IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Anthony DAUNT, *Plaintiff*, v. Jocelyn BENSON, in her official capacity as Michigan Secretary of State, et al., *Defendants*.	Case No. 1:20-cv-522-RJJ-RSK **Plaintiff's Opposition to Motions for Intervention**

Plaintiff alleges that Michigan, under Defendants' leadership, is falling short of its federally mandated duty to maintain accurate voter rolls. That allegation is serious: In Michigan's most recent primary election, at least *half a million* absentee-ballot applications were returned as undeliverable; in other words, Michigan's voter rolls had 500,000 inaccuracies when Plaintiff sued. This litigation, then, will turn on what procedures Michigan uses to remove ineligible voters, whether those procedures are sufficient, and whether those procedures are consistently followed.

Movants' concerns lie elsewhere. As ten groups who work to increase the registration of certain voters, Movants' only interest in this litigation is their concern that, *if* Plaintiff proves that Michigan is violating federal law, then the *remedy* for that violation might be so onerous that it will illegally sweep in lawful voters. Movants express no interest in defending Michigan's existing procedures (an interest that Defendants thoroughly and adequately represent), or in keeping voters on the rolls who

should be removed (an interest that would violate federal law). Their interests go solely to the remedial stage of this litigation, not liability.

This Court should deny Movants' requests for intervention. Their requests are premature at this stage, before liability has been determined or any remedy has been proposed. And their interest in preventing an overbroad remedy is adequately represented by Defendants, who are required by law to defend *all* voters in Michigan, who strongly resist Plaintiff's lawsuit, and who have already raised Movants' concern. For similar reasons, Movants' participation at this stage will needlessly increase the complexity of this litigation without any corresponding benefits. Movants have no factual expertise about Michigan's list-maintenance procedures, and their legal expertise can be adequately expressed in amicus briefs. The Court should deny their motions.

I. The motions to intervene are premature.

Movants raise only one interest in this lawsuit: their concern that Plaintiffs will prove Michigan is violating federal law and that the remedy for Michigan's violation will be overbroad. That overbreadth, in turn, would cause eligible voters to be illegally removed and cause Movants to spend resources reregistering them. By Movants' admission, this interest has at least three contingencies:

1. Movants' interest is tied to the remedial stage of this case, not liability. *See, e.g.*, League Mot. (Doc. 25) 2 (expressing an interest in the "resolution" of any violation); *id.* at 5 (expressing concern about "the deregistration of eligible voters"); *id.* at 11 (tying their interest to the "outcome of this litigation"); *id.* at 12 (arguing inadequacy in the "resolution of this case"); Rise/APRI Mot. (Doc. 19) 5 (expressing concern with "any list maintenance program" resulting from this

lawsuit); *id.* at 5-6 (tying their interest to "further forms of list management").

2. Movants' interest will not ripen unless this Court first rules for Plaintiff on liability. *See, e.g.*, League Mot. 6 ("if Plaintiff succeeds"); *id.* ("if Plaintiff were to succeed"); *id.* at 11 ("if Plaintiff succeeds"); Rise/APRI Mot. 5-6 (tying their interest to the "result" following "any judgment for Plaintiff").

3. Movants' interest will not occur unless Defendants' violation is remedied with relief that is unlawfully overbroad. *See, e.g.*, League Mot. 2 (tying their interest to relief that goes "beyond what federal law requires"); *id.* (expressing concern over "unnecessary" relief); *id.* at 6 (expressing concern over "unreasonable and aggressive" relief); *id.* at 11 (tying their interest to "unnecessary, unreasonable, and unlawful" relief).

Given these contingencies, Movants' request for intervention "is premature." *League of Women Voters of Mich. v. Johnson*, No. 2:17-cv-14148, 2018 WL 3861731, at *1 (E.D. Mich. Aug. 14, 2018) (three-judge district court). It "presupposes events that have not yet come to pass, including but not limited to" a determination that Defendants violated federal law (after motions practice, discovery, and potentially a trial); a determination that the violations require Defendants to adopt new procedures (rather than following their existing procedures); and a proposed remedy that would require Defendants to adopt unlawful, overbroad list-maintenance procedures. *Id.*

This case thus resembles *United States v. Michigan*, where the movants tried to intervene "to protect their divergent interests '*in the event*'" the plaintiffs won on liability. 424 F.3d 438, 444 (6th Cir. 2005). The movants' interests, the Sixth Circuit explained, "seem more concerned about what will transpire *in the future* should the district court

determine" that the plaintiffs are correct on the merits. *Id.* "While 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.* Intervention would thus "prematurely seek to inject [remedial] issues that are not yet before the [district] court," "complicate the case," and "prejudice[] the original parties." *Id.* at 444-45. And to the extent the movants wanted to make arguments about liability, they "failed to articulate why the State of Michigan's legal representation concerning this issue is inadequate." *Id.* at 444. So too here.

Because Movants' interests are contingent and premature, this Court should not grant intervention at this stage. The Court should simply deny the motion to intervene without prejudice, note Movants' remedial concerns, and state that "[s]hould the litigation proceed that far, the proposed intervenors may renew their motion." *Id.* at 446. Alternatively, the Court could "grant [the] Motion to Intervene for the limited purpose" of allowing Movants to participate in the remedial stage of this case, should it get that far. *SEC v. Jones*, No. 1:07-cv-1198, 2008 WL 11350218, at *2 (W.D. Mich. Feb. 15, 2008) (Jonker, J.). This Court unquestionably has "the authority to apply conditions or restrictions" on intervention, including by limiting intervention "to those issues in which the nonparty has a sufficient interest." *Friends of Tims Ford v. TVA*, 585

F.3d 955, 963 n.1 (6th Cir. 2009). Under either option, Movants could still participate in the liability stage as amici. *See infra* III.[1]

Movants suggest a few reasons why they need intervention now, but their suggestions are not persuasive. First, Movants raise the prospect that Defendants will enter a "settlement." League Mot. 6; Rise/APRI Mot. 7. But the prospects of a settlement (in a case Defendants are fiercely opposing and trying to dismiss) is just as speculative and remote as Movants' concern over a future injunction; the Court can cross that bridge when and if it gets there. In any event, Movants would have no right to "block" a settlement, even if they intervened. *Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986). And Defendants "do not object in any fashion" to Movants' participation in this litigation, so they remain "free to impose conditions" on any settlement negotiations, including by "requiring the presence of [Movants]." *United States v. Lexington-Fayette Urban Cty. Gov't*, No. 06-cv-386, 2007 WL 2020246, at *3 & n.5 (E.D. Ky. July 6, 2007). Second, Movants contend that intervention is urgent because Plaintiff's original complaint preserved his right to seek a preliminary injunction before the November 2020 election. League Mot. 3; Rise/APRI Mot. 6. But Plaintiff decided not to seek interim relief before November (hence the lack of any motion on this

[1] The district court in *Public Interest Legal Foundation, Inc.* (*PILF*) *v. Winfrey*, No. 19-13638, 2020 WL 2781826 (E.D. Mich. May 28, 2020), never considered granting intervention limited to the remedial stage. It appears that the plaintiff never asked the Court to consider that option. *See PILF*, Doc. 25, No. 19-13638 (E.D. Mich. Feb. 24, 2020).

Court's docket), so this concern is moot. Until a remedial question is actually before the Court, it should deny Movants' request as premature.

II. Movants are not entitled to intervention as of right.

Intervention as of right has four requirements, *see* Fed. R. App. P. (a)(2), and a movant's failure to "satisfy any one" of them "will defeat intervention," *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). Thus, Movants cannot intervene unless they articulate a "substantial legal interest" in this case and prove that no existing party will "adequately protect *that* interest." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343 (6th Cir. 2007); *Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987) (emphasis added). "[I]n this Circuit," the movant "bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. of Lorain v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983).

While inadequacy is often a low bar, "a presumption of adequate representation arises when a putative intervenor shares the same ultimate objective as a party to the suit." *Reliastar Life Ins. Co. v. MKP Investments*, 565 F. App'x 369, 373 (6th Cir. 2014) (cleaned up; quoting *Michigan*, 424 F.3d at 444). As one Movant has successfully argued before, "[t]he presumption in favor of adequate representation is even more difficult to overcome when the existing party is" Michigan's Secretary of State—"a government official charged with defending [state] law as part of her official duties." *League of Women Voters of Mich.*, Doc. 78 at 19, No. 2:17-cv-14148 (E.D. Mich. July 26, 2018). Movants thus cannot overcome the presumption of adequacy unless they show "collusion

between the representatives and an opposing party," "pursuit by the representative of an interest adverse to the interests of the proposed intervenor," or "a representative's failure in the fulfillment of his duty." *Reliastar*, 565 F. App'x at 373 (cleaned up; quoting *Bradley*, 828 F.2d at 1192).

The presumption of adequacy applies here. Defendants and Movants have the "same ultimate objective" in this case: maintaining the status quo by defending Michigan's existing list-maintenance practices and defeating Plaintiff's lawsuit. *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012), *rev'd in other part*, 572 U.S. 291 (2014). Indeed, Defendants and Movants all agree that this case should be dismissed, and they all raise the same grounds for dismissal. *See* Defts.' MTD (Doc. 22); Rise/APRI Proposed MTD (Doc. 19-1); League Proposed Answer (Doc. 25-1).

That Defendants are vigorously resisting this lawsuit should not be surprising. As the official who designs, administers, and oversees the State's list-maintenance policies, the Secretary of State has every incentive to defend those policies against legal challenge. 52 U.S.C. §20509; Mich. Comp. Laws Ann. §168.31. So does Defendants' counsel, the Michigan Attorney General, who "as the state's chief law enforcement officer" has "a duty to defend [Michigan] laws." *Graveline v. Benson*, No. 18-12354, 2020 WL 2104719, at *1 (E.D. Mich. May 1, 2020) (quoting the Attorney General). "A party charged by law with representing the interests of the absent party will usually be deemed adequate." *Del. Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970, 973 (3d

Cir. 1982), *cited approvingly in Geier v. Sundquist*, 94 F.3d 644 (6th Cir. 1996) (table); *see Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007) ("[A public-interest group's] interest [in intervention] is greatly diminished due to the state's responsibilities in enforcing and defending it as it is written.").

Movants have not rebutted the presumption that Defendants adequately represent them—in fact, they don't even *try*. Movants make no attempt to argue collusion, adversity, or failure of duty; and any attempt to do so would fail. Merely "having an interest which is diverse from" Defendants is not sufficient to overcome the presumption of adequacy. *Bradley*, 828 F.2d at 1193. Neither is having "differences of opinion" about proper policies, "disagreement[s] over litigation strategy," or "disagreement[s] over … individual aspects" of the remedy. *Id.* Even if Defendants someday decide to settle this case, that decision would be made "'on the part of the government as parens patriae to represent its constituents fairly and faithfully'"; in other words, Defendants would be representing the interests of *all* voters, including Movants and their members. *Id.* at 1192. Movants cannot intervene "'simply because they would have voted differently had they been [elected officials].'" *Id.*

Nor have Movants argued—and "there is nothing to support" the argument—that the State "cannot fend for itself or will only litigate [Plaintiff's] action half-heartedly." *Reliastar*, 565 F. App'x at 374. Secretary Benson has not minced words about her opposition to this lawsuit; she told the press it was a play for "media attention" that uses "debunked claims" about voter fraud as a means "to delegitimize our elections."

Burns, *Michigan Secretary of State, 16 Clerks Accused of Keeping Sloppy Voter Roll Records in New Lawsuit*, MLive (June 9, 2020), bit.ly/36bW495. And notably, Defendants have already moved to dismiss this entire case. *See Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000) ("[W]e need only peruse [the existing party's] brief … to appreciate the thoroughness of [the existing] representation."). Movants do "not identify a single argument that [they] would have made" differently, or "explain how [Defendants'] representation has been lacking in vigor." *Id.* Like the District of Montana was in a recent case, this Court should be "skeptical that the [League of Women Voters] will present arguments in support of the [challenged policies] different than those asserted by the existing parties." *Donald J. Trump for President, Inc., v. Bullock*, No. 20-cv-66, 2020 WL 5517169, at *2 (D. Mont. Sept. 14, 2020).[2]

Even if having unique interests could overcome the presumption of adequacy, *but see Bradley*, 828 F.2d at 1193, Movants have not identified any unique interests. Movants only asserted interest is their fear that, unless they intervene, Defendants will

[2] It's fair to say that Defendants and Movants view issues concerning elections and voting similarly. In a recent election-law case that one of Movants brought *against* Secretary Benson, the Secretary "refuse[d] to defend the existing" law and tried to negotiate a consent decree. *League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148, 2019 WL 8106247, at *1 (E.D. Mich. Feb. 1, 2019); *League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148, 2019 WL 8106156, at *1 (E.D. Mich. Feb. 1, 2019). In another similar suit, the Secretary's actions prompted a Justice of the Michigan Supreme Court to characterize the suit as "a friendly scrimmage brought about to obtain a binding result that both [the League of Women Voters of Michigan and Secretary Benson] desire." *League of Women Voters of Mich. v. Sec'y of State*, No. 161671 (Sept. 11, 2020) (Viviano, J., concurring), bit.ly/3kJUnUi.

unlawfully remove eligible voters from the rolls—either by agreeing to an overbroad settlement with Plaintiff, or by receiving an overbroad injunction from this Court. But aside from being wholly speculative, Movants' interest in avoiding overbroad relief is adequately represented by *every* actor in this case. Plaintiff wants Michigan to follow its *existing* duty to remove *ineligible* voters from the rolls; he does not want a settlement that requires Michigan to remove, intentionally or unintentionally, eligible voters. Nor would this Court enter such an overbroad, unlawful injunction.

Defendants, too, adequately represent Movants' interest in resisting overbroad relief that removes eligible voters. In addition to their state-law duty to represent all voters, Defendants have a federal-law duty to maximize the number of eligible voters on the rolls. *See* 52 U.S.C. §20501(b). Defendants pointed this out on the first page of their motion to dismiss, stressing the need to "balance" their responsibilities to maintain the voter rolls without removing "'eligible voters.'" Defts.' MTD 1 (quoting 52 U.S.C. §20501(b)); *accord id.* at 5 (similar); *id.* at 2 (insisting that Michigan "tak[es] precautions against hasty removals of registrants from voter rolls"). Secretary Benson has likewise stated that this lawsuit rests on "the false notion that voter registration rates should be low" and that her "goal is 100% registration among those who are eligible." Burns, *supra*. In short, Movants' concerns "ha[ve] already been raised by [Defendants]," and this Court will certainly ensure that they "be taken into account." *Bradley*, 828 F.2d at 1193. Because Movants cannot "establish that [their] interest can only be protected through intervening," this Court should deny intervention. *Id.*

The Central District of California reached the same conclusion in *Judicial Watch, Inc. v. Logan*, another case where plaintiffs challenged a State's list-maintenance policies and where several voter-registration groups tried to intervene. Doc. 76, No. 2:17-cv-8948 (C.D. Cal. July 12, 2018), bit.ly/2HnM1mX. There, too, the movants argued that, if California was held liable for failing to remove ineligible voters, then the resulting relief could result in the removal of "eligible voters." *Id.* at 2. But it is "purely speculative," the district court explained, "that eligible voters would be injured by ordering compliance with the NVRA." *Id.* at 4. "Plaintiffs," after all, only "request that Defendants reasonably attempt to remove *ineligible* voters from the voter rolls," and the movants "will not be harmed if ineligible voters are removed." *Id.* at 2-3. Even if the movants' concern weren't speculative, the court continued, the defendants were "government officials charged with enforcing state election laws and promoting voter registration to eligible voters." *Id.* at 3. "They share the same interest as [movants] in protecting eligible voters' right to vote," and they "specifically stated that they intend to represent and defend [that] interest." *Id.* The movants thus failed to make the "compelling showing" they needed to overcome "the presumption that Defendants will adequately represent the citizens of California." *Id.* This reasoning is persuasive and should be followed in this virtually identical case.

III. Movants should be denied permissive intervention.

This Court should also deny permissive intervention. Though Rule 24(b) lists a few factors that must be considered, this Court "enjoys very broad discretion" in

denying permissive intervention and "can consider almost any factor rationally relevant." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999); *accord Michigan*, 424 F.3d at 445 (explaining that a district court can consider the factors in Rule 24(b) and "any other relevant factors").

This Court should deny permissive intervention for largely the same reasons outlined above. As explained, Movants' interests are speculative, remote, and already well-represented by Defendants. "*Any* delay caused by [their] intervention," then, would be "undue." *League of Women Voters of Mich.*, 2018 WL 3861731, at *2 (emphasis added). When "intervention as of right is decided based on the government's adequate representation," as it should be here, "the case for permissive intervention diminishes, or disappears entirely." *Me. Republican Party v. Dunlap*, No. 1:18-cv-00179, 2018 WL 2248583, at *2 (D. Me. May 16, 2018). Defendants' adequate representations means that Movants' "intervention would simply be piling onto the arguments advanced by the other parties to this litigation," *Donald J. Trump for President*, 2020 WL 5517169, at *2, and "would result only in the duplication of the efforts of the existing Defendants and undue delay of the litigation," *Blount-Hill v. Bd. of Educ. of Ohio*, 195 F. App'x 482, 487 (6th Cir. 2006).

The added burden of Movants' participation here is not small. Their participation is "likely to delay the main action as the case would expand to [ten] defendants." *Logan*, Doc. 76 at 4, No. 2:17-cv-8948 (C.D. Cal.). Worse, Movants' interests are "not dissimilar to the interests of any number of politically involved organizations in

[Michigan]." *Donald J. Trump for President*, 2020 WL 5517169, at *2. "If this Court were to permit [Movants] to intervene," it "would be hard pressed to deny future motions seeking intervention from any number of the hundreds of organizations who engage in such efforts from a partisan or nonpartisan standpoint." *Id.*

These concerns cannot be offset by any "expertise" that Movants might have about list maintenance. League Mot. 1,3. For one, "defendant, as [Michigan's] Secretary of State, is undoubtedly familiar with [list maintenance]; indeed, defendant is the government party responsible for [overseeing this process]." *Prete v. Bradbury*, 438 F.3d 949, 958 (9th Cir. 2006). Movants offer no reason to believe that she "lacks comparable expertise." *Id.* For another, Movants' "expertise may be effectively deployed through amicus briefs and by providing assistance to the state." *Daggett*, 172 F.3d at 113. Amicus status, which Plaintiff does not oppose, both "protect[s] the proposed intervenors' interests" and "allow[s] the district court the benefit of hearing proposed intervenors' concerns," "views," and "expertise." *Bradley*, 828 F.2d at 1194. Movants routinely file amicus briefs in election-law cases, and that role is most appropriate here as well.

CONCLUSION

The Court should deny Movants' motions to intervene.

Dated: September 25, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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