ-RSK (W.D. Mich. Feb. 16, 2021), ECF No. 58. This is illustrated by Plaintiffs' response to the motion to intervene, which includes a copy of their settlement with Los Angeles that required the city to cancel certain voters' registration on a specific timeline that is not required by the NVRA. ECF No. 34-2, ¶ 3.

[5] If Plaintiffs should change their approach and seek relief earlier, Proposed Intervenors would ask that they be permitted to participate in any relevant proceedings.

The fact that Proposed Intervenors assert that Illinois's existing list maintenance procedures comply with the NVRA accordingly weighs *in favor* of permissive intervention.

Finally, Plaintiffs suggest the Court should exclude Proposed Intervenors, offering their opinion that Proposed Intervenors' presence in the case will not be "helpful." Resp. at 14. But when deciding whether a state's list maintenance practices are "reasonable" under the NVRA, it is "unquestionably . . . helpful" to have "a fulsome consideration" of the NVRA's competing interests, "vigorously advocated by appropriately interested parties concerned with each side of the [NVRA's] balancing test." *Winfrey*, 463 F. Supp. 3d at 801. That is why courts regularly grant permissive intervention by organizations, like Proposed Intervenors here, with an interest in ensuring that a state is not forced to unnecessarily change their list maintenance procedures at the expense of voters' rights. *See, e.g.*, *Winfrey*, 463 F. Supp. 3d at 799 (granting organization permissive intervention in NVRA Section 8 case); Order, *Daunt v. Benson*, 1:20-cv-00522-RJJ-RSK (W.D. Mich. Sept. 28, 2020), ECF No. 30 (same); Order, *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, No. 5:16-cv-683 (E.D.N.C. Dec. 1, 2016), ECF No. 26 (granting voters permissive intervention in NVRA Section 8 case). This Court can and should exercise its discretion to grant Proposed Intervenors' intervention as well.

CONCLUSION

For the foregoing reasons and those stated in their opening brief, Proposed Intervenors respectfully request that the Court grant their motion to intervene.

May 24, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Sarah F. Weiss, certify that on May 24, 2024, I electronically filed the foregoing **REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

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