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SECOND JUDICIAL DISTRICT COURT
IN AND FOR WASHOE COUNTY, STATE OF NEVADA

FREDERICK H. KRAUS; PUBLIC INTEREST LEGAL FOUNDATION,

Petitioners,

v.

CARRIE-ANN BURGESS, in her official capacity as Washoe County Interim Registrar of Voters,

Respondent,

and

RISE ACTION FUND; INSTITUTE FOR A PROGRESSIVE NEVADA; and NEVADA ALLIANCE FOR RETIRED AMERICANS,

Proposed Intervenor-Respondents.

Case No. CV24-01051
Dept. No.: 4

REPLY IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENTS

INTRODUCTION

Proposed Intervenors Rise Action Fund, the Institute for a Progressive Nevada, and the Nevada Alliance for Retired Americans are entitled to intervene as of right under Nevada Rule of Civil Procedure 24. If the Court rules that Respondent has a mandatory duty to investigate Petitioners' allegations, as Petitioners urge, it will open clerks and registrars across the state to third-party demands to investigate all manner of alleged peculiarities in the voter rolls, based on unsourced, unverified, and unsworn information. Such relief would threaten Proposed Intervenors' missions to enfranchise their members, constituents, and Nevadans generally, and undermine their significant efforts to register voters and ensure that those voters can ultimately cast ballots. The other requirements for intervention are also met: Petitioners do not dispute the timeliness of Proposed Intervenors' motion, and the named Respondent does not adequately represent Proposed Intervenors' interests.

This Court should grant Proposed Intervenors intervention as of right under Rule 24(a)(2) or, in the alternative, permissive intervention under Rule 24(b).

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ARGUMENT

I. Proposed Intervenors satisfy all of Rule 24(a)'s requirements for intervention as a matter of right.[1]

A. Proposed Intervenors have significant protectable interests in the subject matter of this litigation.

Petitioners' suit threatens to impair Proposed Intervenors' interests in their members' and constituents' voting rights as well as their interests in their own resources. To argue the opposite, Petitioners selectively narrow the scope of the relief that they themselves seek—asserting that they

[1] Petitioners do not dispute that Proposed Intervenors' motion to intervene is timely. That in itself distinguishes this case from *Public Interest Legal Foundation v. Benson*, No. 1:21-CV-929, 2022 WL 21295936, at *11 (W.D. Mich. Aug. 25, 2022), where a court denied intervention where the motion was "arguably untimely" because it was "filed while the parties were already briefing their motion to dismiss" and where state officials opposed intervention. No such concern exists here.

request only that Respondent Burgess "look into the forty-eight commercial addresses." Resp. in Opp'n to Mot. to Intervene as Resp'ts at 4–5 ("Resp."). But Petitioners fail to mention that they seek such relief by way of a writ of mandamus that would require this Court to conclude that counties have a *mandatory duty* to investigate any voter based on any report from any third party—without the safeguards and limitations that Nevada's voter challenge statures provide, *see* NRS 293.535; NRS 293.547. *See Int'l Game Tech., Inc. v. Second Jud. Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("A writ of mandamus is available to compel the performance of an act that the law *requires* as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." (emphasis added)). Petitioners also fail to mention that they seek "a declaratory judgment that Respondent is not in compliance with NRS 293.530 and 293.675," Pet. ¶ 35, which, too, would adopt a reading of Nevada law that would effectively enable any third party across the state to seek "investigation" of voters in advance of an election. Moreover, Petitioners seek these rulings amid a storm of baseless efforts by third parties to force election officials to undertake a rushed purge of voters before the November election. *See* Mot. to Intervene as Resp'ts at 3 ("Mot.").

As a result, Petitioners' requested relief would have significantly broader consequences than Petitioners let on in their response; indeed, it would entirely change election officials' obligations to act on third-party investigation demands. And it is that change in election officials' obligations that would impair Proposed Intervenors' interests, Mot. at 13–16, which Petitioners do not dispute. Accordingly, "the resolution of the plaintiff's claims actually will affect" Proposed Intervenors' interests. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002).

In any event, "[t]he 'interest' test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established." *Id.* (cleaned up). "Instead, the 'interest' test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* (cleaned up). As set forth in their opening brief, Proposed Intervenors undoubtedly meet that threshold inquiry; there is no reason to exclude them from participating.

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B. Proposed Intervenors' ability to protect its interests may be impaired by the disposition of this matter.

Because Proposed Intervenors have significant protectable interests in this matter, it follows that those interests may be impaired by its disposition. "Once an applicant has established a significantly protectable interest in an action, courts regularly find that disposition of the case may, as a practical matter, impair an applicant's ability to protect that interest." *Venetian Casino Resort, LLC v. Enwave Las Vegas, LLC*, No. 2:19-CV-1197 JCM (DJA), 2020 WL 1539691, at *3 (D. Nev. Jan. 7, 2020) (citing *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)).

C. Respondent does not adequately represent Proposed Intervenors.

Finally, Proposed Intervenors' interests in this matter are not adequately represented by existing parties. "[T]he burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests 'may be' inadequate." *Hairr v. First Jud. Dist. Ct.*, 132 Nev. 180, 185, 368 P.3d 1198, 1201 (2016) (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Petitioners do not contest that they will not adequately represent Proposed Intervenors' interests. *See* Resp. at 8–10. And Petitioners' contention that Respondent will adequately represent Proposed Intervenors' interests fails to address, let alone refute, Proposed Intervenors' argument on this point.

As Proposed Intervenors have explained, Respondent's interest "in administering the election laws generally" varies significantly from Proposed Intervenors' interest in "ensuring that their members and constituents remain registered to vote," and Proposed Intervenors' interest in "the proper allocation of their limited resources to maximize voter turnout and promote civic engagement" is not shared by any other party in this matter. Mot. at 16–17. Proposed Intervenors further cited case law (*id.* at 17) demonstrating that, in cases implicating individuals' ability to vote, including those seeking to compel state defendants to make modifications to their voter rolls, these specific interests will support granting a motion to intervene. *See Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (allowing intervention

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where defendants' "responsibility to properly administer election laws" diverged from intervenors' interest in "ensuring their party members and the voters they represent have the opportunity to vote" and "allocating their limited resources to inform voters about the election procedures"); *Bellitto v. Snipes*, No. 16-cv-61474, 2016 WL 5118568, at *2 (S.D. Fla. Sept. 21, 2016) (holding, in allowing intervention, that government defendant would not adequately represent labor union in case seeking court-ordered "voter list maintenance"); *Pub. Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 799 (E.D. Mich. 2020) (noting, in granting motion to intervene, that "the interests of election officials in voting roll maintenance are sufficiently distinct from those of elected officials and their constituents to warrant intervention by those who could be impacted by the results of the maintenance process").

Petitioners simply ignore this. They do not mention, let alone distinguish, these cases, nor do they address Proposed Intervenors' underlying theory about why their interests diverge from those of Respondent. *See* Resp. at 8–10. Instead, Petitioners cite two cases, *Hairr* and *Lundberg v. Koontz*, 82 Nev. 360, 418 P.2d 808 (1966), to contend that Proposed Intervenors have not overcome the presumption that a state adequately represents its citizens. Resp. at 9–10. *Hairr*, however, states that "in the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens *when the applicant shares the same interest*." 132 Nev. at 185, 368 P.3d at 1201 (cleaned up) (emphasis added). The court concluded the state's representation in that case would be adequate because the would-be intervenors "did not identify any conflicting interest." *Id.* at 186, 368 P.3d at 1202. Here, as just discussed, Proposed Intervenors have identified specifically what the divergence between their interest and Respondent's interest is—and it is a divergence that courts have held will support a determination that a state defendant does not adequately represent a nongovernmental intervenor. Neither *Hairr*, which dealt with a challenge to the constitutionality of a law creating an education grant program, *see id.* at 183, 368 P.3d at 1200, nor *Lundberg*, which involved a challenge to the legal sufficiency of an initiative to repeal Nevada's prohibition on lotteries, *see* 82 Nev. at 361–62, 418 P.2d at 809, implicates the misalignment of interests present in this case.

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Moreover, Petitioners misunderstand what it means for parties to share the "same ultimate objective" in the intervention context. *Hairr*, 132 Nev. at 185, 368 P.3d at 1201. It does not mean merely that the parties seek the same outcome. Resp. at 10. If that were "all it takes to defeat intervention, then intervention as of right will almost always fail," because a party must necessarily intervene "on one side of the 'v.' or the other." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). That is not the law. Indeed, as Proposed Intervenors set forth in their opening brief, "[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." *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (internal quotation marks omitted). Thus, no presumption of adequate representation applies, and if it does, the presumption has been overcome.

Finally, to the extent that Petitioners appear to suggest that the motion should be denied because Respondent has not yet responded to the Petition and thus it is unclear whether Proposed Intervenors will make the same arguments as Respondent, this contention must be rejected. Had Proposed Intervenors waited for Respondent to respond to the Petition before moving to intervene, the motion to intervene may well have been denied as untimely, as Petitioners' own authority shows. *See Benson*, 2022 WL 21295936, at *11 (cited in Resp. at 5 n.2) ("Here, the motion to intervene, which was filed while the parties were already briefing their motion to dismiss, is arguably untimely."). NRCP 24 does not present intervenors with such an impossible choice.

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II. Alternatively, Proposed Intervenors satisfy Rule 24(b)'s requirements for permissive intervention.

In the alternative, Proposed Intervenors should be granted permissive intervention because they present defenses that share questions of law and fact in common with the main action, and their intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. *See Hairr*, 132 Nev. at 187, 368 P.3d at 1202. That is all Rule 24(b) requires. Here, as demonstrated by their Proposed Answer, Proposed Intervenors plainly present defenses to Petitioners' claims that share common questions of law and fact. Petitioners' only objections to

permissive intervention are that Proposed Intervenors have not satisfied the requirements for intervention as of right and that their participation in this case will cause burdens and delay.

As to the first concern, Petitioners are wrong for the reasons already discussed above. And, in any event, while courts may consider the mandatory intervention factors among other "discretionary" factors in analyzing permissive intervention, they may not "deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right." *Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 804 (7th Cir. 2019); *see also Maverick Gaming LLC v. United States*, No. 3:22-cv-05325-DGE, 2022 WL 4547082, at *4 (W.D. Wash. Sept. 29, 2022) ("[I]nadequate representation is not required under Rule 24(b)[.]"). Doing so would render Rule 24(b) entirely superfluous.

Second, granting permissive intervention also will not cause any prejudice or delay. As Petitioners apparently concede, the motion is unquestionably timely, filed before any proceedings of substance have occurred in the case. Proposed Intervenors, like Petitioners, have a strong interest in swift resolution of this action, and in *avoiding* any unnecessary delay. And Proposed Intervenors agree to be bound by any case schedule set by the Court or agreed to by the principal parties. *See Thomas v. Andino*, 335 F.R.D. 364, 371 (D.S.C. 2020) (crediting a similar commitment and granting permissive intervention). This is also a mandamus proceeding that presents a pure question of law—there will be no need for additional discovery or other associated burdens. Petitioners' concerns about "delay" and "prejudice" are apparently rooted in their desire to avoid having to respond to additional briefing. But Petitioners "can hardly be said to be prejudiced by having to prove a lawsuit [they] chose to initiate." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995).

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CONCLUSION

For the reasons stated above, Proposed Intervenors respectfully request that the Court grant their motion to intervene as a matter of right under Rule 24(a)(2) or, in the alternative, permit them

to intervene under Rule 24(b).[2]

AFFIRMATION

Pursuant to NRS 239B.030 and 603A.040, the undersigned does hereby affirm that this document does not contain the personal information of any person.

DATED this 18th day of June, 2024.

By: */s/ Bradley Schrager*

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*Pro hac vice application pending

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[2] Participation as amicus is not, as Petitioners suggest, an adequate substitute. Resp. at 2 n.1. *See Freedom from Religion Found., Inc. v. Geithner*, 262 F.R.D. 527, 530 (E.D. Cal. 2009) ("The filing of an amicus brief to the court seems a meager substitute in comparison, and would deny the potential intervenors a voice in key junctures of this litigation.").

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2024, a true and correct copy of **REPLY IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENTS** was served via the Washoe County E-Flex Filing System on all parties or persons requesting notice and via U.S.P.S. as follows:

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