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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JUDICIAL WATCH, INC., et al.

Plaintiffs,

v.

DEAN C. LOGAN, et al.

Defendants.

Case No. 2:17-cv-08948-R-SK

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO INTERVENE (ECF No. 43)

Hon. Manuel L. Real
Hearing Date: June 4, 2018
Time: 10:00 a.m.
Crtrm: 880

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PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

Following a motion to intervene by three political organizations, yet another, California Common Cause ("Movant"), now seeks to intervene and participate alongside state and local government Defendants.

This action is brought by four residents of Los Angeles, Judicial Watch, Inc., and Election Integrity Project California, Inc. (collectively "Plaintiffs") to vindicate violations of the National Voter Registration Act of 1993 ("NVRA") by Los Angeles County and the State of California, relating to the County's failure to implement appropriate list maintenance procedures to remove ineligible voters from its rolls. [Doc. No. 1.] Named as official-capacity Defendants are Dean Logan, the Registrar-Recorded/County Clerk of Los Angeles County, and Alex Padilla, California's Secretary of State. *Id.* at 4.

Plaintiffs claim (1) that Defendants have violated Section 8(a)(4) of the NVRA by failing to conduct a general program that makes a reasonable effort to cancel the registrations of persons who are ineligible to vote in California in federal elections; and (2) that Defendants have violated Section 8(i) of the NVRA by failing to make available to Plaintiffs all records within the past two years concerning Defendants' programs and activities intended to ensure that its voter lists are accurate and current. [Doc. No. 1 at 11-26.] Defendants were served on January 2, 2018 [Doc. No. 22], and both filed Answers on January 23, 2018. [Doc. Nos. 24, 25.] Defendants Logan and Secretary Padilla have denied any violations of the NVRA. *Id.* Discovery is ongoing. [*See* Doc. No. 38.] The primary questions in these proceedings are whether Defendants have a program to remove ineligible voters and, if so, does the program satisfy Section 8 of the NVRA. The Plaintiffs contend Defendants' programs do not satisfy the NVRA's minimal requirements. Defendants deny the same.

By Order issued on March 21, 2018, the discovery deadline was set for October 15, 2018, and trial was set for December 4, 2018. [Doc. No. 28.] Due to the complexity and scale of discovery required, including approximately thirty (30) anticipated witness

depositions, Plaintiffs and Defendants have requested a ninety-day extension of these deadlines. [Doc. No. 38.]

On April 17, 2018 Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles filed a motion to intervene. [Doc. No. 32.] Plaintiffs opposed that motion by response dated May 14, 2018. [Doc. No. 47.] Movant has now filed the instant motion to intervene and proposed Answer. [Doc. No. 43.] Movant now seeks to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternate, permissively under Rule 24(b)(1)(B). Movant (as well as the other proposed intervenors) seek to intervene in order to assert the same legal positions taken by the current state and local Defendants.

Both forms of requested intervention should be denied. As discussed below, Movant has no significantly protectable interest that would be impaired by the claims Plaintiffs bring. The government Defendants are providing more than adequate representation in defending against Plaintiffs' claims. Movant's proposed answer shows that its intervention would effectively reopen issues already resolved in these proceedings. If intervention is granted, the already-cumbersome nature of the extensive discovery in this case would be compounded significantly. A new scheduling order likely will be needed to address all the interests and concerns of the new parties. This added time and expense is unnecessary because the government Defendants are providing vigorous representation, as they are presumed to do by the case authority of the Ninth Circuit.

There is no basis for Movant to intervene as of right or with permission. Therefore, the motion should be denied.

ARGUMENT

I. THE COURT SHOULD DENY MOVANT'S REQUEST FOR INTERVENTION AS OF RIGHT.

Movant first seeks to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), which permits intervention only if four elements are satisfied: (1) the request to

intervene must be timely; (2) Movant must show "a significantly protectable interest" related to the "property or transaction that is the subject of the action;" (3) Movant must demonstrate it is "situated such that disposition of the action may impair or impede" its ability to protect the interest at stake; and (4) the protectable interest "*must* not be adequately represented by existing parties." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009) (emphasis added) (citations omitted).

Failing to demonstrate just one of these elements dooms a motion to intervene as of right under Rule 24(a)(2). *Id.*

A. Movant Has No "Significantly Protectable Interest" in the Subject Matter of this Case.

To show a "significantly protectable interest," Movant must (1) assert an interest protected by law, and (2) prove a "relationship" between the legally protected interest and Plaintiffs' claims in this litigation. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998), citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (citations omitted). Movant will satisfy this "relationship requirement" only if resolving Plaintiffs' claims "actually will affect" it. *Donnelly*, 159 F.3d at 410 (citations and quotation marks omitted).

The required connection between Movant's legally protected interests and Plaintiffs' claims is missing. Unlike the other political organizations seeking to intervene in this case, Movant does not endeavor to show that its own members' state and federal voting rights will be violated by government Defendants' compliance with the NVRA's reasonable list maintenance requirements. Instead, Movant emphasizes its organizational efforts, claiming it has worked "tirelessly to assist people to register as voters, assist registered voters or voting-*eligible* people" and to ensure "that all *eligible* persons have equal opportunity" to vote. Mov. Br. 10 (emphasis added). To be sure, eligible voters in Los Angeles County, on whose behalf Movant claims to work, have a panoply of federal and state voting rights. But Plaintiffs have alleged that Los Angeles County is not

identifying and removing the registrations of *ineligible* voters. [Doc. No. 1 at 11-26.] Of concern are voters who have moved elsewhere but whose inactive registrations are never cancelled as the NVRA requires. *Id.*, ¶¶ 16-17, 34-37. Taking voters who have moved to another jurisdiction off the rolls in Los Angeles County simply does not affect the voting rights of eligible voters. No provision of the U.S. Constitution, the Voting Rights Act, or California law guarantees that a person who is not a legal resident of a particular jurisdiction has some sort of protected legal right to vote there. While Movant may have political *preferences* as to how the NVRA should be enforced, these cannot justify intervention. *See Texas v. U.S.*, 805 F.3d 653, 657 (5th Cir. 2015) ("[A]n intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological . . . reasons; that would-be intervenor merely *prefers* one outcome to the other.") (citations omitted).

Relying on conjecture and speculation, Movant fears that unidentified eligible voters could be removed from the rolls if certain list maintenance activities – which Movant does not specifically identify – are ordered. Thus, the declaration submitted in support of the motion to intervene worries that Plaintiffs will seek voting roll "purges"[1] that are "sweeping" and "wide-ranging" and "expansive" and "improper" and "wrongful." [Doc. No. 43-2, ¶¶11-15.] This declarant is simply heaping speculation on top of speculation, arguing without a shred of evidence that presently unknown measures that *might* be imposed at the remedial stage of this litigation *might* be flawed. It is pure speculation to suggest that Plaintiffs would ask for "sweeping" or "expansive" "purging,"

[1] All proposed intervenors repeatedly use the inflammatory word "purging" to describe the removal of ineligible voters. Presumably it is meant to suggest the political arrests, show trials, and summary executions of the totalitarian regime of Joseph Stalin. *See, e.g.*, Robert Conquest, THE GREAT TERROR: A REASSESSMENT (1990) ("Book I: The Purge Begins"). Aside from the obvious hyperbole implicit in any such comparison, note that cancelling the voter registrations of those who have died or moved out of state is expressly mandated by federal law under the NVRA; that it is an eminently sensible policy that, among other things, reduces the opportunities for fraud; and that voters whose registrations are cancelled because they live and vote elsewhere have lost no rights. Removing a person from a registration list who is not legally entitled to vote in a jurisdiction is not a totalitarian act, but the responsible act of a constitutional republic.

that Defendants would agree to such things, or that this Court would order them. Even if, like other proposed intervenors, Movant finds anecdotes about eligible voters in other states being removed pursuant to allegedly improper procedures, these say nothing about the relief Plaintiffs seek here and what measures this Court would order or approve. Movant's worst fears, unsupported by relevant facts, do not establish a relationship between its alleged legally protected interests and Plaintiffs' claims in this case.

As is the case in the supporting declaration, *id.*, Movant's brief speculates when it argues that Plaintiff seeks relief that "would require aggressive purging of Los Angeles County's and California's voter rolls." Mov. Br. 12. In fact, Plaintiffs' complaint only seeks a judgment "enjoining Defendants from violating" the NVRA and ordering them "to develop and implement a general program that makes a reasonable effort to remove from Los Angeles County's rolls the registrations of ineligible registrants." [Doc. No. 1 at 26 (Prayer for Relief).]

The cases Movant cites granting intervention in voting cases do not support their motion here. *See* Mov. Br. 11. The *only* decision Movant cites granting intervention in a list maintenance case brought under Section 8 of the NVRA is *Bellitto v. Snipes*, Case No. 16-cv-61474, 2016 U.S. Dist. LEXIS 128840 (S.D. Fla. Sept. 21, 2017). But in that case, the plaintiffs proposed specific list maintenance techniques not found in the NVRA. Thus, they alleged in their complaint that

> One example of Defendant's failure to reasonably maintain voter rolls . . . is that Defendant undertakes absolutely no effort whatsoever to use data available from the Broward County Circuit Court Clerk obtained from jury excusal forms. This data identifies numerous Broward County residents who self-identify, under oath, that they are non-citizens or non-residents of Broward County. . . . [I]t would be simple to cross-check the excusal forms or other data regarding jurors who have moved, died, or declared non-United States citizenship . . . .

Popper Decl., Ex. A (Bellitto plaintiffs' first amended complaint) at ¶ 19; *see id.*, ¶ 26

(citing "failure to . . . access[] readily available data regarding domicile and citizenship of Broward County residents"). In those circumstances, it was plausible for the court, in its decision initially granting intervention, to credit intervenors' assertion that the "the court-ordered 'voter list maintenance' sought by Plaintiffs in Count I of their Amended Complaint . . . could itself violate the NVRA." *Bellitto*, 2016 U.S. Dist. LEXIS 128840 at *6. Indeed, the final decision granting judgment for the defendants specifically rejected that and other list maintenance techniques as not required by the NVRA. Popper Decl., Ex. B (*Bellitto* order) at 38-41 (internal page nos. 36-39). By contrast, Plaintiffs' complaint here does not ask the Court to order any particular list maintenance program or technique, let alone a non-statutory one. Certainly Movant has failed to identify any specific list maintenance technique that it objects to.[2]

In sum, Movant has not explained how its mission will be imperiled if Defendants are compelled to comply with federal and state law concerning voter list maintenance. Movant has offered nothing to show a relationship between Movant's speculative interest and the subject matter of this suit. For this reason alone, the instant motion should be denied.

B. Movant Has No Interest that Will be Impaired in this Case without Its Participation.

For all the same reasons that Movant cannot show a legally protectable interest, Movant cannot show any impairment of its ability to protect its interests. *See* FED. R. CIV. P. 24. Plaintiffs simply seek to compel Defendants to develop and implement a general program that makes a reasonable effort to remove ineligible registrants from Los Angeles County's voter rolls, as required by the NVRA. [Doc. No. 1 at 26.] Movant speculates its interests *may* be harmed *if* Plaintiffs prevail and *if* this Court grants, not the relief sought in the complaint, but "purging," which it labels "aggressive" and "sweeping" and "wide-ranging," not to mention "wrongful" and "improper." Notwithstanding its

[2] In fact, the only specific list maintenance technique objected to by *either* intervenor is the use of address confirmation postcards – which is specifically authorized by the NVRA. *See* Doc. No. 31-4, ¶ 8; 52 U.S.C. § 20507(d)(2).

flair for the dramatic, Movant has failed to show a protectable legal interest *related to the Plaintiffs' claims* that will be impaired without Movant's participation.

In addition to its failure to establish the required nexus, Movant's own moving papers acknowledge avenues for their members to protect any voting rights through an independent action. If the rights of Movant or its members ever were violated, the NVRA affords a private right of action for a "person who is aggrieved by a violation" of the Act. 52 U.S.C. § 20510(b). In addition, 52 U.S.C. Section 10301(b) provides Movant with a basis in federal law to sue officials if they discriminate on the basis of race in their removal of voter registrants from voting lists.

Freestanding private remedies counsel against finding any impairment under existing Ninth Circuit precedent. In *United States v. City of Los Angeles*, 288 F.3d 391, 396 (9th Cir. 2002), for example, the federal government sought to enjoin certain police practices and, after filing, entered a proposed consent decree with the City of Los Angeles, the Board of Police Commissioners of the City of Los Angeles, and the Los Angeles Police Department ("LAPD"). Community groups and private individuals sought intervention to protect their members' rights to be free from unconstitutional police practices. *Id.* at 397. The Ninth Circuit found it "doubtful" that the community intervenors' interests would be impaired because the litigation did "not prevent any individual from initiating suit against LAPD officers who engage in unconstitutional practices or against the City defendants for engaging in unconstitutional patterns or practices." *Id.* at 402. Further, no "aspect of the litigation [would] prevent the community organizations from continuing to work on police reform." *Id.* Here too, no member of the Movant will be precluded from bringing a private right of action, and nothing in this litigation would preclude Movant from working to achieve its legitimate voter registration goals. If Movant wants to challenge Congress' authority to require list maintenance programs related to federal elections, they are certainly free to file their own complaint here or elsewhere to litigate the propriety and necessity of list maintenance mandated by the NVRA. For now, the questions raised in these proceedings are whether

Defendants have a list maintenance program and, if so, does it satisfy the NVRA.

Other cases are in accord with the principle that an independent action precludes a finding of potential impairment. *See Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977) (noting that third element was not met because, *inter alia*, movants were free to bring their individual claims in independent actions); *Lee v. The Pep Boys-Manny Moe & Jack of Cal.*, Case No. 12-CV-5064-JSC, 2016 U.S. Dist. LEXIS 9753, at *9-10 (N.D. Cal. Jan. 27, 2016) (ability to file independent action weighed against finding impairment of interest).

Movant suggests that a "Court-ordered resolution in this action would preempt a later challenge." Mov. Br. 16. But everyone who believes they have a cognizable claim under the NVRA or any other federal voting statute is free to pursue their own remedies. Due process would not allow forfeiture of rights by persons (yet unidentified) not parties to this action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) (citations omitted).

Given the interest Movant has described, its concerns about a "Court-ordered resolution" must mean that it believes the Court could require "aggressive" purges that are "improper and "wrongful"; and it must be further concerned that the Ninth Circuit will uphold this Court's error. Again, there is no basis for assuming that Plaintiffs would seek or that this Court would order improper list maintenance activities that threaten citizens' voting rights. Movant cannot contend that the Plaintiffs, the Court, and Defendants are incapable of remediating any NVRA violations without also "purging" "marginalized communities" of eligible voters. Courts fashion appropriate injunctive relief in a variety of circumstances to remedy violations of federal law all the time, and there is no basis to contend this Court cannot do the same here should it find a violation. *See Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (citations omitted) (noting that injunctive relief must be tailored to remedy the specific harms shown). Despite the Court's broad discretion in fashioning relief in these proceedings, the current parties are certainly mindful that the remedy will be narrow and

that such injunction does no more and no less than correct the particular violation. *Jones v. City & Cty. of San Francisco*, 976 F. Supp. 896, 916 (N.D. Cal. 1997) (citation omitted) ("To properly strike a balance between remedying the constitutional violation and minimizing judicial intrusion into jail management, courts typically require the development and implementation of a narrowly tailored remedial plan."). Movant's concerns about the impact of an erroneous court order are, thus, another level of unsupported conjecture, "too speculative to warrant intervention." *Greene v. United States*, 996 F.2d 973, 977 (9th Cir. 1993).

C. Movant Has Not Overcome the Presumption of Adequate Representation by the Government Defendants.

The Ninth Circuit considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (citations omitted). In other types of cases, proposed intervenors are faced with a "minimal" burden to show inadequacy, and it is enough to show that representation "may be" inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citation omitted).

This standard gives way to a presumption of adequacy of representation in two kinds of circumstances. First, "[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki*, 324 F3d at 1086. (citation omitted). Furthermore, "[i]f the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Id.* (citation omitted). "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id.* (citation omitted).

Second, there is an assumption of adequacy "when the government is acting on

behalf of a constituency that it represents." *Prete v. v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (citation omitted). Furthermore, "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens when the applicant shares the same interest." *Arakaki*, 324 F.3d at 1086, citing 7C Wright, Miller & Kane, § 1909, at 332; *see Pest Comm. v. Miller*, 648 F. Supp. 2d 1202, 1213-14 (D. Nev. 2009) (applying heightened standard where the Nevada Secretary of State and the intervenors shared the same interest).[3]

In this case, it must be presumed that Defendant Logan, the Registrar-Recorder/County Clerk of Los Angeles County, and Defendant Padilla, California's Secretary of State, government officials in charge of voting laws who share the same interest as the Movant, adequately represent it, absent a "very compelling showing to the contrary." *Arakaki*, 324 F.3d at 1086. The Secretary of State "is the chief elections officer of the state," responsible by law for "administer[ing] the provisions of the Elections Code" and for "see[ing] that . . . state election laws are enforced." CAL. GOV. CODE § 12172.5(a). County clerks and registrars of voters are responsible for voter registration and for "all duties . . . that relate to and are a part of election procedure." CAL. GOV. CODE § 26802. The Secretary of State is also directed by law to "make reasonable efforts" to "[p]romote voter registration to eligible voters" and "[e]ncourage eligible voters to vote." CAL. ELEC. CODE § 10(b); *see also* CAL. ELEC. CODE § 2404(a) (Secretary of State and county election officials must coordinate regarding voter

[3] Stated another way, *Arakaki* really sets forth four different circumstances in which a presumption of adequacy of representation arises: (1) an ordinary presumption that applies when an applicant and any party have "the same ultimate objective"; (2) a compelling presumption when an applicant and any party have "identical interests"; (3) an ordinary presumption when "the government is acting on behalf of" its constituents; and (4) a compelling presumption when the *government* and an applicant "share[] the same interest." *Arakaki*, 324 F3d at 1086 (citations omitted). Note that the requirement that an applicant and a party have identical interests only applies to one of these circumstances – not to all four. Thus, it misstates the holding of *Arakaki* to insist that *every* presumption of adequate representation depends on "identical interests." The first set of proposed intervenors made this mistake. [*See* Doc. No. 58 at 14.]

registration agencies). Note that the Secretary of State is particularly charged by law with promoting the voter registration interests of the same "marginalized communities" Movant claims to specially represent: "In undertaking these efforts, the Secretary of State shall prioritize communities that have been historically underrepresented in voter registration or voting." CAL. ELEC. CODE § 10(b)(2).

It is equally evident that Movant and Defendants share the same interest with respect to the outcome of this case. In Secretary Padilla's response to the instant motion to intervene, he states:

> Defendant Padilla takes no position on [Movant's] motion for intervention as of right under Rule 24(a), but notes that he vigorously disputes the factual and legal bases of Plaintiffs' claims and will actively defend this case in such a manner that maximizes eligible voter engagement and participation.

[Doc. No. 66 at 1 n. 2.] *See also* Doc. No. 42 at 2 n. 2 (responding to prior motion to intervene, stating that he "is actively defending the case, and will not accept terms that could jeopardize anyone's statutory or constitutional rights").

Furthermore, Secretary Padilla has repeatedly pledged to defend the voting interests Movant claims to be concerned about. Secretary Padilla has elaborated on this point in numerous public statements made in online tweets.[4] Consider the tweets he has made in just this calendar year. In January 2018, he said:

> Let me make this clear: I will not tolerate any efforts by this administration to undermine the voting rights of eligible citizens. Every vote matters, and I'm prepared to stand up for every eligible Californian's right to register and cast a ballot free of unnecessary obstacles.

Popper Decl., ¶ 3. This same theme is emphasized in many similar tweets. *See id.*, ¶ 4 ("Voting is not a use-it-or-lose-it right. Not in California, or anywhere else in our

[4] *See Hawaii v. Trump*, 859 F.3d 741, 773 fn. 14 (9th Cir. 2017), *cert. granted sub nom., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017), *vacated and remanded on other grounds*, 138 S. Ct. 377 (2017) (relying on tweets from government account as official statements).

country."); *id.*, ¶ 5 ("I was firm in my refusal to hand over Californians' personal voter info"); *id.*, ¶ 6 ("I'm more committed than ever to continue serving the state of CA by striving to increase voter registration and participation and protect our voting rights."); *id.*, ¶ 7 ("We must continue to defend free and fair elections."); *id.*, ¶ 8 ("Proud to defend the rights of California's voters.").

In the same vein, the front page of Secretary Padilla's election website identifies one issue – voting rights:

> It's hard to believe that in this day and age, we are working so hard to protect voting rights in the United States of America. But we are and we must. I am thankful to serve as California's Chief Elections Officer at such a critical time. . . . I would be honored to continue serving you in defending and expanding voting rights here in California.

Popper Decl., ¶ 9.

For its part, Movant has publicly recognized Secretary Padilla for his voting rights advocacy. In December 2017, Movant honored Secretary Padilla with its "Champion of Democracy" award. Movant's executive director, who submitted a declaration in support of the instant motion, praised Secretary Padilla for advancing "bold policies to modernize elections and eliminate unnecessary burdens on Californians' right to vote," calling him and his staff "a breath of fresh air—and urgency—to expanding our democracy." *See* Popper Decl., ¶ 12. Thus, only a few *days* before Plaintiffs filed this action, Movant publicly praised Secretary Padilla for protecting the very interests it seeks intervention on now. One can reasonably expect that Secretary Padilla will continue to protect Movant's legitimate interests.

Defendant-Secretary Padilla is not the only Defendant publicly aligning himself with Movant's interests. The website for the Registrar-Recorder/County Clerk, Dean Logan, represents that it partners with "citizen, community, and advocacy organizations" in a committee designed to "facilitate communication and collaboration . . . about ways to educate, engage and provide quality service to ensure accessibility for all voters."

Popper Decl., ¶ 11. One of the organizations in the list of groups that Defendant Logan's office "frequently works with" is Movant. *Id.* Proposed intervenors Rock the Vote and League of Women Voters also appear on that list. *Id.*

If every other organization on Defendant Logan's list were to follow suit and seek to intervene, the proposed intervenors will grow from four to sixteen. And there are likely other people and entities that did not make the list but that may wish to participate. But merely having opinions on voting laws and their interpretations is not grounds for turning the courtroom into a policy forum. *See Texas*, 805 F.3d at 657 (5th Cir. 2015) (rejecting notion that "ideological . . . reasons" or preferences qualify as sufficient interest) (citations omitted). Adding defendants who agree with Defendants and disagree with Plaintiffs would not serve any worthwhile purpose, especially given the Defendants' public stances.

In contrast to this concrete display of vigorous representation, Movant offers only theories about how government interests might, generally speaking, diverge from its own. Such vague speculation "falls far short of a 'very compelling showing.'" *Dep't of Fair Employment and Housing v. Lucent Tech., Inc.*, 642 F.3d 728, 740-41 (9th Cir. 2011) (citations omitted); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997).

For example, Movant argues that Defendants may "seek an unsatisfactory resolution" to "avoid the distraction and expense of litigation" in light of their "substantial public responsibilities and limited resources tied to the public treasury . . . ." Mov. Br. 14. The assertion that California and its Justice Department are not financially equipped to litigate this case is without merit. The California's Department of Justice had a $894-million-dollar budget for 2017-2018. *See* Popper Decl., ¶ 10. Certainly, it does not need to rely on intervenors to cover expenses related to defending itself against alleged violations of federal law.

Even if these concerns had a grounding in reality (they do not), they would, if accepted, swallow the general rule that government representation is presumed to be

adequate. *See Prete*, 438 F.3d at 957-58 (citations omitted) (rejecting argument that "budget constraints" overcame government-representation presumption, reasoning that "[v]irtually all governments face budget constraints" and movants' argument would eliminate the presumption); *see also Wilson*, 131 F.3d at 1307 (arguments about the nature of government generally were insufficient, otherwise "proposed intervenors could *always* satisfy the third prong of Rule 24(a)(2) if the defendant" were a government entity).

The assertion that Movant would defend more vigorously than existing parties does not amount to a showing of inadequate representation. *Tahoe Reg'l Planning Agency*, 792 F.2d at 779. Speculation that Movant might stress different facts and make different arguments is likewise not enough. *See Daggett v. Commission on Gov. Ethics*, 172 F.3d 104, 112 (1st Cir. 1999) (holding that speculation is not enough to show state's Attorney General would "soft-pedal arguments so clearly helpful to his cause") (citation omitted). Bald claims that Movant's interests might otherwise diverge from those of government defendants, or may involve different motivations, is speculative and does not justify intervention. *Wilson*, 131 F.3d at 1307 (citation omitted); *United States v. California*, Case No. 2:18-CV-490-JAM, 2018 U.S. Dist. LEXIS 71403, at *6-7 (E.D. Cal. April 27, 2018), quoting *Oregon Envtl. Council v. Oregon Dep't of Envtl. Quality*, 775 F. Supp. 353, 359 (D. Or. 1991) ("The interest of a putative intervenor is not inadequately represented by a party to a lawsuit simply because the party to the lawsuit has a motive to litigate that is different from the motive to litigate of the intervenor.") (citation omitted); *see also Earth Island Inst. v. Evans*, 136 F. App'x 34, 36 (9th Cir. 2005) ("associations' different motives to litigate" did not constitute a neglected "necessary element") (citations omitted); *SEC v. Private Equity Mgmt. Grp., Inc.*, Case No. 09-CV-2901-PSG, 2009 U.S. Dist. LEXIS 135683, at *13 (C.D. Cal. Aug. 5, 2009) (denying intervention where proposed intervenor "only established that it seeks to intervene because it apparently disagrees with the strategy taken by" an existing party). To deny intervention, the Government's representation does not have to align "perfectly" with

what Movant or previous applicants want. The question is one of adequacy – which is more than established here.

Movant cites *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001), but that case is distinguishable because the City of San Diego had bluntly "acknowledge[d] that it 'will not represent proposed intervenors' interests in this action.'" And in *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898-99 (9th Cir. 2011), applicants made a "compelling showing" that the Forrest Service did not adequately represent its interests, where it was being sued over restrictions in an order issued to comply with a court decision in litigation originally brought *by the applicants*, which the Forest Service was in the process of appealing. Finally, *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1185-86 (9th Cir. 1998), granted intervention of right to the Teamsters Union in a challenge by public works contractors to California's prevailing wage law. The employment interests of the union in that case obviously were "more narrow and parochial than the interests of the public at large" (*id.* at 1190) – including, for example, the interests of those who sued to have the law struck down.

The Supreme Court case Movant cites, *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), is likewise distinguishable. There, the Secretary of Labor was statutorily required to "serve two distinct interests" and his "ultimate objective was not the same as that of the proposed intervenor to begin with." *Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013) (quoting and analyzing *Trbovich*). Thus, *Trbovich* stands for the unremarkable "proposition that where the existing party and a proposed intervenor seek divergent objectives" the presumption of adequate representation has less warrant. *Id.* No proposed intervenor here has been able to identify one area of actual disagreement between the Movant and Defendants regarding *this* case. *Trbovich* is inapposite. *See id.; Maine v. Dir., United States Fish & Wildlife Serv.*, 262 F.3d 13, 18-19 (1st Cir. 2001) (like *Stuart*, distinguishing *Trbovich* on its unique facts); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985-87 (2nd Cir. 1984) (same).

Finally, the fact that Movant has, in the past, filed a lawsuit challenging Secretary Padilla (and others) regarding a *different* provision of the NVRA is irrelevant. In evaluating whether representation is adequate, "the focus should be on the 'subject of the action.'" *Berg*, 268 F.3d at 823 (citation omitted); *see* FED. R. CIV. P. 24(a)(2) (allowing intervention where interest related to property or a transaction "that is the subject of the action" is not adequately represented).

The simple fact is that Movant, Defendant Padilla, and Defendant Logan all maintain that Los Angeles County and the State of California have properly conducted list maintenance under the applicable laws, and all agree that Plaintiffs' claims are meritless. Because Defendants Padilla and Logan are government officials who share the same interest as Movant, it must make a very compelling showing to defeat the presumption that Defendants adequately represent its interests. *Arakaki*, 324 F.3d at 1086. This Movant fails to do. The facts here "do not even begin to rebut the presumption of adequacy. On the contrary, they bear it out." *Wilson*, 131 F.3d at 1305.

II. THE COURT SHOULD DENY MOVANT'S REQUEST FOR PERMISSIVE INTERVENTION.

"An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly*, 159 F.3d at 412 (citation omitted); *see* FED. R. CIV. P. 24(b). Yet "[e]ven if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Donnelly*, 159 F.3d at 412 (citations omitted). "In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id.*, citing, *inter alia*, FED. R. CIV. P. 24(b)(2).[5]

[5] As the case law indicates, timeliness is a "threshold" condition that must be met *before* the Court exercises its discretion to consider the possibility of undue delay of the action or prejudice to existing parties. Thus, timeliness is a separate legal issue from delay of the action or prejudice to parties. The first set of proposed intervenors simply

The permissive intervention Movant seeks is only available where an applicant demonstrates "a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(2). If the asserted claim or defense "contains no question of law or fact that is also raised by the main action, intervention under Rule 24(b)(2) must be denied." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011); *see also Fair Political Practices Comm'n v. U.S. Postal Serv.*, Case No. 2:12-CV-93-GEB, 2012 U.S. Dist. LEXIS 58759, at *11 (E.D. Cal. Apr. 26, 2012). Only if there is a common question to a claim or defense is the Court vested with discretion to consider permissive intervention. *Kootenai Tribe*, 313 F.3d at 1111.

Movant identifies not an "asserted claim or defense" that it hopes to litigate. It apparently seeks only to defend the maintenance procedures of current Defendants. But defenses about what Los Angeles County has and has not done are not the Movant's to raise. *See True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 709 (S.D. Miss. 2014) (holding that the Republican Party was an improper defendant under the NVRA). Plaintiffs have not sued Movant for failing to maintain reasonable list maintenance procedures, nor could they here or anywhere else. Movant is not the one charged by the NVRA to conduct list maintenance. Defendants are.

As Justice O'Connor explained, while there is no requirement that the intervenor have "a direct personal or pecuniary interest in the subject of the litigation," the permissive-intervention Rule "plainly *does* require an interest sufficient to support a legal claim or defense which is 'founded upon [that] interest.'" *Diamond v. Charles*, 476 U.S. 54, 77 (1986) (O'Connor, J., concurring) (citation omitted). The "primary focus of Rule 24(b) is intervention for the purpose of litigating a claim on the merits." *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992).

Other federal cases addressing the meaning of "claim or defense" within the

misapprehend this point, when they suggest that Plaintiffs' agreement not to raise timeliness somehow includes an agreement not to raise those other matters. [Doc. No. 58 at 17 n. 9.]

meaning of Rule 24(b) are in accord. *Donahoe v. Arpaio*, Case No. CV10-2756-PHX, 2012 U.S. Dist. LEXIS 93497, at *14 (D. Ariz. July 6, 2012) (denying permissive intervention where movant had "no claim or defense at all" and asked the Court to resolve a question of law "untethered to any 'claim or defense'"); *United States v. Brooks*, 164 F.R.D. 501, 506 (D. Or. 1995) (intervenor "has no claim or defense in common with the main action. The tax refund check was made payable to the [personal representatives], and they are the only proper defendants against whom the United States may obtain judgment."), *aff'd* 163 F.R.D. 601, 605 (D. Or. 1995); *Laube v. Campbell*, 215 F.R.D. 655, 659 (M.D. Ala. 2003) (adopting and applying Justice O'Connor's reasoning from *Diamond*); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 116 F.R.D. 608, 611 (W.D. Wis. 1987) (finding permissive intervention inapplicable where the movant "does not articulate a claim or defense per se, but rather recites a number of aspects of its interest in the [subject of the action]").

Even if the criteria for permissive intervention were met, intervention would not be automatic, and the Court would have discretion to deny Movant's application. *Donnelly*, 159 F.3d at 412 (citations omitted). In exercising such discretion, the Court would be required to "consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id.* (citations omitted); FED. R. CIV. P. 24(b)(3). The Court could also consider "the nature and extent of the intervenor['s] interest" and "whether intervenor['s] interests are adequately represented by other parties." *Perry*, 587 F.3d at 955 (citation omitted).

If the intervention motions were both granted, the case would expand from two defendants to six. The inevitable inefficiency that would accompany such an expansion necessarily entails a degree of delay and expense. *See Perry*, 587 F.3d at 955 (affirming finding of delay where district court found that, if intervention were allowed, "each group would need to conduct discovery on substantially similar issues"). This is especially the situation here, in this NVRA Section 8(a)(4) litigation, which is data driven and requires significant discovery. [Doc. No. 38-2, ¶ 4.] In fact, the parties expect to take

approximately thirty (30) depositions. Even if Movant sought to schedule no additional depositions (which is not guaranteed), coordinating the planned depositions with another set of lawyers would become much more difficult. *Allied Concrete & Supply Co. v. Brown*, Case No. 2:16-CV-4830, 2016 U.S. Dist. LEXIS 191495, at *9 (C.D. Cal. Sept. 26, 2016) (denying permissive intervention because, *inter alia*, it would "ultimately delay the proceedings" and "force all parties to conduct additional discovery") (citation omitted).

In addition, Movant's proposed Answer in intervention will have the effect of revisiting factual matters that had been resolved by the current parties' pleadings. Defendants Logan and Secretary Padilla have jointly admitted, in whole or in part, seven allegations in Plaintiffs' complaint. These include partial or complete admissions regarding the identities of persons living in Los Angeles County, the number of registered inactive voters in Los Angeles County, and correspondence exchanged between Judicial Watch and Defendants. [Doc. No. 24, ¶¶ 5-8, 35, 69, 74; Doc. No. 25, ¶¶ 5-8, 35, 69, 74.] These admitted facts are conclusively established for purposes of this litigation. *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). However, Movant's Answer denies, on insufficient information, all of these allegations. [Doc. No. 43-1, ¶¶ 5-8, 35, 69, 74.] Because these allegations would now be in dispute if Movant were allowed to intervene and file its proposed Answer, granting Movant's intervention motion would have the effect of reopening issues that the current parties have resolved. *See Tahoe Reg'l Planning Agency*, 792 F.2d at 779 (affirming district court's conclusion that intervention by those with interests adequately represented "would be redundant and would impair the efficiency of the litigation.").

For all of these reasons, permissive intervention is unwarranted and unnecessary.

* * *

In conclusion, both Movant on this motion and the first set of proposed intervenors bring nothing new or useful to this litigation. The proposed intervenors and Defendants all share an identical view of this lawsuit and of Plaintiffs' claims. Indeed, they work together

on voter registration projects and boards; they publicly voice their agreement on voting-related issues; and they lavish praise and awards upon one another for their voting-related work. Both legally (given the responsibilities Defendants, as government officials, are charged with) and as a practical matter, the current Defendants will amply represent proposed intervenors' interests as this case moves forward.

At the same time, allowing these movants to intervene will hinder the progress of this action. Discovery, motion practice, stipulations, mediation and settlement, and trial all become that much harder to coordinate. A simple demonstration of the kind of complications to be expected is afforded by the proposed intervenors' varying Answers, which seem to reopen issues that the current pleadings had effectively closed.

If the proposed intervenors add anything, it is an overtly ideological approach to voting law that is not helpful. Thus, they accuse Plaintiffs of intending to conduct "purges" that they characterize as "expansive," "sweeping," "wrongful," and "improper," and generally are quick to question Plaintiffs' motives.[6] Strikingly, they oppose list maintenance techniques expressly authorized by federal law,[7] and in all of their papers they fail to identify a list maintenance program they *do* favor. This litigation should not be transformed into ideologically charged policy hearings on the propriety of the NVRA's list maintenance mandate. Congress settled that matter by enacting the list maintenance requirements of Section 8 of the NVRA.

CONCLUSION

For the foregoing reasons, the Court should deny the pending motion to intervene.

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Respectfully Submitted,

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[6] *See* Doc. No. 58 at 17 n. 9.

[7] *See* Doc. No. 31-4, ¶ 8.

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