IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, *et al.*	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
vs.	)	5:13-CV-4095-EFM-DJW
	)	
UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.* his	)	
	)	
Defendants,	)	
	)	
and,	)	
	)	
PROJECT VOTE, INC.	)	
	)	
Defendant-Intervenor.	)	
_____	)	

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AS DEFENDANT

Project Vote helps citizens register to vote. Plaintiffs, the States of Arizona and Kansas, seek relief that will impede voter registration, particularly by minorities, young people, and the poor, and will make it harder to train voter registration organizers and conduct voter registration drives. Movant in fact sued Plaintiff Arizona in a case involving nearly identical issues, and ultimately prevailed in the Supreme Court. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013). Movant therefore seeks leave to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), or in the alternative to intervene permissively under Federal Rule of Civil Procedure 24(b)(1)(B). The courts have construed Rule 24 liberally and freely allowed intervention, *see Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("[The Tenth Circuit] has tended to follow a somewhat liberal line in allowing

intervention."); *Nuesse v. Camp*, 385 F.2d 694, 702-04 (D.C. Cir. 1967), particularly in cases involving voting rights. *See infra* at 4-5 (collecting cases).

I. INTERVENTION AS OF RIGHT IS WARRANTED

Movant satisfies each of the elements of Rule 24(a)(2) regarding intervention as of right. The Rule provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Tenth Circuit has set forth a four-part test based on this rule: (1) the motion to intervene must be timely, (2) the motion "claims an interest relating to the property or transaction which is the subject of the action," (3) the interest "may as a practical matter" be "impair[ed] or impede[d]," and (4) which interest "is [not] adequately represented by existing parties." *Elliott Indus. Ltd. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005). Particularly given the Tenth Circuit's "liberal view in allowing intervention under Rule 24(a)," Movant is entitled to intervene as of right under these standards. *Id.*; *see also* *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977).

A. Intervention Is Timely

As an initial matter, the motion for intervention is timely. Defendants have not responded to the Complaint. Discovery has not commenced. There has been no status conference. The Court has entered no dispositive orders. And no trial has been set or held. Accordingly, intervention will cause no prejudice to the existing parties.

"The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the

case." § 1916 Timeliness of Motion, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.); *see also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) ("The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." (citation and quotation marks omitted)); *United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 596 (D. Colo. 2008) ("In the absence of any such prejudice," question of whether party "could have intervened sooner" is not "determinative on the question of whether its instant motion is timely."); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970) ("[i]n fact, this may well be the *only* significant consideration when the proposed intervenor seeks intervention of right").[1] Where, as here, intervention will not delay resolution of the litigation, intervention should be allowed. *Cummings v. United States*, 704 F.2d 437, 441 (9th Cir. 1983) (abuse of discretion for trial court to deny intervention in the absence of a showing of prejudice to the government).

With this case in its very early stages, intervention would not cause any delay in the trial nor prejudice the rights of any existing party. In sum, Movant's motion to intervene is timely.

B. Movant Has a Vital Interest in the Litigation

Courts "determine whether an applicant's interest is sufficient by applying the policies underlying the 'interest' requirement to the particular facts of the case." *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1420 (10th Cir. 1984) (citing *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 850 (10th Cir. 1981)); *see also Nuesse*, 385 F.2d at 700 ("[T]he 'interest'

[1] Prejudice should not, of course, be confused with the convenience of the parties. *See McDonald*, 430 F.2d at 1073 ("mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right"); *Clark v. Putnam Cnty.*, 168 F.3d 458, 462 (11th Cir. 1999).

test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.").

The mission of Movant includes helping low-income, minority, and young citizens to register to vote and supporting the voter registration programs of other organizations doing similar work. Movant plainly has an interest in the "transaction that is the subject of the action," Rule 24(a)(2), *i.e.*, if Plaintiffs succeed in forcing Defendant Election Assistance Commission ("EAC") to require documentary proof-of-citizenship on the Federal Form (a) it will make it harder for their citizens to register to vote, particularly those citizens who have the most difficulty affording and obtaining the kinds of proof of citizenship that Plaintiffs demand, and (b) it will make it harder to train voter registration organizers and conduct voter registration drives because of the additional requirements to register to vote. Intervention in voting rights cases is favored, and the courts have routinely allowed it. *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003); *City of Lockhart v. United States*, 460 U.S. 125, 129 (1983); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982); *City of Port Arthur, Texas v. United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1981); *N.Y. State v. United States*, 65 F.R.D. 10, 12 (D.D.C. 1974); *Commonwealth of Va. v. United States*, 386 F. Supp. 1319, 1321 (D.D.C. 1974); *City of Petersburg, Va. v. United States*, 354 F. Supp. 1021, 1024 (D.D.C. 1972); *Nw. Austin Mun. Util. Dist. v. Gonzales*, Civ. No. 1:06-cv-01384 (D.D.C. Nov. 09, 2006, Doc. 33); *LaRoque v. Holder*, Civ. No. 10-0561 (D.D.C. Aug. 25, 2010, Doc. 24); *Shelby Cnty., Ala. v. Holder*, Civ. No. 10-0651 (D.D.C. Aug. 25, 2010, Doc. 29); *Texas v. United States*, 1:11-cv-01303 (D.D.C. Aug. 16, 2011, Doc. 11).[2]

[2] In some of the cases cited above intervenors played not merely an important but a crucial role. In *City of Lockhart*, for example, the intervenors presented the sole argument in the Supreme Court on behalf of the appellees. No argument was presented on behalf of the United States. 460 U.S. at 130.

Intervention is also appropriate because Movant sued Plaintiff Arizona in the previous litigation involving Arizona's ongoing attempt to require documentary proof of citizenship for voter registration that resulted in the United States Supreme Court's recent *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013), decision. In that case, Movant challenged one of the laws at issue here, Arizona's Proposition 200, which imposed a proof-of-citizenship restriction on voter registration and voting. The Supreme Court held that the NVRA preempts Proposition 200 and therefore precluded the State from requiring documentation of citizenship to accompany the Federal Form. In effect, Plaintiffs mount the next phase of their attack by continuing to litigate the same issue that Movant fought and won in the Supreme Court in *Inter Tribal Council of Arizona*, merely in a different legal posture. The changes sought by Arizona and Kansas will make it harder for Plaintiffs' citizens to register to vote, and will impose a particular disadvantage on those who have difficulty obtaining or affording the kinds of proof of citizenship that Plaintiffs require -- minorities, the poor, the elderly, among others. This is precisely why Movant sued Plaintiff Arizona in 2007: to stop the state from imposing illegal barriers to voter registration.

Intervention is also particularly appropriate in this case because Movant, unlike the Defendants, is in a special position to provide the Court with an on-the-ground appraisal of the facts and circumstances involved in the present litigation. Movant is experienced in conducting and supervising voter registration drives and is therefore uniquely qualified to identify and assess the impact of the Plaintiffs' proposed documentary proof-of-citizenship requirements. For example, in the *Inter Tribal Council of Arizona* litigation, Movant supplied the courts with statistical evidence of the adverse effects of Proposition 200 on voter registration in Arizona:

Following enactment of Proposition 200 over 31,000 individuals were rejected for

> voter registration in Arizona. Less than one-third of the rejected registrants subsequently successfully registered to vote. Reflecting the demographic composition of Arizona voter registrants overall, more than 80% of the rejected voters were not Latino. Voter registration through community-based drives in Maricopa County, Arizona's largest county, plummeted 44%. The proportion of all voter registrations in Maricopa County attributable to community-based drives decreased from 24% in 2004 to 7% in 2005, 5% in 2006 and 6% in 2007. Throughout Arizona, voter registrations attributable to community drives has remained low - 5% in 2009-2010 and 11% in 2007-2008.

Respondents' Br. at 18-20, *State of Arizona v. The Inter Tribal Council of Arizona, Inc.*, 2013 WL 179943 (U.S.) (record citations omitted). Data consistently show that African Americans and Latinos disproportionately use community-based registration drives to register to vote.

Movant has an interest in the subject matter of this action sufficient to warrant intervention. As an organization dedicated to assisting low income, minority, youth, and other marginalized communities to register to vote, its interests, in fact, are compelling.

C. Denial of Intervention Would Impair or Impede Movant's Ability to Protect Its Interests

"'To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.'" *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (quoting *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir.1999)). The outcome of this action may as a legal and practical matter seriously undermine Movant's interests. *See* Fed. R. Civ. P. 24(a)(2). If Plaintiffs are able to compel Defendants to make proof-of-citizenship changes to the Federal Form, there would be new restrictions placed on voters attempting to register in Kansas and Arizona, and Movant's registration organizing activities would be made more difficult, if not altogether frustrated. For example, Movant is hampered and deterred from conducting voter registration because many applicants do not possess the listed documentation, and even if they

do, individuals do not regularly carry proof of citizenship in everyday activities where drives seek to reach voters, and photocopying citizenship documents in the setting of a voter registration drive is practically and logistically nearly impossible. Furthermore, such a precedent could encourage other states to impose other, burdensome hurdles to voter registration. These changes would have a direct and adverse impact on Movant's mission of conducting voter registration drives in low income, minority, youth and other marginalized communities, which would have a dramatic impact on these communities' ability to participate effectively in the electoral process. If Movant cannot participate in this action and bring its expertise to bear on matters so central to its mission, its ability to protect its interests would be impaired or impeded.

D. Movant's Interests Cannot Be Adequately Represented by the Existing Parties

"Although an applicant for intervention as of right bears the burden of showing inadequate representation, that burden is the 'minimal' one of showing that representation 'may' be inadequate." *Sanguine*, 736 F.2d at 1419 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Clinton*, 255 F.3d at 1254 (quoting *Natural Res. Def. Council v. United States Nuclear Reg. Comm'n*, 578 F.2d 1341, 1346 (10th Cir.1978)). Rule 24 "underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." *Nuesse*, 385 F.2d at 702.

Although the Defendants and Movant "may share some objectives," *In re Sierra Club*, 945 F.2d at 780, that does not mean the Defendants' interests and Movant's interests are identical or that their approaches to litigation would be the same. For example, Movant

anticipates that the Defendants and Movant have different views on the legality of any substantive changes to the Federal Form approved pursuant to the "Wilkey Memorandum" (referenced in the Complaint ¶ 29). Movant also anticipates that the Defendants and Movant have different views on the legality of any substantive changes approved to the Federal Form that were authorized informally, *i.e.*, outside formal notice and rulemaking. Movant also believes that its position may diverge from the Defendants regarding the legality of the EAC's approval of changes made to the Federal Form at the request of Louisiana, to the extent such changes are inconsistent with federal law. Moreover, Movant anticipates that its position may diverge from Defendants' on whether the EAC may authorize substantive changes to the Federal Form in the absence of a quorum of Commissioners.

Allowing intervention is particularly appropriate where, as here, Movant is seeking to intervene on the same side as the federal government, because the government has obligations to protect the public interest. The Supreme Court has "recognized that when a party to an existing suit is obligated to serve two distinct interests, which, although related, are not identical, another with one of those interests should be entitled to intervene." *United Guaranty Residential Ins. v. Phila. Sav. Fund Soc'y*, 819 F.2d 473, 475 (4th Cir. 1987) (referring to *Trbovich*, 404 U.S. at 538-39). In *Trbovich*, the Supreme Court allowed a union member to intervene in an action brought by the Secretary of Labor to set aside union elections for violation of the Labor-Management Reporting and Disclosure Act of 1959, even though the Secretary was broadly charged with protecting the public interest. The Court reasoned that the Secretary of Labor could not adequately represent the union member because the Secretary had a "duty to serve two distinct interests," 404 U.S. at 538, a duty to protect both the public interest and the rights of union members.

In a similar case, the Tenth Circuit allowed tourism-related businesses and environmental organizations to intervene as a matter of right on behalf of the government in a case seeking injunctive and declaratory relief in connection with the designation of a National Monument. *See Clinton*, 255 F.3d at 1255-56. The Tenth Circuit agreed with the intervenors' argument that the "showing [of inadequate representation] is easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor's particular interest." *Id.* at 1254-55. The Court pointed out, as the case law made clear, that the "government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation" because "[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Id.* at 1255-56; *see also In re Sierra Club*, 945 F.2d at 780 (granting intervention as of right and recognizing that government entity could not adequately represent the interests of an environmental group because "in theory, [government] should represent all of the citizens of the state, including the interests of those citizens who may be . . . proponents of new hazardous waste facilities," while the environmental group "on the other hand, appears to represent only a subset of citizens concerned with hazardous waste—those who would prefer that few or no new hazardous waste facilities receive permits").[3]

[3] This Court has also recognized "the general presumption that 'representation is *adequate* when the objective of the applicant for intervention is identical to that of one of the parties.'" *San Juan Cnty., Utah v. United States*, 503 F.3d 1163, 1204 (10th Cir. 2007) (quoting *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996)). Here, however, the

Movant's interests in this litigation are sufficiently different from those of the Defendants to justify intervention. The Defendants must represent the interests of its citizenry generally -- including the interests of the Plaintiffs. *Trbovich*, 404 U.S. at 538-39; *In re Sierra Club*, 945 F.2d at 780. Where a party represents such dual interests in litigation, the "test" of whether that party will adequately represent the interests of potential intervenors is "whether each of the dual interests [of the party] may 'always dictate precisely the same approach to the conduct of the litigation.'" *United Guaranty Residential Ins. Co.*, 819 F.2d at 475 (holding that the largest mortgage holder could intervene of right in case brought after collapse of real estate firm because the trustee could not adequately protect the interests of such holder given the trustee's duty to represent all holders with equal vigor). Consequently, Defendants' vigorous performance of their duty to represent all citizens still would not make their representation of Movant's distinct interests adequate, because Defendants must balance the competing interests presented by the proposed intervenors as well as those entities, like the Plaintiffs, who oppose it.

For other decisions holding that government parties could not adequately represent the interests of a subset of the general public, *see Chiles v. Thornburgh*, 865 F.2d 1197, 1214-15 (11th Cir. 1989) (federal prison detainees' interests may not be adequately represented by county); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (private party seeking to protect narrow financial interest allowed to intervene despite presence of government which represented general public interest); *Natural Resources Defense Council, Inc. v. United States Envtl. Prot. Agency*, 99 F.R.D. 607, 610 n.5 (D.D.C. 1983) (pesticide manufacturers and

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federal government's interest is not identical to Movant's. Movant is committed to the goal of the most efficient, accessible, and streamlined process of voter registration across the country, but the EAC has allowed changes to the Federal Form, on at least one occasion, that Movant does not believe were legal or promoted efficiency in the voter registration process.

industry representatives allowed to intervene even though EPA was a party); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of the Univ. of the State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (pharmacists and pharmacy association allowed to intervene where "there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would" the state Regents); *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 130 F.R.D. 4, 11-12 (D. Conn. 1990) (minority contractors allowed to intervene because "its interest in the set-aside is compelling economically and thus distinct from that of the City").

In short, Defendants may not adequately represent Movant's unique perspectives in this action.

III. PERMISSIVE INTERVENTION IS ALSO APPROPRIATE

Even if this Court should determine that Movant does not satisfy the requirements for intervention as of right, it should grant permissive intervention under Rule 24(b)(1)(B). Rule 24(b)(1)(B) permits intervention on timely motion when a person "has a claim or defense that shares with the main action a common question of law or fact." As discussed above, Movant seeks to have this Court deny Plaintiffs' request to compel the EAC to modify the Federal Form to include illegal proof-of-citizenship requirements. The factual and legal questions are in substantial part the same as in the main action. Also, as discussed above, intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

In *Florida v. United States*, 820 F. Supp. 2d 85 (D.D.C. 2011), Florida sought preclearance for changes to its voting laws (including restrictions on voter registration requirements) under Section 5 of the Voting Rights Act. Movant and other parties were "granted leave to intervene permissively as defendants" because they had "a special interest in the

administration of Florida's election laws." *Id.* at 86-87. The pending litigation is equally important to Movant's interests, and accordingly intervention should be granted.

CONCLUSION

For the foregoing reasons, the Court should permit Movant to intervene in this action as a party defendant.

Dated: November 13, 2013

Respectfully submitted,

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**Pro Hac Vice Motion Pending*

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November, 2013, I electronically filed the foregoing MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT with the clerk of the court by using the CM/ECF system, which will automatically send a notice of electronic filing and a copy of the filing to all counsel of record.

s/ Erin Thompson
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