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

Northeast Ohio Coalition for the Homeless; Ohio Federation of Teachers; Ohio Alliance for Retired Americans; Union Veterans Council, and Civic Influencers, Inc.,

Plaintiffs,

v.

Frank LaRose, in his official capacity as Ohio Secretary of State,

Defendant.

Case No. 1:23-cv-00026-DCN

District Judge Donald C. Nugent
Magistrate Judge Jonathan D. Greenberg

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

INTRODUCTION

This Court should deny the motion to intervene filed by the Ohio Republican Party ("ORP") and two individuals (collectively, the "Proposed Intervenors"). *See* ECF No. 20. Put simply, the motion is too late. Proposed Intervenors waited months to seek intervention, choosing not to file this motion until after the existing parties carefully negotiated a specialized discovery plan that has since been adopted by the Court. Allowing them to enter the litigation at this juncture would threaten to upend that agreement and require the parties to start all over again, jeopardizing timely resolution of Plaintiffs' claims.

But that's not all. Proposed Intervenors also fail to satisfy the other requirements for intervention as of right. They do not identify any legally protectable interest that this litigation threatens. Instead, they offer a generalized wish to enforce Ohio law as written and an unexplained (and cynical) assertion that enjoining the laws challenged in this suit—and reinstating voting rights and procedures that Ohioans had enjoyed for years—might somehow harm ORP's electoral prospects. Nor can they overcome the presumption that counsel for the Secretary of State can and will adequately represent Proposed Intervenors' interests in defending HB 458's constitutionality.

For the same reasons, the Court should also deny Proposed Intervenors' alternative request for permissive intervention. Granting this untimely motion will delay the proceedings and prejudice the existing parties, who are already working on a tight schedule. If Proposed Intervenors have a perspective they think would be helpful to the Court in this case, they can offer it as *amici*.

BACKGROUND

This lawsuit challenges House Bills ("HBs") 45 and 458, which together make dramatic changes to Ohio's election code. Plaintiffs claim these laws impose unjustified burdens on the fundamental right to vote in violation of the First and Fourteenth Amendments. Am. Compl., ECF

No. 13 ¶¶ 134–45. The sole defendant is Ohio Secretary of State Frank LaRose, the state's chief election officer, who is represented by the Ohio Attorney General. *See id.* ¶ 22; Rule 26(f) Rep. at 4, ECF No. 19.

Plaintiffs filed this lawsuit on January 6, 2023, hours after Governor DeWine signed HBs 45 and 458 into law. Plaintiffs amended their complaint on January 27. ECF No. 13. On February 23, the Court set a case management conference to occur on March 22 and instructed the parties to confer and propose a discovery plan prior to that conference. ECF No. 17. In the weeks that followed, the parties negotiated a specialized discovery plan aimed at resolving this dispute in advance of the 2024 primary elections. In exchange for the Secretary's agreement to an expedited schedule, Plaintiffs agreed to limit discovery such that each side could offer no more than two expert witnesses and could depose no more than eight witnesses. *See* Rule 26(f) Rep. at 2. Having reached this agreement, the parties filed a Rule 26(f) report on March 17. *Id.* at 1–3.

After the parties' negotiations were completed and memorialized—and the day before the case management conference during which the Court ratified that negotiated schedule—Proposed Intervenors filed this motion to intervene. ECF No. 20.

LEGAL STANDARD

A party moving for intervention as of right must demonstrate that: (1) its motion is timely; (2) it has "a substantial legal interest in the subject matter of the case"; (3) its ability to protect its interest "may be impaired in the absence of intervention"; and (4) the defendant already before the court "may not adequately represent its interest." *Northland Fam. Plan. Clinic, Inc. v. Cox*, 487 F.3d 323, 343 (6th Cir. 2007); Fed. R. Civ. P. 24(a)(2). "Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

A party moving for permissive intervention must establish that its motion is timely and that its claims or defenses raise at least one question of law or fact in common with the main action. *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005); Fed. R. Civ. P. 24(b). But even if it satisfies those requirements, the Court has wide discretion to deny permissive intervention after considering the prospect of undue delay or prejudice to the original parties, or any other relevant factors. *Michigan*, 424 F.3d at 445.

ARGUMENT

I. Proposed Intervenors have not established a right to intervene.

Proposed Intervenors' motion fails to satisfy the elements of intervention as of right. It is untimely, having been filed months after Plaintiffs filed this lawsuit, and it would derail the specialized discovery plan negotiated by the parties and ratified by the Court. Proposed Intervenors also identify no legally cognizable interest in this action and fail to overcome the strong presumption that the Secretary's counsel adequately represents Proposed Intervenors' interest in ensuring HBs 45 and 458 are implemented.

A. Proposed Intervenors' motion is untimely and threatens to prejudice the existing parties.

Proposed Intervenors' motion is untimely. While timeliness depends on all the "relevant circumstances," five factors may be particularly important: (1) the purpose for seeking intervention; (2) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (3) prejudice to the existing parties due to the delay; (4) unusual circumstances militating against or in favor of intervention; and (5) the point to which the suit has progressed. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 (6th Cir. 1982). These factors confirm that this motion is untimely.

Proposed Intervenor ORP was aware—or, at the very least, should have been aware—of

this lawsuit immediately after it was filed nearly three months ago. Local and national media heavily covered the suit.[1] Moreover, ORP counts among its leaders both the Secretary of State, who accepted service of the complaint the day after it was filed, and the Attorney General, who represents the Secretary in this case. *See Ohio Republican Leaders*, Ohio Republican Party, https://www.ohiogop.org/leaders/. Despite this knowledge, Proposed Intervenors waited *months* to get involved. That alone renders the motion untimely. *See Stupak-Thrall*, 226 F.3d at 478 (finding potential intervenor's delay unacceptable in light of the fact that they knew of the case since its inception); *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) ("we find that proposed Intervenors[] failed to act promptly despite actual or constructive knowledge of their interest in this litigation, and that this failure weighs heavily against the timeliness of their application to intervene").

Proposed Intervenors' late attempt at intervention now threatens to cause the parties serious prejudice. In the months while Proposed Intervenors were waiting to file this motion, the existing parties engaged in serious negotiations resulting in a specialized, expedited discovery plan tailored to achieve resolution of Plaintiffs' claim in advance of the 2024 primary election. As discussed above, an important component of the parties' negotiated discovery plan is a series of strict discovery limits, including that "each side may offer no more than two expert witnesses and may

[1] *See, e.g.*, Haley BeMiller, *Groups sue Ohio over new election law that requires photo ID, tightens mail-in voting*, The Columbus Dispatch (Jan. 9, 2023), https://www.dispatch.com/story/news/politics/2023/01/09/ohio-election-law-faces-lawsuit-from-democratic-attorney/69790208007/; Nick Evans, *Ohio's photo voter ID law already facing legal challenge*, Ohio Capital Journal (Jan. 10, 2023), https://ohiocapitaljournal.com/2023/01/10/ohios-photo-voter-id-law-already-facing-legal-challenge/; Meryl Kornfield, *'Clear as mud': Ohio's new voting restrictions from GOP raise alarm*, The Wash. Post (Jan. 19, 2023), https://www.washingtonpost.com/politics/2023/01/19/ohio-strict-voter-id-law/; Sam Levin, *Ohio Republicans quietly enact 'alarming' new voting restrictions*, The Guardian (Jan. 18, 2023), https://www.theguardian.com/us-news/2023/jan/18/activists-sue-ohio-republican-voting-access-restrictions.

depose no more than eight fact witnesses (including any Rule 30(b)(6) representatives), and that Plaintiffs will not depose any Ohio elected officials." Rule 26(f) Rep. at 2. Plaintiffs have since served Defendant with their initial discovery requests. If Proposed Intervenors are granted intervention, the details of the existing discovery plan would have to be reopened, particularly the limits on each party's discovery.

Accordingly, Proposed Intervenors' bald assertion that an order granting their intervention at this stage "will not delay the proceedings"—and their citations to cases in which parties sought intervention just weeks after initiation of suit—rings hollow. Mem. in Supp. of Mot. to Intervene at 5 ("Mem."), ECF No. 20-1 (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (motion filed "just two weeks after the complaint"), and *Priorities USA v. Benson*, 448 F. Supp. 3d 755, 762–63 (E.D. Mich. 2020) (legislature moved to intervene nineteen business days after lawsuit was filed)). Not only would Proposed Intervenors' participation in this case disrupt the carefully-negotiated discovery ordered by this Court, *see Stupak-Thrall*, 226 F.3d at 478 (finding intervention untimely and prejudicial because it "would have substantially interfered with the orderly processes of the district court" after district court had set expedited case schedule), it would also introduce a new round of motions practice that is guaranteed to further delay and multiply proceedings, *see* Proposed Mot. to Dismiss, ECF No. 20-2; *see also One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) (denying permissive intervention where intervenors presented a different substantive argument that would "unnecessarily complicate and delay all stages of this case" and "jeopardize the parties' ability to obtain a final judgment (and appellate review of that judgment) in time for the election").

Excusing Proposed Intervenors' delay in filing this motion would run counter to speedy and efficient resolution of this case and would prejudice the parties. As a result, they are not

entitled to intervention.

B. Proposed Intervenors have no legally protectable interest at stake in this litigation.

Proposed Intervenors' delay in filing this motion is sufficient on its own to require denial of their requested intervention. *See Blount-Hill*, 636 F.3d at 284 (holding that untimeliness provides an "independent basis" for denying intervention). But even setting aside that delay, the purported interests that Proposed Intervenors claim they have in this litigation fall well short of the high mark required for intervention as of right. Intervention as of right is reserved only for "significantly protectable interest[s]." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). As the Sixth Circuit has explained, a putative intervenor must show more than a mere "general ideological interest in the lawsuit." *Coal. to Def. Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007). Whether that interest is "substantial" enough to warrant intervention of right is a "fact-specific" determination. *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula* 41 F.4th 767, 772 (6th Cir. 2022) (quoting *Grubbs v. Norris,* 870 F.2d 343, 346 (6th Cir. 1989)).

The interests Proposed Intervenors claim to have in this litigation are too generalized and insubstantial to warrant intervention as of right. For the most part, they are epitomic generalized concerns shared by all Ohioans. Proposed Intervenors gesture at a variety of related concepts: "ensur[ing] . . . that Ohio's elections are secure and trusted by voters across the political spectrum,"; "ensur[ing] that Ohio carries out free, fair, and trusted elections"; "upholding and abiding by election rules"; and "knowing the rules by which" elections should be run. Mem. at 1, 2, 7. But these are "precisely the kind of undifferentiated, generalized grievance[s]" that courts do not entertain. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see also Athens Lumber Co. v. Fed. Election Comm'n,* 690 F.2d 1364, 1366 (11th Cir. 1982) (interest "shared with all unions and all

citizens concerned about the ramifications of" the challenged provisions was "so generalized it will not support a claim for intervention of right"); *Coal. to Def. Affirmative Action*, 501 F.3d at 782 (same, for "generic interest shared by the entire Michigan citizenry").

Proposed Intervenors similarly have no legally protectable interest in "demanding adherence" to HBs 45 and 458. Mem. at 7 (cleaned up). Once a law is enacted, "the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." *Northland Fam. Plan. Clinic*, 487 F.3d at 345. Thus, an asserted "interest in [a] case [that] simply pertains to the enforceability of the statute in general" is not "cognizable as a substantial legal interest sufficient to require intervention as of right." *Id*. at 346.

While Proposed Intervenors vaguely gesture towards ORP's competitive interests, they make no effort to satisfy their burden of making a fact-specific demonstration that this case impacts that interest. *See Coal. to Def. Affirmative Action*, 501 F.3d at 780 (explaining that proposed intervenors' burden of "establishing a substantial legal interest 'is necessarily fact-specific'" (quoting *Miller,* 103 F.3d at 1245)). Their suggestion that *any* case involving "voting procedures" sufficiently implicates ORP's competitive interests to warrant intervention, Mem. at 5, cannot be squared with decisions of courts throughout the country—including in this circuit—indicating the opposite. *See Mi Familia Vota v. Hobbs*, No. 2:22-cv-00509-PHX-SRB (D. Ariz. Jun. 23, 2022), Doc. 57 (denying Republican committees' motion to intervene because "a would-be intervenor's partisan motivation—vis-à-vis the government's obligation to its entire constituency, regardless of political affiliation—does not alone 'call into question [the government's] sincerity, will or desire' to defend the challenged law"); *League of Women Voters of Mich. v. Johnson*, No. 2:17-CV-14148, 2018 WL 10483889, at *1 (E.D. Mich. Apr. 4, 2018) (denying Republican

congressional delegation's motion to intervene in redistricting challenge because "[a]ll citizens of Michigan share a generalized interest in this litigation insofar as they have the right to vote, run for office, and otherwise participate in the 2020 election"); *Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, 2020 WL 8181703, at *3, *4 (D. Ariz. Sept. 16, 2020) (denying Republican Party's motion to intervene in voting rights case); *Common Cause R.I. v. Gorbea*, No. 1:20-cv-00318-MSML7DA, 2020 WL 4365608, at *3 n.5 (D.R.I. July 30, 2020) (explaining a previous denial of a motion to intervene by the Republican National Committee and Rhode Island Republican Party); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 6591397, at *1 (M.D.N.C. June 24, 2020) (denying Republican National Committee and North Carolina Republican Party's motion to intervene in voting rights case); *One Wis. Inst., Inc.*, 310 F.R.D. at 399 (denying intervention to Republican officials and voters); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 259 (D.N.M. 2008) (denying intervention motions by Republican entities seeking to defend restrictive election law).

Nor do the various cases cited in Footnote 1 of Proposed Intervenors' memorandum support their claim that "political party committees" automatically "have a substantial interest in intervening in cases implicating elections laws and procedures." Mem. at 6 & n.1. Rather, several involved litigation where the political committee was directly regulated by the law at issue or where voters supporting that party were at risk of disenfranchisement. *See, e.g., La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022) (challenged statute regulated the behavior of partisan poll watchers recruited, trained, and appointed by Republican committees); *Issa v. Newsom*, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *4 (E.D. Cal. June 10, 2020) (challenged executive order threatened to disenfranchise Democratic Party voters). Proposed Intervenors also cite to a variety of cases where intervention was granted only in the

name of partisan fairness, which does not apply here. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-WMC, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (denying intervention as of right, and allowing permissive intervention to Republican Party entities only as "mirror-image" of Democratic plaintiffs); *Democratic Exec. Comm. of Fla. v. Detzner*, No. 4:18-cv-520-MW-MJF (N.D. Fla. Nov. 9, 2018) (granting intervention by Republican Party intervenors in case brought by Democratic Party plaintiffs). Still more of Proposed Intervenors' cases turned on meaningful disagreement with the state defendants, indicating that, unlike here, the political parties were inadequately represented. *See, e.g., Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365 (D. Nev. Apr. 28, 2020) (Democratic intervenors were adverse to state defendants in a different lawsuit on the same subject); *League of Women Voters of Minn. Educ. Fund v. Simon*, No. 20-cv-1205 ECT/TNL (D. Minn. June 23, 2020) (state defendants took the position that challenged laws were unconstitutional, diverging from intervenors' position that they were legal). These cases do not support Proposed Intervenors' involvement in this lawsuit, let alone the proposition that political parties have a freestanding right of intervention in all election litigation.

Nothing in *Shays v. Federal Election Commission*, 414 F.3d 76 (D.C. Cir. 2005)—on which Proposed Intervenors rely to suggest this case impacts ORP's interest in the "'competitive environment" of elections, Mem. at 2, 7—offers Proposed Intervenors any support. There, the court held that two congressional candidates had standing to challenge Federal Election Commission rules that allowed their opponents to violate statutory campaign-finance restrictions. *Shays*, 414 F.3d at 84. But here, there is no prospect of any analogous "illegally structure[d] competitive environment." *Id*. at 87. The only two possible outcomes in this case are (1) HBs 45 and 458 will be implemented, or (2) Ohio election law will remain the way it has been for years,

which ORP does not suggest was "illegally structured." ORP has not demonstrated that either of those possibilities threatens their competitive interests.

Ultimately, the only way this case *could* impact ORP's competitive interests is that an injunction against HBs 45 and 458 would alleviate burdens on eligible voters who might not support ORP's preferred candidates in future elections. But preventing eligible voters from participating in elections is not a valid interest, let alone one that gives rise to a right of intervention. *Cf. Wise v. Circosta*, 978 F.3d 93, 100 (4th Cir. 2020) (plaintiffs lacked standing to challenge extension of election deadline where "no voter [would] be treated differently than any other voter" and "*no one was hurt by th[e] deadline extension*"); *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987) (concluding that alleged interest in perpetuating "unconstitutional conditions" is not a "legally protected interest").

Proposed Intervenors' assertion that Ms. Feix and Ms. Lambo, as potential future election workers, have an interest in "knowing the rules by which they will judge elections" fares no better. Mem. at 7. If they choose to serve as election workers, they will be informed of the applicable law regardless of the outcome of this case. If this asserted interest were sufficient, every election worker in the state would have a right to intervene in every election case based not on any unique interest or perspective but solely on their shared desire to "know[] the rules." *See Michigan*, 424 F.3d at 444 (denying intervention where "proposed intervenors have not identified any separate arguments unique to them that they would like to make"); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658 (7th Cir. 2013) (holding that a given "interest must be unique to the proposed intervenor" to satisfy the requirements of Rule 24(a)); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (generalized environmental interest insufficient for intervention where it was shared with "a substantial portion of the population"). To the extent that any election

rules are ultimately affected or altered by this litigation, Ms. Feix's and Ms. Lambo's curiosity can be satisfied by monitoring the proceedings rather than participating in them.

Finally, Proposed Intervenors' suggestion that Ms. Feix and Ms. Lambo have "a separate interest in preventing their votes from being 'debase[d] or dilute[d]' by the counting of invalid ballots" finds no support in law or fact. Mem. at 8. This argument relies entirely on speculation that an injunction against HBs 45 and 458 might lead to "voter fraud and other irregularities." *Id*. But Proposed Intervenors provide no reason to believe that would occur. Courts have routinely concluded that generalized fears of "vote dilution" resulting from potential voter fraud do not give rise to legal rights. *See, e.g.*, *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) (plaintiffs lacked standing on a theory of "alleged future risk of vote dilution or vote denial" because they did not establish that future unlawful conduct was imminent); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (holding the dilution of a voter's ballot by the counting of unlawful votes is "a paradigmatic generalized grievance" because "no single voter is specifically disadvantaged" (quotation omitted)). If fears of this type of "vote dilution" were a basis for intervention, every single Ohioan would have an automatic right to intervene to defend *any* challenge to *any* election regulation.[2]

[2] As one federal court has explained, a "veritable tsunami of decisions" hold that voters cannot pursue claims based on a mere allegation that a fraudulent vote could dilute their voting strength in the future. *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff'd*, No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022); see also *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 999-1000 (D. Nev. 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more directly and tangibly benefits them than it does the public at large." (quotations and alterations omitted)); *Martel v. Condos*, 487 F. Supp. 3d 247, 252 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably

Because Proposed Intervenors have identified no substantial, legally protectable interest at stake in this litigation, they have no right to intervene.

C. Proposed Intervenors fail to demonstrate that the Secretary does not represent their interests in this litigation.

Proposed Intervenors "bear the burden of proving that they are inadequately represented by a party to the suit." *Michigan*, 424 F.3d at 444. That burden is heightened when proposed intervenors "share the same ultimate objective as a party to the suit." *Id.* In making this determination, courts often consider whether the proposed intervenors possess a substantial legal interest that is adverse to the defendant, whether the defendant has aggressively fulfilled her duty to defend this case, and whether there is evidence of collusion between plaintiff and defendant. *See Miller*, 103 F.3d at 1247. Proposed Intervenors have failed to demonstrate that any of these factors justifies intervention.

Because the position Proposed Intervenors seek to take in this litigation is the same as the Secretary's (*i.e.*, that HBs 45 and 458 are constitutional), there is a "presumption of adequacy of representation." *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *see also Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 111 (1st Cir. 1999) ("The government in defending the validity of [a] statute is presumed to be representing adequately the interests of all citizens who support the statute."). Proposed Intervenors do little to rebut that presumption. To the contrary, ORP's website refers to the Secretary as one of "Ohio['s] Republican Leaders" "upholding [ORP's] values and traditions." *See Ohio Republican Leaders*,

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raised by any Nevada voter."); *see also Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such [is] more akin to a generalized grievance about the government than an injury in fact."); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (explaining this "vote dilution argument fell into the 'generalized grievance' category"); *Moncier v. Haslam*, 1 F. Supp. 3d 854, 862 (E.D. Tenn.), *aff'd*, 570 F. App'x 553 (6th Cir. 2014) ("Plaintiff has also not alleged that he is being treated differently from any other voter in Tennessee").

supra p. 4. While Proposed Intervenors hint at "private interests" that might distinguish their position from the Secretary's, none amounts to much. Their interest in "electing particular candidates across a wide variety of elections" does not suffice. Mem. at 10. As already explained, Proposed Intervenors have not made any fact-specific showing that this litigation actually implicates ORP's competitive interests. In any event, partisan interests, standing alone, do not suffice to demonstrate that the Secretary is not an adequate representative of Proposed Intervenors. *See, e.g.*, *Miracle v. Hobbs*, 333 F.R.D. 151, 156 (D. Ariz. 2019) (finding representation adequate where proposed intervenors "superficially" alleged partisan concerns); *Victim Rts. L. Ctr. v. Rosenfelt*, 988 F.3d 556, 562 (1st Cir. 2021), *cert. denied* 142 S. Ct. 754 (2022) ("Nor is perfect identity of motivational interests between the movant-intervenor and the government necessary to a finding of adequate representation.").

Proposed Intervenors also speculate that the Secretary may make litigation choices with which Proposed Intervenors disagree because the Secretary may consider factors such as expense, opposing views, and the "social and political divisiveness of the election issue," suggesting that this might have led the Secretary to file an answer rather than a motion to dismiss. Mem. at 10. But "mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party." 7C Charles Alan Wright, et al., *Federal Practice and Procedure* § 1909 (3d ed.); *see also Bradley*, 828 F.2d at 1193 (finding adequate representation where "[a]lthough the litigation strategy has altered," plaintiffs and proposed intervenors "share the same ultimate objective"). What matters is whether there is reason to think that the Secretary will defend this case in a manner that is *substantively* different from how Proposed Intervenors would. *See Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 275 (D. Ariz. 2020) (rejecting speculation

that an existing defendant's "substantive positions may be different" where the movants "fail[ed] to provide any examples of such differences"). Proposed Intervenors have offered no reason to believe that might be the case here.

Because Proposed Intervenors have not rebutted the presumption that the Secretary adequately represents any of Proposed Intervenors' interests that are at stake in this litigation, they have no right to intervene.

II. The Court should deny permissive intervention.

Proposed Intervenors' alternative request for permissive intervention should be denied for the same reasons. *See Coal. to Def. Affirmative Action*, 501 F.3d at 784 (holding that, together with considerations of prejudice, the "district court's conclusions that the proposed intervenors lacked a substantial legal interest in the lawsuit, and that the proposed intervenors were adequately represented by existing parties" warranted denial of permissive intervention); *see also Bay Mills Indian Cmty. v. Snyder*, 720 F. App'x 754, 759 (6th Cir. 2018) (affirming denial of permissive intervention upon consideration of proposed intervenors' purported interest and its representation by an existing party).

As discussed, Proposed Intervenors' motion is untimely. *See supra* § I.A. They unjustifiably waited months to file it, and allowing them to enter the litigation at this point would upend the discovery plan negotiated by the parties and ratified by the Court. Proposed Intervenors' presence would serve only disturb those efforts, prejudice the parties, and multiply and delay proceedings. Particularly where Proposed Intervenors also lack "a substantial legal interest in the lawsuit" and are "adequately represented by existing parties," permissive intervention is unwarranted. *Coal. to Def. Affirmative Action*, 501 F.3d at 784 (quotation omitted).

CONCLUSION

Federal courts routinely decide whether state laws pass constitutional muster, and such

cases are regularly litigated (and vigorously defended) by state officials. This case is no different. Like any other entity, Proposed Intervenors are free to monitor proceedings and seek leave to participate as *amici curiae* if they believe they have a perspective that would be helpful to the Court. *See Blount-Hill*, 636 F.3d at 288 (finding that parties denied intervention "are not without a voice" when they are permitted to appear as *amici*); *Stupak–Thrall*, 226 F.3d at 474 (suggesting *amicus* participation as a less burdensome way to allow a party's participation in the same case). But for all of the foregoing reasons, the motion to intervene should be denied.[3]

[3] In the event the Court grants intervention, Plaintiffs request that the parties' existing agreement regarding discovery limitations apply collectively to Defendant and Intervenor-Defendants alike. In addition, Plaintiffs respectfully request that those limitations be modified to grant Plaintiffs three additional fact witnesses, one for each of the Proposed Intervenors.

Dated: April 4, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2023, the foregoing was filed electronically with the Clerk of the Court using the Court's electronic case filing system, which will serve such filing on all counsel of record.

/s/ *Donald J. McTigue*
Donald J. McTigue