IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

AMERICA FIRST POLICY INSTITUTE, et al.,

Plaintiffs,

vs.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al.,

Defendants.

No. 2:24-cv-152-Z

PROPOSED INTERVENOR-DEFENDANTS LEAGUE OF WOMEN VOTERS, BLACK VOTERS MATTER, AND NAEVA'S REPLY IN SUPPORT OF MOTION TO INTERVENE

ARGUMENT

Plaintiffs' Opp'n to Mot. to Intervene, *AFPI v. Biden*, No. 2:24-cv-152-Z (Sept. 27, 2024), ECF No. 59 [hereinafter "Opp."], is based on an unduly restrictive mischaracterization of the law on intervention and ignores significant portions of the Amended Complaint, which repeatedly and defamatorily allege that Intervenors conspired with Defendants in ways that impugns Intervenors' integrity and potentially puts their tax-exemptions at risk. Because Plaintiffs chose to engage in their campaign of disparagement, and because Plaintiffs' claims impinge on Intervenors' institutional interests and organizational activities, Intervenors have the right to defend themselves in this proceeding.

I. Intervenors are Entitled to Intervene as of Right

The Rule 24(a) inquiry "is a flexible one" and should be "liberally construed." *Entergy Gulf States Louisiana, L.L.C. v. U.S. EPA*, 817 F.3d 198, 203 (5th Cir. 2016). As a result, "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). That is the case here where no Defendant has filed any objection to the motion. And Plaintiffs conceded Intervenors' motion is timely because they made no objections based on timeliness.[1]

A. Intervenors' substantial legal interests may be impaired.

An intervenor's interest need not "be 'legally enforceable[.]'" *La Union del Pueblo Entero* ("*LUPE*") *v. Abbott*, 29 F.4th 299, 305–06 (5th Cir. 2022) (emphasis removed) (quoting *Texas v. United States*, 805 F.3d 653, 659 (5th Cir. 2015)). All that is required is an interest stronger than "a generalized preference that the case come out a certain way." *Texas*, 805 F.3d at 657. Plaintiffs

[1] "[F]ailure to respond to arguments constitutes abandonment or waiver of the issue." *Kellam v. Servs.*, No. 3:12-CV-352-P, 2013 WL 12093753, at *3 (N.D. Tex. May 31, 2013), *aff'd,* 560 F. App'x 360 (5th Cir. 2014).

significantly overstate the interest requirement. Opp. at 1–14. Moreover, Plaintiffs never contend with the "lower" burden, applicable here, for "'public interest group[s]' raising a 'public interest question.'" *LUPE*, 29 F.4th at 306 (quoting *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014)). Intervenors are all public interest groups that have articulated a number of substantial legal interests in this matter. Plaintiffs unsuccessfully address only three of the interests raised: those related to the League and BLM's "tax exemptions," Opp. at 2–9, their "reputation", *id.* at 9–11, and "Naeva", *id.* at 11–14.

Damage of false allegations relates to tax exemptions. Intervenors have a strong interest in addressing Plaintiffs' accusations that they are only "nominally nonpartisan" and thus fraudulently maintain "nonprofit status." Am. Compl., *AFPI v. Biden*, No. 2:24-cv-152-Z (July 31, 2024), ¶ 84 n.6, ECF No. 11 [hereinafter "Am. Compl."] Plaintiffs' opposition misrepresents the allegations in the Amended Complaint and relies on cherry-picked language from a handful of inapposite cases.

There is no doubt the Amended Complaint directly accuses Intervenors of partisan conduct inconsistent with their nonprofit tax status: Immediately under the bolded, italicized, and underlined header, "*Leftwing Coalition* Targets Key Agency Programs *for Partisan Gain*," it names members of that coalition who participated in a "listening session" with the White House on "July 12, 2021," including "Black Voters Matter" and "League of Women Voters." Am. Compl. ¶¶ 111–12 (emphases added). Under the heading, "Biden-Harris Administration's *Ideologically Partisan* Partners," Plaintiffs allege that the Administration is "partner[ing] with *ideologically partisan* third-party organizations," including the attendees of the same "July 12, 2021 . . . 'listening session'" that "included dozens of people, *all of them from left-leaning groups*." *Id.*

¶¶ 84–85 (emphases added).[2] Plaintiffs further allege that, "[w]hile many of these organizations are *nominally nonpartisan because of their nonprofit status*, they are clearly and openly aligned with *advancing the election of leftwing Democrats*." *Id.* ¶ 84 n.6 (emphases added). Plaintiffs' mischaracterization of their own allegations is baffling. *Compare* Opp. at 2 (insisting the Court must "strain[] to read the Amended Complaint as implying that LWV or BVM are 'left-leaning'"), *with* Am. Compl. ¶¶ 84-85 & n.6, 111–12.[3]

Plaintiffs' opposition does not withstand scrutiny. For example, their claims about the lack of tax implications, *see* Opp. at 2–7, are irreconcilable with their allegations that the League and BVM work for Democrats and lie about nonpartisanship to achieve tax benefits, as well as their related threat that "[f]ederal campaign finance laws apply to private parties' voter-registration activities." Am. Compl. ¶¶ 84–85 & n.6, 87. This threat could only be directed at the League's and BVM's 501(c)(3) entities, which conduct their voter registration activities. *See* Mem. in Supp. of Mot. to Intervene, *AFPI v. Biden*, No. 2:24-cv-152-Z (Sept. 14, 2024), at 13, ECF No. 27 [hereinafter "Mot."]. Accordingly, Plaintiffs' argument that the Amended Complaint refers only to 501(c)(4) nonprofits, Opp. at 2–3, and thus has no tax implication, is not reflected in and is inconsistent with the Amended Complaint. Moreover, Plaintiffs' argument does not comport with

[2] Plaintiffs also allege the League partners with an agency to offer voter registration to incarcerated individuals who "are more likely to vote Democrat." Am. Compl. ¶¶ 240–44, 259.

[3] And Plaintiffs continue to push these false allegations even further in the declarations filed in support of Plaintiffs' motion for a preliminary injunction. *See, e.g.*, App. in Supp. of Mot. for TRO and Prelim. Inj., *AFPI v. Biden*, No. 2:24-cv-152-Z (Sept. 10, 2024), at 6, ECF No. 17 (Blackwell Dec. ¶ 22) ("I conclude that the composition of the meetings described by the Heritage Oversight Project and the pleadings in this case, including political allies of the Biden-Harris Administration and the Democratic Party, suggests that the EO and its implementing actions are intended and designed to produce a partisan electoral benefit for Democrats"); *id.* at 29 (Gorka Dec. ¶¶ 9, 14) ("I am aware that the Federal Bureau of Prisons partnered with the League of Women Voters and the D.C. Board of Elections to register voters at FCC Petersburg in Virginia" and "I believe those programs operating in the Commonwealth of Virginia will result in more persons registering to vote who will vote for opposing Democratic candidates").

tax law: 501(c)(4) entities must primarily engage in lobbying and political activities "related to the organization's exempt purpose,"[4] which would necessarily be at odds with Plaintiffs' allegations that Intervenors are only "nominally nonpartisan" in order to maintain "nonprofit status" while actually advancing partisan interests. *See* Am. Compl. ¶ 84 n.6.

Plaintiffs' opposition also fails because the case law on which they rely has no bearing on the facts or posture here. For example, Plaintiffs cite the unpublished opinion in *Chambers Med. Found. v. Petrie*, *see* Opp. at 4, 23, where the Fifth Circuit affirmed a denial of intervention because the intervenor "d[id] not describe . . . how and to what degree" the litigation might "affect [its] tax liability" and accordingly, it "fail[ed] to sufficiently specify its financial interest in the case." 221 F. App'x 349, 351 (5th Cir. 2007). Here, Intervenors thoroughly specified their interests in disproving Plaintiffs' direct, false allegations and defending against the ramifications of those claims. The half-century-old district court order in *United States v. Lloyd*, *see* Opp. at 4, is even less relevant. 49 F.R.D. 200 (N.D. Tex. 1970). In actions by the United States to enforce summons against parties possessing records related to taxpayer investigations, the court denied intervention to a man who sought to prevent disclosure of his tax records because he neglected to argue "that the papers and records sought to be obtained from the Respondents" were his, and even if they were, he failed to identify "any confidential relationship" that "would entitle him to prevent a disclosure." *Id.* at 201–02. Plaintiffs' reliance on out-of-circuit case law fares no better.[5]

[4] *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations* at L-2, https://www.irs.gov/pub/irs-tege/eotopicl03.pdf; *see* 26 C.F.R. § 1.501(c)(4)-1 (similar).

[5] For example, in *People Who Care v. Rockford Bd. of Educ.* (cited Opp. at 4), the Seventh Circuit rejected the intervention as untimely and did not reach the interest requirement at issue here. 68 F.3d 172, 179 (7th Cir. 1995). In *Nat'l Collegiate Athletic Ass'n v. Governor of N. J.*, 520 F. App'x 61 (3d Cir. 2013) (cited Opp. at 5), a *pro se* "frequent litigator" was denied intervention for the purpose of "deferring any decision 'until the U.S. Congress changes the law on the reporting of gambling income only as it relates to thoroughbred racing,'" because that

Additionally, Plaintiffs misstate and misapply Rule 24(a) when they insist that Intervenors have no interest here related to their tax-exempt status because Plaintiffs allege the threatened impairment of tax-exemption status is not certain to occur. Opp'n at 6. First, "[t]he impairment requirement does not demand that the movant be bound by a possible future judgment." *Brumfield*, 749 F.3d at 344. Second, intervenors "must demonstrate *only* that the disposition of the action '*may*' impair or impede their ability to protect their interests." *See, e.g.*, *Brumfield*, 749 F.3d at 344 (emphasis added). In other words, "a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied," and that "burden is *minimal*." *id.* at 344 n.2 (citation omitted). Intervenors easily meet that standard.

Reputational interests. Plaintiffs' attempt to diminish Intervenors' interest in defending against reputational harms is likewise unavailing. Again, Plaintiffs misstate the law, citing inapposite and out-of-circuit cases, and mischaracterize the nature of the interests identified in Intervenors' motion. *See, e.g.*, *Veasey v. Perry*, 577 F. App'x 261, 262 (5th Cir. 2014) (cited at Opp. at 10) (declining to reach question of sufficiency of intervenor's interest); *see also* Mot. at 14–16. For instance, the threat to Intervenors' specific reputations does not resemble the "indirect," attenuated reputational harm that a constitutional challenge to city-wide policing policy could have hypothetically inflicted on rank-and-file police officers in the department. *See Floyd v. City of New York*, 770 F.3d 1051, 1061 (2d Cir. 2014). Rather, the Amended Complaint falsely accuses Intervenors, by name, of conspiring with the federal government to promote the Democratic Party, and that alleged association is a central focus of the Amended Complaint. This is more than sufficient to warrant intervention. *See, e.g.*, *Samsung Elecs. Co. v. Panasonic Corp.*, No. 10-CV-

issue simply "[did] not relate to the question" in the case. *Id* at 61–62. And *Est. of Dixon*, 666 F.2d 386 (9th Cir. 1982) (cited Opp. at 5), involved niche, inapposite merits and concerned the Tax Court's denial of permissive intervention, subject to Rule 24(b)'s different standard.

03098-JSW, 2016 WL 11781870, at *2 (N.D. Cal. Sept. 26, 2016) (granting intervention as of right where "[a]llegations that [proposed intervenor] conspired with Defendants pervade the [complaint]"); *cf. Skeans v. Key Com. Fin., LLC*, No. CV 18-1516-CFC-MPT, 2022 WL 605718, at *3 (D. Del. Jan. 24, 2022) ("[I]t [is] fundamentally unfair and inappropriate for" a plaintiff to "identif[y]" a proposed intervenor "by name in the . . . Complaint" and make "allegations about him when they did not make him a party to the action").[6]

Naeva's Interest. Plaintiffs attack Naeva's interest by mischaracterizing it as "economic" or a "merely prefer[ring] one outcome to the other," and then cite a sprawling collection of cases denying intervention, Opp. at 11–14, without tying them to Naeva's actual articulated interests.

As noted, the Fifth Circuit has repeatedly emphasized, "the burden is lower for a 'public interest group' raising a 'public interest question.'" *See LUPE*, 29 F.4th at 306 (quoting *Brumfield*, 749 F.3d at 344). Moreover, in *LUPE*, intervenors "satisfied the interest requirement" because "they expend resources regarding the recruitment, training, and appointment of poll watchers, and [the challenged law] changes the legal landscape for what it takes to carry out that duty." *Id.* at 306. According to the Fifth Circuit, "[t]his interest is not unlike . . . regularly engag[ing] in voter registration, voter education, and other activities and programs designed to increase voter turnout among . . . [Latinx] communities" or "making expenditures . . . to educate, register, mobilize, and turn out Latinx voters." *Id.* at 306 n.3.

Here, Plaintiffs complain that the Executive Order will improve voter registration among

[6] Plaintiffs repeatedly cite sources in a selective and misleading fashion. For example, they invoke a treatise for the notion that "[t]he mere fact that one's reputation is injured . . . in a proceeding seeking relief against others is an insufficient interest to allow one to intervene as of right," Opp. at 10, but they omit the end of the sentence: "*absent a legal detriment flowing from the findings*." 25 James Buchwalter et al., *Federal Procedure, Lawyers Edition* § 59:309 (2024). Here, Intervenors have specifically identified legal detriments that could flow from findings in this case and that are inseparably tied to the reputational harm from Plaintiffs' allegations.

eligible Native Americans, Am. Compl. ¶¶ 40–41, 101, 103, 122–23, 169, 196–200, 223–29, 232, and specifically attack actions taken to improve access to voter registration for Native American in New Mexico, *id.* ¶ 228. These challenged actions directly impact Naeva's public interest goals and work. "Naeva works directly with Tribal communities in New Mexico . . . to promote and protect Tribal members' right to vote," centering on "Native voter education and non-partisan voter registration and outreach." Mot. at 8–9 (listing expenditures and activities). Therefore, as in *LUPE*, Naeva's "interest goes beyond a purely 'ideological' reason for intervention and amounts to a 'direct' and 'substantial' interest in the proceedings." *LUPE*, 29 F.4th at 306 (citation omitted).

Intervenors' Unaddressed Interests. In addition to not effectively rebutting these three interests, Plaintiffs also fail to address—and thus concede—several other critical interests raised by Intervenors. *See supra* n.1. Plaintiffs do not respond to the League's or BVM's interest in defending the outcomes of their advocacy related to the Executive Order. *See* Mot. at 16. This uncontested interest alone suffices to justify intervention. In *City of Houston v. American Traffic Solutions, Inc.*, 668 F.3d 291 (5th Cir. 2012), the Fifth Circuit reversed denial of intervention by those who "engineered the drive that led to a city charter amendment" because they had "a particular interest in cementing their electoral victory and defending the charter amendment itself" and because, if it were "overturned, their money and time [would] have been spent in vain." *Id.* at 294; *see Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) ("[A] public interest group that has supported a measure . . . has a 'significant protectable interest' in defending [its] legality . . . ."). Plaintiffs also fail to respond to the League's or BVM's interest in their missions of

> increas[ing] participation in the democratic process by supporting robust voter registration efforts, including defending the Executive Order and ensuring the federal government's continued commitment to educating and assisting eligible individuals regarding voter registration.

Mot. at 17–18; *see* Opp. at 11–14 (exclusively responding to Naeva's interest). This interest also

independently supports intervention. *See LUPE*, 29 F.4th at 306.

B. Defendants Inadequately Represent Intervenors' Interests.

Intervenors need only show that representation "may be" inadequate, not that it "will be, for certain." *Texas*, 805 F.3d at 661. Although the Fifth Circuit recognizes two presumptions of adequate representation, those presumptions merely ensure that the "minimal" burden is not "*so minimal* as to write the requirement completely out of the rule." *Id.* (emphasis added).

As Intervenors explained in their motion, the presumptions do not apply here. "Where the absentee's interest is similar to, but not identical with, that of one of the parties, that normally is not enough to trigger a presumption of adequate representation." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 197 (2022) (internal quotation marks omitted). Moreover, this APA case nearly exclusively challenges agency actions—that precludes application of the governmental representation presumption. *Entergy*, 817 F.3d at 204 n.2 ("[The Fifth Circuit] has not required a stronger showing of inadequacy in [] cases where a governmental agency is a party.").[7]

Even if these presumptions did apply here, they would not bar intervention. The presumptions can be overcome by "specif[ying] the particular ways in which [intervenors'] interests diverge from the Government's." *Texas*, 805 F.3d at 663. Plaintiffs cannot dispute that Defendants do not share an interest in defending Intervenors against Plaintiffs' legal and reputational threats.[8] Instead, they merely repeat their argument that those unrepresented interests do not suffice to grant intervention. And Plaintiffs muse about the insufficiency of "general" statements about "broader" government interests, Opp. at 17, but fail to adequately address

[7] *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) (cited Opp. at 15), has been cabined as inapplicable to cases against federal agencies. *See Entergy*, 817 F.3d at 204 n.2; *Miller v. Vilsack*, No. 21-11271, 2022 WL 851782, at *3 n.4.

[8] Defendants are just as likely to use Proposed Intervenor-Defendants as a convenient shield to deflect liability for alleged partisan conduct as they are to "resist Plaintiffs' allegations that outside groups involved in formulating the EO are ideological or partisan." Opp'n at 17.

Intervenors' specific articulation of divergent interests, *see* Mot. at 22–23. Notably, Defendants have not argued that they adequately represent Intervenors' interests—a position that the federal government has taken when opposing interventions in other challenges to the Executive Order. *See* Federal Defs.' Resp. to Vet Voice Fdn.'s Mot. to Intervene, *RNC v. Whitmer*, No. 1:24-cv-720-PLM-SJB (W.D. Mich., Aug 7, 2024), ECF No. 14.

Plaintiffs' remaining arguments merely hypothesize possible ways the government's interests *could* align with Intervenors'. Opp. at 18-19. But even if one "cannot say for sure that the state's more extensive interests will *in fact* result in inadequate representation, . . . surely they might, which is all that the rule requires." *Brumfield*, 749 F.3d at 346. Indeed, *Floyd*, the case on which Plaintiffs rely, similarly held that litigants should intervene as soon as they know or "should have known that their 'interests *might* not be adequately represented.'" 770 F.3d at 1059.

II. Alternatively, Intervenors Should Be Granted Permissive Intervention.

Intervenors also satisfy the permissive intervention standard, as their motion is timely and their defenses share common questions of law and fact. Fed. R. Civ. P. 24(b)(1). "[T]he 'claim or defense' portion of Rule 24(b) is to be construed liberally." *United States ex rel Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 577 (5th Cir. 2023) (cleaned up). Plaintiffs do not address the relevant standard -- instead their opposition to permissive intervention irrelevantly focuses on one of Intervenors' interests raised to support their intervention *as of right*. Opp. at 20–22. Yet applying the proper standard, Intervenors' defenses raise common questions of law and fact with this action, as evidenced in part by the grounds for dismissal in their Rule 24(c) motion to dismiss, which Plaintiffs ignore. Plaintiffs' claims "are clearly related to the Proposed Intervenors' arguments," as "[b]oth the Proposed Intervenors and the Federal Government seek to defend the lawfulness of" the executive order and agency activities. *Texas v. U.S. Dep't of Homeland Sec.*, No. 6:23-CV-7, 2023 WL 3025080, at *2–3 (S.D. Tex. Apr. 19, 2023). "[T]he Proposed Intervenors' defenses, the

Federal Government's defenses, and the Plaintiff[s'] claims arise from the same set of facts and considerations," and "[d]istrict courts within the Fifth Circuit regularly permit intervention under similar circumstances." *Id.*

Furthermore, Intervenors' "expertise about voter registration" and the effect the Executive Order has on eligible voters will "significantly contribute to full development of the underlying factual issues," Mot. at 23–24; as will Intervenors' perspective of the events alleged in the Amended Complaint. *See id.* Entire counts of the Amended Complaint are premised upon purportedly illicit, partisan activities. *See, e.g.*, Am. Compl., Counts VI, VIII, XI. These claims stem from allegations of a purported partisan conspiracy allegedly masterminded by Intervenors and their "leftwing coalition." *See, e.g.*, Am. Compl. ¶¶ 10, 112–28, 241–44. Surely there is value in permitting Intervenors an opportunity to properly characterize the record.[9]

Finally, Plaintiffs' invocation of delay and prejudice, Opp. at 24, is unconvincing. This Court has held that "[t]he analysis . . .whether the intervention will cause undue delay or prejudice is essentially the same as the timeliness analysis." *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2024 WL 1260639, at *7 (N.D. Tex. Jan. 12, 2024) (citation omitted). Plaintiffs do not contest timeliness. Intervenors reassert their unopposed arguments as to the lack of prejudice here in support of permissive intervention. *See* Mot. at 9–12.

CONCLUSION

For these reasons, the Court should grant the Intervenors' motion.

Dated: October 4, 2024

Respectfully Submitted,

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/s/ *Edgar Saldivar*
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[9] *See, e.g.*, *Lucid Grp. USA Inc. v. Johnson*, No. 1:22-CV-1116-RP, 2023 WL 4539846, at *3 (W.D. Tex. Mar. 20, 2023) (finding "good cause to grant permissive intervention" despite adequate representation where intervenor "is particularly well-positioned to discuss" the allegations).

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**Application for Admission Pro Hac Vice Pending or Forthcoming*

CERTIFICATE OF SERVICE

I certify that on October 4, 2024, the foregoing document was filed on the Court's CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ *Edgar Saldivar*

Edgar Saldivar