

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Texas Democratic Party, Gilbert Hinojosa, §
Chair of the Texas Democratic Party, §
Joseph Daniel Cascino, Shanda Marie §
Sansing, and Brenda Li Garcia, §
Plaintiffs, §

v. §

Civil Action No. 5:20-CV-00438-FB

Greg Abbott, Governor of Texas, §
Ken Paxton, Attorney General of Texas, §
Ruth Hughs, Texas Secretary of State, §
Dana Debeauvoir, Travis County Clerk, and §
Jacquelyn F. Callanen, Bexar County §
Elections Administrator, §
Defendants. §

**STATE DEFENDANTS' RESPONSE TO LULAC AND TEXAS LULAC'S
RENEWED MOTION TO INTERVENE**

The Court previously denied the motion filed by LULAC and Texas LULAC (collectively, “LULAC” or “putative intervenors”) to intervene prior to the hearing on Plaintiffs’ motion for preliminary injunction. The Court’s ruling in this regard was sound, and LULAC’s renewed motion for intervention does not warrant a different result. As before, putative intervenors cannot show that they are entitled to intervene as of right because they have not shown the requisite adversity of interests from Plaintiffs. Instead, they continue to seek the very same relief Plaintiffs request. Nor is permissive intervention appropriate. The Court stated in its order denying LULAC’s first motion that it would reconsider the intervention only “*after* the preliminary injunction issue is resolved in this Court *and the Fifth Circuit Court of Appeals[.]*” Doc. 40 at 1 (emphasis added). The appeal of the Court’s preliminary injunction order remains pending before the Fifth Circuit.¹ Intervention at this juncture will not assist in the resolution of the issues before the Court and thus should be denied.

¹ See *Tex. Democratic Party v. Abbott*, No. 20-50407 (5th Cir. dkt’d May 20, 2020).

ARGUMENT**A. Putative Intervenors Do Not Have a Right to Intervene.**

To establish a right to intervene in a lawsuit, would-be intervenors must show that (1) the application is timely; (2) they have an interest related to the property or transaction that is the subject of the action; (3) the disposition of the action may impair or impede their ability to protect that interest; and (4) none of the existing parties adequately represents that interest. FED. R. CIV. P. 24(a). “Failure to satisfy one requirement precludes intervention of right.” *Haspel & Davis Milling & Planting Co. Ltd. V. Bd. of Levee Comms’rs of the Orleans Levee District*, 495 F.3d 570, 578 (5th Cir. 2007). A party seeking to intervene bears the burden to establish that he meets these requirements. *See Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004).

A “presumption of adequate representation arises” where “the would-be intervenor has the same ultimate objective as a party to the lawsuit.” *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996). To overcome that presumption, “the applicant for intervention must show adversity of interest . . . on the part of the existing party.” *Id.* To show adversity of interest, in turn, “an intervenor must demonstrate that its interests diverge from the putative representative’s interests in a manner germane to the case.” *Entergy Gulf States La., LLC v. U.S. EPA*, 817 F.3d 198, 204 (5th Cir. 2016).

LULAC has not shown that Plaintiffs cannot adequately represent their interests. Indeed, both Plaintiffs and putative intervenors seek to expand Texas’s “vote-by mail eligibility policy in the context of the pandemic.” *Compare, e.g.*, Doc. 30-2 at 21 (LULAC’s proposed complaint, seeking universal voting by mail for all voters, “whether or not the voter meets the Eligibility Criteria [in the Texas Election Code] for the duration of the COVID- 19 pandemic”) *with* Doc. 10 at 34 (Plaintiffs’ complaint requesting relief “to allow the plaintiffs and voters like the plaintiffs to be eligible to receive a mail ballot, to cast that ballot, and to have that ballot counted by the appropriate authority.”).

Because Plaintiffs and putative intervenors seek the same remedy—a mandatory injunction that would allow all voters in Texas to vote by mail—LULAC’s asserted interests are adequately represented here.

Although it is true, as putative intervenors note, that the Fifth Circuit has characterized a putative intervenor’s burden as “minimal,” *id.*, that burden “cannot be treated as so minimal as to write the requirement completely out of the rule.” *Texas v. United States*, 805 F.3d 653, 661 (5th Cir. 2015) (citation and quotation marks omitted). In the face of a presumption of adequate representation, putative intervenors allege only vague and nebulous interests such as “pursuing their own legal theories and claims to protect their rights and the rights of their members” and a divergence in strategic legal decision-making. Doc. 93 at 9. This does not meet the burden of showing an actual divergence of interests within the meaning of Rule 24(a). *See Edwards*, 78 F.3d at 1005.²

Putative Intervenors also contend that because they are a nonpartisan group and Plaintiffs represent the interests of the Democratic Party, their interests are necessarily adverse for the purposes of Rule 24(a). While their respective organizations may represent different groups in society generally, that fact has nothing to do with whether these groups share the same ultimate objective as described above. Putative intervenors’ citation to *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Commission* does not support their position. 834 F.3d 562, 569 (5th Cir. 2016). In that case, a trade association was determined to have interests that were not adequately represented by a state agency in the defense of a statutory scheme that the trade association sought to defend. *Id.* The Fifth Circuit did not discuss the impacts of partisanship on whether intervention is warranted, and therefore, is inapposite. *See id.* Putative intervenors also cite *Entergy Gulf State La., L.L.C. v. E.P.A.* for the proposition that interests

² Putative intervenors also argue, in a footnote, that if the State Defendants’ raise jurisdictional arguments, it is somehow improper for them to oppose LULAC’s intervention. Doc. 93 at 9 n.2. But “a person may not intervene if the original, underlying case was jurisdictionally defective.” *Odle v. Flores*, 899 F.3d 344, 348 (5th Cir. 2017) (citing *Non Commissioned Officers Ass’n v. Army Times Publ’g Co.*, 637 F.2d 372, 373 (5th Cir. 1981)); *see also id.* (“[t]here is no right . . . to intervene in a [jurisdictionally] defective suit.”) (quoting *Truillion v. King’s Daughters Hosp.*, 614 F.2d 520, 526 (5th Cir. 1980)) (alteration in *Odle*).

are adverse if the intervenor pursues a strategy that “would result in a ‘likely narrower ruling,’” but the putative intervenors do not even attempt to say what narrower ruling they might seek in the future. 817 F.3d 198, 205 (5th Cir. 2016). Speculative claims about what might be brought about in the future do not satisfy Rule 24(a)’s requirement that adversity be shown in the present case. *Bush v. Viterma*, 740 F.2d 350, 356–57 (5th Cir. 1984).

Allowing LULAC to intervene as of right would render the Fifth Circuit’s requirement of an “adversity of interest” completely meaningless. LULAC only speculates that, at some point, Plaintiffs’ representation may be inadequate because “it is far from obvious that [LULAC and Plaintiffs] will obtain all of the relief they seek.”³ *E.g.*, Doc. 93 at 9 (conceding that “LULAC’s legal claims overlap in large part with the Party Plaintiffs[.]”). The Fifth Circuit has made clear that “adversity of interest must be shown in the present proceeding and may not be inferred from the possibility of adversity in some future proceeding.” *Bush*, 740 F.2d at 356–57. Putative intervenors’ unsubstantiated conjecture that Plaintiffs may, at some point, not fully represent their alleged interests—despite their virtually identical claims, and the fact that Plaintiffs seek all relief LULAC does—does not meet their burden of proof. Accordingly, LULAC is not entitled to intervene as of right under Rule 24(a).

B. The Court Should Not Allow Permissive Intervention.

Alternatively, putative intervenors seek permissive intervention under Federal Rule of Civil Procedure 24(b). Permissive intervention is permitted upon a timely motion and where there is a common question of law or fact. FED. R. CIV. P. 24(b). But even when these requirements are met, “[p]ermissive intervention is wholly discretionary with the [district] court[.]” *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470–71 (5th Cir. 1984).

³ Tellingly, in LULAC’s first motion to intervene, LULAC conceded that “LULAC Plaintiffs’ interest may overlap the interest of the Party Plaintiffs’ interest.” Doc. 30 at 9.

As the Court has already recognized, intervention should not be considered until resolution of the preliminary injunction matter by the Fifth Circuit. Doc. 40 at 1. The Court's decision in this regard correctly recognizes that circumstances could change, placing the intervention question in a new light. Given the novel questions of constitutional and state law involved in this lawsuit, a fuller exposition by a higher court will better inform the resolution of this matter. Furthermore, the fluid nature of developments concerning both COVID-19 and the government's response could also present these important questions in a different posture in the near future. Therefore, the Court should maintain its present course and delay consideration of the intervention until the preliminary injunction has been resolved in the Fifth Circuit. *See id.*

CONCLUSION

The Court should deny LULAC Intervenors' renewed motion to intervene.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2020 a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

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