Appeal Nos. 18-56102, 18-56105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDICIAL WATCH, INC., *et al.*,

Plaintiffs-Appellees,

v.

DEAN C. LOGAN, *et al.*,

Defendants,

v.

MI FAMILIA VOTA EDUCATION FUND, et al.,

Movants-Appellants,

v.

CALIFORNIA COMMON CAUSE,

Movants-Appellants.

On appeal from the United States District Court
for the Central District of California
No. 2:17-cv-08948-R-SK
The Honorable Manuel L. Real

MOVANTS-APPELLANTS' JOINT OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Mi Familia Vota Education Fund is a nongovernmental corporate entity that has no parent company.

Rock the Vote is a nongovernmental corporate entity that has no parent company.

League of Women Voters of Los Angeles is a nongovernmental corporate entity that has no parent company.

California Common Cause is the California branch of Common Cause, a nongovernmental corporate entity that has no parent company.

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INTRODUCTION

Movants-Appellants Mi Familia Vota Education Fund, Rock the Vote, League of Women Voters of Los Angeles, and California Common Cause seek this Court's reversal of the district court's denial of its motion to intervene as defendants alongside Dean Logan, the Registrar of Voters of Los Angeles County and Alex Padilla, the Secretary of State of California, in their defense of the county's voter list maintenance program and the state's list maintenance laws and policies. Plaintiffs-Appellees claim the county and state are violating the National Voter Registration Act, 52 U.S.C. § 20501 et seq., because, in their wildly speculative estimate, there are too many voters on the county's voter rolls. The relief requested by Plaintiffs-Appellees below could result in the purging of millions of voters from California's voter rolls.

Movants-Appellants are nonprofit organizations that register and engage voters in marginalized communities in Los Angeles County and across California. Their participation in the underlying action is necessary to protect their interests in ensuring that the decision in this case about what list maintenance procedures are required or permitted pursuant to the NVRA does not negatively impact and disenfranchise eligible, registered voters in Los Angeles County and across California.

This case is just one of at least 17 lawsuits that Plaintiff-Appellee Judicial Watch, Inc, and its allies have brought under the NVRA asking courts to require election authorities in a variety of jurisdictions to take more aggressive action to purge potentially ineligible voters from the voting rolls based on nothing more than supposition and hysteria. *See* Jonathan Brater et al., *Voter Purges: a Growing Threat to the Right to Vote* 9, n.114 (2018), *available at* https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf. Therefore, the district court's order, which applied fundamentally flawed logic to find that voter engagement organizations like Movants-Appellants do not have a protected interest in ensuring that eligible, registered voters are not swept up in massive voter purge programs being pursued across the country, reaches beyond the present case and touches voters whose rights are threatened across the country.

Movants-Appellants therefore respectfully request that this Court reverse Judge Real's decision below, which denied them intervention of right to protect the interests of marginalized, eligible voters in Los Angeles County from the relief Plaintiffs-Appellees seek in this case. In the alternative, this Court should find the district court abused its discretion when it denied permissive intervention to Movants-Appellants, whose collective experience and perspective should be represented in this action to assist with the full resolution of the claims in a way

that protects the critical rights at stake and furthers the interests of judicial economy.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction under 28 U.S.C. § 1331. This appeal is from the district court's order denying Movants-Appellants' motion to intervene under Fed. R. Civ. P. 24. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over the appeal of the district court's final order, entered on July 12, 2018. Movants-Appellants filed their notice of appeal on August 10, 2018. The appeal is thus timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Whether Movants-Appellants are entitled to intervene of right where they have a significant and direct interest in the voter purge procedures at issue in this litigation because of those procedures' potential to disenfranchise eligible voters; where a resolution of the action without Movants-Appellants' participation will impair their ability to protect against and prevent disenfranchisement of eligible voters, particularly those whom Movants-Appellants serve; and where the county and state Defendants may be constrained by broader and conflicting interests that undermine their ability adequately to represent the narrower, unique interests of Movants-Appellants and their constituents.

2. Whether the district court abused its discretion when it refused, in the alternative, to grant permissive intervention where Movants-Appellants' interests in protecting eligible voters from wrongful removal relate directly to Plaintiffs-Appellees' claims that Los Angeles County and the State of California are failing to remove sufficient numbers of voters from the voter rolls; where Movants-Appellants' participation would not unduly delay the case; and where denial of the motion to intervene significantly increases the likelihood of collateral litigation in the future concerning implementation of any procedural changes adopted or imposed without adequate representation of Movants-Appellants' interests.

STATEMENT OF THE CASE

In recent years, organizations like Plaintiff-Appellee Judicial Watch and its allies have brought at least 17 lawsuits under the National Voter Registration Act, 52 U.S.C. § 20501 et seq., asking the courts to require election authorities in a variety of jurisdictions to take more aggressive action to purge potentially ineligible persons from the voting rolls based on nothing more than supposition and hysteria. *See* Jonathan Brater et al., *Voter Purges: a Growing Threat to the Right to Vote* 9, n.114 (2018), *available at* https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf. The underlying action that gives rise to this appeal is one of those cases. Movants-Appellants are nonprofit, nonpartisan organizations that work to

improve civic engagement and political participation in a variety of communities in Los Angeles and across California. This appeal seeks reversal of the district court's denial of Movants-Appellants' motion under Rule 24 of the Federal Rules of Civil Procedure to intervene as of right, or alternatively, for permissive intervention. ER175-77[1]

A. Federal Statutory Background

In 1993, Congress enacted the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 et seq., Pub. L. 103-31, 107 Stat. 77, to establish national voter registration procedures for federal elections. The NVRA has four stated purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
> (3) to protect the integrity of the electoral process; and
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501.

[1] On May 14, 2018, California Common Cause filed its own motion to intervene as a defendant, ER159-63, and that motion was denied in the same Order denying Mi Familia Vota Education Fund, Rock the Vote, League of Women Voters of Los Angeles's motion. Its appeal of the Order was docketed before this Court (Case No. 18-56105). On September 12, 2018, this Court sua sponte consolidated the two appeals under Case No. 18-56105 (Dkt. No. 16).

Section 8 of the NVRA governs a state's "administration of voter registration for elections for Federal office."[2] 52 U.S.C. § 20507. Consistent with the statute's multiple objectives, it places significant restrictions on state efforts to remove the names of registered voters from the rolls. When Congress enacted the NVRA, it was "wary of the devastating impact purging efforts previously had on the electorate." *Am. Civil Rights Union v. Philadelphia City Comm'rs*, 872 F.3d 175, 178 (3d Cir. 2017) ("ACRU"). Congress found that purging efforts are often "highly inefficient and costly" by requiring reprocessing of registrations removed in error and that "there is a long history of such cleaning mechanisms which have been used to violate the basic rights of citizens." S. Rep. No. 103-6 at 18 (1993). Accordingly, Section 8 allows states to remove names from the voting rolls only in "certain specific circumstances." *ACRU*, 872 F.3d at 182. The name of a registrant may not be removed from the official list of eligible voters except (A) at the request of the registrant; (B) as provided by State law, by reason of criminal conviction or mental incapacity; or (C) by reason of death of the registrant or a change in residence of the registrant. 52 U.S.C. § 20507(a)(3)-(4).

[2] This brief refers to 52 U.S.C. § 20507 interchangeably as "Section 8," reflecting the statute's original location at Section 8 of Pub. L. 103-31, May 20, 1993, 107 Stat. 77.

In addition to restricting the reasons by which names be removed, the NVRA also restricts how and when names may be removed. A state's removal program must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act" and must not result in the removal of the name of any registered voter "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(1)-(2). Systematic efforts to remove names of registered voters are prohibited within 90 days of a federal election. 52 U.S.C. § 20507(c)(2). Section 8 also includes procedural safeguards which jurisdictions must follow when they seek to remove a registrant's name due to a change in residence. 52 U.S.C. § 20507(d).

Section 8 also requires states to take certain minimum steps to maintain the accuracy of lists of registered voters. Section 8 provides that each state shall "[c]onduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—(A) the death of the registrant; or (B) a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4). This statutory text makes clear that the obligation imposed on states is limited in two important respects. First, each state is required to remove ineligible voters by reason of *two criteria only*: death or change in residence.[3]

[3] The NVRA's legislative history likewise states: "States are permitted to remove the names of eligible voters from the rolls at the request of the voter or as provided by State law by reason of mental incapacity or criminal conviction." S. Rep. 103-6 at 18 (1993). "In addition, States are required to conduct a general program that

Second, the State's program need only make a *reasonable effort* to remove the names of ineligible voters based on the two enumerated criteria.

B. The Parties and Movants

Plaintiffs-Appellees are Judicial Watch, Inc., Election Integrity Project California, Inc., Wolfgang Kupka, Rhue Guyant, Jerry Griffin, and Delores M. Mars. Defendants are Dean C. Logan in his official capacity as Registrar/Recorder/ County Clerk of Los Angeles County, and Alex Padilla in his official capacity as the California Secretary of State. Movants-Appellants are Mi Familia Vota Education Fund ("MVEF"), Rock the Vote ("RTV"), the League of Women Voters of Los Angeles County ("LWVLA"), and California Common Cause ("CCC").

Movant-Appellant MVEF is a 501(c)(3) nonpartisan, nonprofit organization whose mission is to facilitate the civic engagement of the Latino community. ER153 at ¶ 3. Since its founding in 2008, MFVEF has become one of the leading Latino civic engagement organizations in the country, with field offices in 16 cities across six states, including California. *See id.* at ¶ 4. The organization has 70,518 members nationwide, including 7,767 members in California. *See id*. In California, MFVEF works to expand the electorate by assisting legal permanent residents in the naturalization process, educating and registering new voters, and ensuring

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makes a reasonable effort to remove the names of ineligible voters from the official lists *by reason of death or a change in residence*." *Id.* (emphasis added).

voters keep their registrations up to date. *See id.* at ¶ 5. In the past two years alone, MFVEF successfully registered more than 15,000 voters in California, most of whom are between the ages of 17 and 30 years of age, and 69% of whom are Latino. *Id.* at ¶ 6. MFVEF is concerned that the present action could result in the wrongful removal of its members and the voters it registers and engages from the Los Angeles County voter rolls. *See id.* at ¶ 7-8.

RTV is a national and nonpartisan nonprofit dedicated to building long-term youth political power. ER179 at ¶ 2. Since 1990, RTV has pioneered innovative ways to register and mobilize more young voters. *Id.* at ¶ 3. In 2015, RTV opened a Los Angeles office to further explore opportunities to close registration age gaps in California. *Id.* at ¶ 5. In 2016 alone, RTV processed more than 240,000 voter registration applications in California; 72,647 of those registrations were in Los Angeles County. *Id.* at ¶ 6. Because young voters move at significantly higher rates than their older counterparts, they often have little time to establish a voting history or may have inconsistent voting histories. *Id.* at ¶ 8. RTV is therefore concerned that the court-ordered list maintenance that Plaintiffs seek could result in the wrongful removal of eligible young voters from the voter rolls. *Id.*

LWVLA is a nonpartisan political organization that works to encourage informed and active participation in elections and government. ER183 at ¶ 2. LWVLA has 336 members and serves the city of Los Angeles and nearby

communities. *Id.* at ¶ 3. To meet its objectives, LWVLA works to register and educate voters in communities with persistent registration and participation gaps, including youth, people of color, and low-income Americans. ER183 ¶ 4. In 2016 and 2017 alone, LWVLA worked with community partners to register more than 3,000 youth voters. *Id.* at ¶ 5. LWVLA is concerned that the relief Plaintiffs seek could result in its members and voters they engage being wrongfully purged from the voter rolls. *Id.* at ¶¶ 7-8.

Common Cause is a 501(c)(4) nonprofit, nonpartisan, grassroots advocacy organization incorporated and headquartered in Washington, D.C. ER167 at ¶ 2. Founded in 1968, Common Cause is dedicated to restoring the core values of American democracy; reinventing an open, honest and accountable government that serves the public interest; and empowering ordinary people to make their voices heard in the political process. *Id.* at ¶ 4. CCC is the California branch of the Common Cause 501(c)(4) corporate entity. With offices and staff in Los Angeles, Sacramento, and Oakland, California, CCC serves its more than 175,000 members throughout California, including many registered and eligible voters. *Id.* at ¶ 3. CCC aims to ensure open, honest, and accountable government; to promote equal rights, opportunity, and representation for all; and to empower all people to make their voices heard as equals in the political process, including through work on voting and elections. *Id.* at ¶¶ 4-5. In furtherance of this mission, CCC conducts

voter registration activities (especially focused on marginalized communities that do not regularly vote), encourages civic participation, and assists voters on Election Day. *Id.* at ¶¶ 6, 9. CCC also seeks adoption and enforcement of state and federal laws to enable voter participation and prevent disenfranchisement. *Id.* at ¶¶ 7-8, 10.

C. Proceedings in the District Court

On December 13, 2017, Plaintiffs-Appellees filed a complaint in the district court seeking, among other things, an order declaring Defendants to be in violation of the NVRA and requiring the removal of "ineligible" voters from Los Angeles County's voter rolls. ER188. They alleged that as many as 3.5 million voters in Los Angeles County should be removed for ineligibility. ER197-99 at ¶¶ 40, 54. On April 17, 2018, prior to any significant discovery in the case and well before the October discovery cutoff date, Movants-Appellants MVEF, RTV, and LWVLA,filed a timely motion under Rule 24 of the Federal Rules of Civil Procedure to intervene as of right as Defendants, or alternatively, for permissive intervention. ER175-77. Movant-Appellant CCC filed a similar motion on May 14, 2018. ER159-63.

Plaintiffs-Appellees opposed the motion to intervene, but conceded the timeliness of the motion. ER23, ER149-51. Defendant Logan took no position on Movants-Appellants' motion. ER156-57. Defendant Padilla did not oppose the

motion and further stated that he did "not dispute Potential Intervenors' assertion that they would provide an important perspective on the issues in the case by focusing intensively on the interests of young, minority, and other voters who may be disproportionately harmed by the relief sought by Plaintiffs if it were to be granted." ER173.

On July 16, 2018, without hearing, Judge Real entered his Order denying Movants-Appellants' motion to intervene. ER1.[4] Ruling on Movants-Appellants motion for intervention of right, Judge Real noted that Movants-Appellants filed their motions "before any hearings or rulings on substantive matters," and that the timeliness of their motion weighed in favor of intervention. *Id.* at ER2. Judge Real likewise did not question the fact that Movants-Appellants have a legally protected interest in ensuring that eligible voters remain on the voter rolls. *Id.* at ER2. Judge Real concluded, however, that the threshold for intervention of right had not been met because their legally protected interest bore no relationship to the claims in this case. *Id.* at ER2. Judge Real opined that because Plaintiffs-Appellees claim to be seeking the removal of only *ineligible* voters from the voter rolls, while Movants-Appellants are concerned about the wrongful removal of *eligible* voters,

[4] The Order is dated July 12, 2018, but it was not entered and sent to the parties until July 16, 2018.

any program designed to remove *ineligible* voters would not implicate the rights of *eligible* voters. *Id.* at ER2.

Applying this same logic, Judge Real held that Movants-Appellants interests were not impaired by the action because, again, it did not view the action as impacting anyone other than ineligible voters. *Id. at* ER3. The court thus determined that Movants-Appellants could later bring a separate cause of action to challenge any outcome that harms the rights of the voters they represent. ER3.

In addition, the court determined that Defendants should be afforded "the presumption that [they] will adequately represent the citizens of California" and that Movants-Appellants had only asserted that they "may approach litigation differently" from Defendants, and thus could not justify intervention of right. *Id.* ER3.

Finally, Judge Real declined Movants-Appellants' request for permissive intervention, employing the same underlying reasoning for its denial of intervention of right: that because Movants-Appellants were interested in protecting eligible voters, they did not share a common question of law or fact with Plaintiffs-Appellees' claims, which the court again believed implicated only ineligible voters. *Id*. at ER4. The court opined, "There is no reason that eligible voters would be injured by ordering compliance with the NVRA." *Id.* at ER4. The court further held, despite its earlier finding that the motion to intervene as of right

was timely, that granting permissive intervention would unduly delay the case, citing as the only basis for its reasoning that a grant of intervention would increase the number of Defendants in the case. *Id.* at ER4.

D. Proceedings in this Court

Movants-Appellants filed a notice of appeal of the district court's Order on August 10, 2018. ER17. On August 24, 2018, Movants-Appellants filed a designation of the record on appeal informing the district court that there were no transcribed proceedings below, and thus no transcripts would be ordered. ER11.

On August 31, 2018, Plaintiffs-Appellees and Defendants filed a Joint Notice of Settlement in the district court and requested 120 days to finalize the settlement. ER6. On September 5, 2018, the district court issued an Order of Dismissal without prejudice to the right to reopen the action within 120 days if a settlement is not finalized. ER5. Movants-Appellants have no knowledge of the terms of the settlement or the status of the ongoing negotiations.

On September 10, 2018, Movants-Appellants filed an emergency motion in this Court to expedite briefing, argument, and review of this appeal. (Dkt. No. 13.) Movants-Appellants requested a decision on the emergency motion to expedite in less than 21 days. *Id.* Movants-Appellants requested, and this Court ordered, that Plaintiffs-Appellees file a response to the motion to expedite by September 14, 2018, with any reply by Movants-Appellants to be filed by September 17, 2018.

(Dkt. No. 14.) For the merits briefing schedule itself, Movants-Appellants informed the Court they intended to file this opening brief on September 17, 2018, and requested that the Court direct Plaintiffs-Appellees to file their briefs in opposition by October 9, 2018, that Movants-Appellants file their reply brief by October 15, 2018, and that argument before this Court be scheduled at the first opportunity after October 15, 2018, that would be available for the Court. (Dkt. No. 13.)

On September 14, 2018, Plaintiffs-Appellees filed their response to the motion to expedite. (Dkt. No. 21.) Despite the fact they did not oppose the motion to intervene below, both Defendants filed a response expressing their opposition to Movants-Appellants' motion to expedite. (Dkt. Nos. 20, 22.) On September 17, 2018, Movants-Appellants filed their reply to Plaintiffs-Appellees response to the motion to expedite. (Dkt. No. 23.)

SUMMARY OF ARGUMENT

The district court's denial of Movants-Appellants' motion, pursuant to Fed. R. Civ. P. 24, for both intervention of right and permissive intervention, must be reversed. It was premised on the illogical reasoning that, because Plaintiffs-Appellees' request for relief seeks only the removal of *ineligible* voters from the voter rolls, it somehow follows that the rights of *eligibl*e voters are in no way implicated in the case. Contrary to the court's flawed reasoning, and as

demonstrated to the court below and again herein, the question of how elections officials identify and remove ineligible voters from the rolls is central to the resolution of Plaintiffs-Appellees' claims in this case and squarely impacts the voting rights of eligible, registered voters.

Judge Real's opinion flowed from the fundamentally false presumption that there is a perfect system for identifying when an otherwise lawfully registered voter has become ineligible to vote by virtue of some event, such as a move or death. As Movants-Appellants demonstrated below, and as demonstrated herein, the methods for identifying and confirming when someone becomes ineligible to vote are far from perfect, and in jurisdiction after jurisdiction a variety of voter list maintenance programs whose stated aim was the removal of *ineligible* voters have resulted in the wrongful removal of *eligible*, registered voters from the voter rolls. These removal programs have been shown to have a particularly disparate impact on the marginalized voters Movants-Appellants represent, and they therefore have a significant interest in protecting these voters from wrongful disenfranchisement.

As this Court's de novo review will find, Movants-Appellants not only have a protected interest in the underlying action, but they also satisfy the remaining three elements of the test for intervention of right under Federal Rule of Civil Procedure 24(a).

First, Plaintiffs-Appellees conceded timeliness and the district court noted in its opinion that the timeliness of the motion weighed in favor of intervention. *Second*, Movants-Appellants ability to protect eligible voters from wrongful removal prior to multiple upcoming scheduled elections could be impaired if they are not allowed to participate in the resolution of the case. *Third*, the government Defendants, who at the time this brief is being drafted, are negotiating a potential settlement of the action, have broader and potentially conflicting interests that may compromise their ability to adequately represent the narrower and unique interests of the marginalized communities that Movants-Appellants register to vote and engage in elections.

If this Court does not grant intervention of right, it should find the district court abused its discretion when it denied permissive intervention. The district court again applied its flawed reasoning regarding Movants-Appellants' interest in the underlying action to conclude that they did not share a common question of law or fact in the action, despite the fact that Movants-Appellants are uniquely situated to present evidence and legal arguments that relate directly to the very question being litigated below: what procedures are permitted and required by the NVRA to identify and remove ineligible voters from the voter rolls? Moreover, it was an abuse of the district court's discretion to decide, after finding that the motion to intervene was timely, that Movants-Appellants' participation would unduly delay

the action based solely on the fact that it would increase the number of parties in the case. Of course, if the mere prospect of adding parties to the action were enough to defeat a motion to intervene, no motion to intervene would ever be granted under Rule 24(b).

Absent intervention, Movants-Appellants will be deprived of the opportunity to present evidence and legal theories that disprove Plaintiff-Appellee's alleged injuries, and the important and personal interests that marginalized, eligible, registered voters have in the underlying action will go unrepresented. Therefore, Movants-Appellants respectfully request that this Court reverse the district court's denial of intervention and grant them intervention of right or, in the alternative, permissive intervention.

ARGUMENT

I. STANDARD OF REVIEW

The Ninth Circuit reviews *de novo* a district court's denial of intervention of right, but generally reviews determinations as to timeliness for abuse of discretion. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 896 (9th Cir. 2011). This Court reviews the denial of a motion for permissive intervention for abuse of discretion. *LULAC v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997). In conducting its review, this Court accepts as true all well-pleaded, nonconclusory

allegations in an intervention motion and its supporting documents. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

II. MOVANTS-APPELLANTS ARE ENTITLED TO INTERVENE AS OF RIGHT TO PROTECT THEIR INTERESTS IN ENSURING THEIR MEMBERS AND THE MARGINALIZED COMMUNITIES THEY ENGAGE ARE NOT WRONGFULLY PURGED FROM THE VOTER ROLLS.

Under Federal Rule of Civil Procedure 24(a)(2), a court must allow a party to intervene where, as here: (1) the motion to intervene is timely; (2) the movant has a "'significantly protectable' interest relating to the property or transaction that is the subject of the action;" (3) the disposition of the action could impair or impede movant's ability to protect that interest; and (4) the movant's interest may not be adequately represented by the existing parties to the lawsuit. *Southwest Ctr.*, 268 F.3d at 817, 823 (quoting *Northwest Forest Resource Council ("NFRC") v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996)). This Court mandates a "broad construction" of Rule 24(a)(2), and "construe[s] Rule 24(a) liberally in favor of potential intervenors." *Id.* (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995)). A liberal policy in favor of intervention, guided by "practical and equitable considerations," ensures "efficient resolution of issues and broadened access to the courts." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (citing *United States v. City of Los Angeles*, 288 F.3d 391, 397-398 (9th Cir. 2002)).

A. The Motion to Intervene Was Timely, as Conceded by Plaintiffs-Appellees Below and Noted By the District Court.

Courts in the Ninth Circuit look at the totality of the circumstances to determine the timeliness of a motion to intervene. *Smith v. Los Angeles Unified School Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). They generally weigh three factors: (1) the stage of the proceedings; (2) the prejudice to other parties; and (3) the reasons for and length of any delay. *Id*. (citing *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)).

Plaintiffs-Appellants did not contest the timeliness of Movants-Appellants' motion below (ER149), and timeliness was not a basis for the denial of the motion to intervene. As the district court noted in its order, Movants-Appellants filed their motion before any hearings or rulings on any substantive matters in the case, and this factor therefore favored intervention. (*See* Dist. Ct. Dkt. No. 76.)

B. Movants-Appellants Have a Significant and Direct Interest In Ensuring That the Relief Plaintiffs-Appellees Seek Does Not Result In the Disenfranchisement of Eligible Voters.

An applicant has a right to intervene if it has "a 'protectable interest' in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action." *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981). The applicant is not required to show it has "a legal or equitable interest in jeopardy." *Id*. Instead, a court conducts a "practical, threshold inquiry" to determine whether an applicant

has demonstrated a sufficient interest in the action. *Citizens for Balanced Use*, 647 F.3d at 897 (quoting *NFRC*, 82 F.3d at 837) (internal quotation marks omitted).

The interests of Movants-Appellants more than satisfy the standards for establishing a protectable interest in this case. Voting is a constitutionally protected right. As the Supreme Court has repeatedly held, "Restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The Supreme Court has further held that election laws directly impact and can impose burdens on individual voters:

> Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends."

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

Protecting the right to vote – even where, as here, a government agency is charged with the same objective – is so important that the Supreme Court has expressly recognized that it supports a private party's intervention as of right to

defend against litigation seeking to change voting laws or procedures. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 476 (2003), *superseded by statute as stated in Alabama Legislative Black Caucus v. Alabama, U.S.Ala., March 25, 2015* (upholding district court's grant of intervention of right for private parties to intervene as defendants and defend, alongside the U.S. Department of Justice, against judicial preclearance proceedings brought under Section 5 of the Voting Rights Act). Importantly, courts have granted intervention in cases where parties specifically seek to protect their interest in ensuring that registered voters remain registered to vote and are not wrongfully purged from voter rolls. *See Am. Civil Rights Union v. Snipes*, No. 16-cv-61474, slip op. at 3 (S.D. Fla. March 30, 2018) (noting, in order denying plaintiffs' challenge to Broward County Florida's list maintenance practices, that court had granted intervention to defendant-intervenor union representing numerous members who could be affected by the stricter purge requirements sought by plaintiffs).

Here, Plaintiffs-Appellees are seeking changes to voter list maintenance practices that could require Los Angeles County to purge millions of validly registered voters from its voter rolls. ER188 at ¶¶ 40, 54[5] Movants-Appellants have

[5] In a declaration filed with Plaintiffs-Appellees Response to Movants-Appellants' Motion to Expedite Appeal, counsel for Plaintiffs-Appellees states that since filing their Complaint, they "have since obtained information in the course of discovery that has caused us to reject the 3.5 million number as unlikely." (Decl. of Robert D.

a significant interest in any procedures that may be adopted to remove legally registered voters from the voter rolls. *See, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1045 (9th Cir. 2015) (recognizing that organizational plaintiffs seeking compliance with Section 7 of the NVRA had an interest in "maximizing voter registration" that was adequate to support Article III standing).[6] Movants-Appellants – organizations whose collective mission is to ensure that members of marginalized communities register to vote and become lifelong participants in our democracy – have an important stake in the procedures used to remove legally registered voters from the rolls. They expend significant organizational resources to ensure that eligible voters, including their members, are registered to vote and remain registered and engaged in the political process. (*See* Monterroso Decl., ¶ 5-6, Dist. Ct. Dkt. No. 58; Tolentino Decl., ¶ 3, 4, Dist. Ct. Dkt. No. 31-5; Guavara Decl., ¶ 4, 5, Dist. Ct. Dkt. No. 31-6; Feng Decl., ¶ 6, 9, Dist. Ct. Dkt. No. 43-2.)

Popper at ¶ 3, 9th Cir. Dkt Entry 21-2.) Counsel for Plaintiffs-Appellees did not indicate in his declaration the number of inactive voter they are now targeting for removal from the Los Angeles County voter rolls.

[6] While the Movants-Appellants' interests are fully adequate to support independent Article III standing under this Circuit's precedents, this Circuit does *not* require intervenors to meet Article III standing requirements. *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (holding lower threshold for intervention applies when there is ongoing litigation between other parties).

Judge Real acknowledged that "Intervenors and CCC have a legally protected interest to ensure that eligible voters maintain their right to vote and remain on the voter rolls." (*See* Order at 2:21-22, Dist. Ct. Dkt. No. 76.) The district court nevertheless reached the puzzling conclusion that there is somehow "no relationship between this interest and the claims at issue in this case." *Id*. at 2:23. The court's entire explanation of this reasoning was as follows: "Plaintiffs request that Defendants reasonably attempt to remove *ineligible* voters from the voter rolls. Removing ineligible voters from the voter rolls will not affect eligible voters' rights. Accordingly, Intervenors and CCC do not satisfy the second prong." *Id*. at 2:23-26.

The district court's reasoning is deeply flawed, and must be overturned to avoid significant harm to the interests of Movants-Appellants in this case, and to similarly situated litigants in other cases who seek to protect the voting rights of their members and the voters they engage.

First, the district court's reasoning entirely misunderstands the cause of action that Plaintiffs-Appellees are pursuing in this case. Plaintiffs-Appellees cannot succeed merely by alleging that there may be ineligible voters on the rolls in Los Angeles County. Rather, their cause of action requires them to prove that Defendants lack a "general program that makes a reasonable effort to remove the names of ineligible voters" as required by 52 U.S.C. §20507(a)(4). Therefore,

contrary to the district court's reasoning, the "claims at issue in this case" involve whether there should be changes to tighten significantly the procedures the county Defendant uses to remove persons on the voting rolls who may have become ineligible. Movants-Appellants have a strong and undeniable interest in contesting Plaintiffs-Appellees' allegation that Los Angeles County lacks such a general program, such as by refuting that the sheer number of inactive voters in the county somehow translates into "ineligible" voters being on the voter rolls. (*See* Compl. at ¶¶ 23, 28, Dist. Ct. Dkt. No. 1.) Movants-Appellants also have a strong interest in preventing any changes to Los Angeles County's purge procedures that may carry an unwarranted and unanticipated danger of purging eligible voters, like the purge practices sought by Judicial Watch and its allies in other cases.

Second, the district court's reasoning incorrectly assumes that election officials possess perfect information about which persons currently on the registration rolls have become ineligible since the time they registered, and that officials can use that perfect information to design a program to remove the persons who have in fact become ineligible without affecting voters who remain eligible. In reality, it can be quite difficult for election administrators to determine which currently-registered voters have somehow become ineligible, and which registered voters remain fully eligible. As a result, states across the country have adopted a variety of different programs seeking to identify registered voters who

might have become ineligible. All of these programs carry some risk of misidentifying an eligible voter as ineligible (e.g., by incorrectly identifying the person as having moved out of the jurisdiction). And some programs pose greater risks than others of erroneously removing eligible voters from the rolls.

The likelihood that particular purge practices will cancel the registrations of *eligible* voters is anything but speculative. Indeed, it is a frequent problem in election administration. Many of the numerous methodologies being promoted and tested throughout the country have resulted in eligible voters being wrongfully purged from the rolls. For example:

- Florida's use of Systematic Alien Verification for Entitlements (SAVE) data to identify ineligible voters in 2012 resulted in a 30 percent error rate in Dade County alone. Liz Kennedy and Danielle Root, *Keeping Voters off the Rolls*, Center for American Progress (2017), at ¶ 32, https://www.americanprogress.org/issues/democracy/reports/2017/07/18/435914/keeping-voters-off-rolls.
- Prior to the 2000 presidential election, Florida's dependence on unreliable felony conviction data resulted in 12,000 voters misidentified as ineligible – in an election that turned on some 600 votes. *Id.* at ¶ 28 (citations omitted).

- In 2012, Texas relied on faulty data that repeatedly matched active Texas voters with deceased voters across the county. *Id.* at ¶ 27 (citations omitted).
- The Interstate Voter Registration Cross-Check program ("Cross-Check"), utilized by several states and which purports to identify persons allegedly registered to vote in two different states, is the subject of a research study finding that it would impede *more than 1,000 legitimate votes* for every double vote prevented by the strategy. Sharad Goel, Marc Meredith, Michael Morse, David Rothschild, and Houshmand Shirani-Mehr, *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, Working Paper (October 24, 2017), https://scholar.harvard.edu/files/morse/files/1p1v.pdf. [7]

These are just four of the many examples of different programs used to identify ineligible voters that have been demonstrated to sweep up, remove, and disenfranchise eligible voters – often from the marginalized communities Movants-Appellants represent – due to their overbreadth. The district court's misunderstanding of this crucial point is directly responsible for its mistaken

[7] Plaintiff-Appellee Judicial Watch itself has insisted on including the Cross-Check program in at least one settlement to which it has been a party. ER130-35 at ¶ 2(b)).

conclusion that Movants-Appellants lack a protectable interest under Rule 24(a)(2).

Third, Movants-Appellants' interests in defending against Plaintiffs-Appellees' claims are particularly strong because faulty purge procedures often disproportionately harm the communities they represent. All four Movants-Appellants work to register and engage marginalized and infrequent voters in the electoral process, including low-income, non-college and college youth, and Latinos and other people of color. (*See* Monterroso Decl., ¶ 6, Dist. Ct. Dkt. No. 58; Tolentino Decl., ¶ 5, Dist. Ct. Dkt. No. 31-5; Guavara Decl., ¶ 2, Dist. Ct. Dkt. No. 31-6; Feng Decl., ¶ 9, Dist. Ct. Dkt. No. 43-2.) These are the very voters most vulnerable to wrongful removal even when they are registered to vote in the jurisdiction where they live, because they move more frequently, may not receive or respond to postcard mailings questioning their registration status, and may be infrequent voters without long voting histories. (*See* Monterroso Decl., ¶ 7-8, Dist. Ct. Dkt. No. 58; Tolentino Decl., ¶ 8, Dist. Ct. Dkt. No. 31-5; Guavara Decl., ¶ 7, Dist. Ct. Dkt. No. 31-6; Feng Decl., ¶ 12, Dist. Ct. Dkt. No. 43-2.) Statistics bear this out in states that have undertaken aggressive removal programs.

For example, between 2012 and 2016, Ohio's contested voter removal program resulted in the purging of ten percent of voters in heavily African-American, low-income neighborhoods near downtown Cincinnati as compared to

only four percent in a surrounding suburb. *See* Liz Kennedy and Danielle Root, *Keeping Voters off the Rolls*, Center for American Progress (2017), ¶ 34, https://www.americanprogress.org/issues/democracy/reports/2017/07/18/435914/keeping-voters-off-rolls/ (citations omitted). Of the voters targeted in Georgia's controversial 2016 voter removal program, African Americans were eight times more likely to be affected than whites, and Latinos and Asian Americans were six times more likely to be affected than white voters. *Id*. at ¶ 26 (citations omitted). When Texas undertook a program in 2012 to identify registered voters for possible removal, people living in heavily Latino or African American districts were more likely to be affected. *Id*. at ¶ 27 (citations omitted). Thus, the interests of Movants-Appellants and the communities they engage clearly are implicated by the list maintenance programs at issue in this action.

These facts easily meet the "practical, threshold inquiry" necessary for the Court to conclude that Movants-Appellants have a sufficient interest in the action to be entitled to intervene. *Citizens for Balanced Use*, 647 F.3d at 897 (quoting *NFRC*, 82 F.3d at 837) (internal quotation marks omitted). Indeed, the interest 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.'" *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 398 (9th Cir. 2002) (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir.1980)

(internal quotation marks and citation omitted). For the foregoing reasons, Movants-Appellants have demonstrated a protectable interest that warrants intervention of right.

C. The Resolution of this Action Threatens to Impair the Interests of Movants-Appellants, Their Members, and the Communities They Represent.

Movants-Appellants also fully established that they meet the requirement of Rule 24(a)(3). This Court has emphasized that "intervention of right does not require an absolute certainty that a party's interests will be impaired . . . ." *Citizens for Balanced Use*, 647 F.3d at 900. Instead, intervention should be granted where, as here, disposition of the action without the potential intervenors "*may* as a practical matter impair or impede their ability to safeguard their protectable interest." *Southwest Ctr.*, 268 F.3d at 823 (emphasis added); *Smith*, 830 F.3d at 862; *see also* Fed. R. Civ. P. 24, Advisory Comm. Note to 1966 Amend. ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.").

As noted above, Movants-Appellants are organizations that work to promote and maintain voter registration and to engage marginalized and infrequent voters. The disposition of this action could result in eligible voters' registrations being put at risk by unnecessary, poorly executed, or unlawful purges of Los Angeles County's voting rolls, which clearly would harm Movants-Appellants' interests.

It is undisputed that Plaintiffs-Appellees seek to impose new procedures that would result in removing potentially millions of voters from Los Angeles County's voter rolls. Given that any procedure to identify ineligible voters carries the risk of sweeping in eligible voters, and in light of the track record of Judicial Watch and its partner organizations in pursuing aggressive purge practices, disposition of Plaintiffs-Appellees' legal claims threatens to impair and impede Movants-Appellants' core mission of ensuring that eligible voters in marginalized communities are registered to vote and are able to participate in elections. If Plaintiffs-Appellee's prevail on their claim, some remedy will follow, and Movants-Appellants will have to explain to their constituencies how to mitigate the risks that remedy poses to them. Moreover, if an aggressive purge of voter rolls is ordered by the court or agreed to as part of a settlement, Movants-Appellants will be forced to divert even more precious organizational resources to determining whether their members and the voters they register have had their registrations improperly canceled, and seeking to re-reregister them. (*See* Monterroso Decl., ¶ 9, Dist. Ct. Dkt. No. 58; Tolentino Decl., ¶ 9, Dist. Ct. Dkt. No. 31-5; Guevara Decl., ¶ 8; Feng Decl., ¶ 13, Dist. Ct. Dkt. No. 43-2.)

Likewise, the ultimate decision of what list maintenance procedures are permitted or required by the NVRA could impair Movants-Appellants' ability to protect the interests of voters who may be at greater risk of wrongful removal.

Because of their work registering and engaging voters in marginalized communities, Movants-Appellants are uniquely situated to offer expertise and legal theories that protect these communities from overly aggressive list maintenance practices.

The district court's ruling that the interests of Movants-Appellants could not be impaired as contemplated by Rule 24(a)(3) was based on the same inherently flawed reasoning already discussed, *supra*, with respect to Movants-Appellants' protectable interests in this case. In its analysis of Rule 24(a)(3), the district court stated:

> Here, Intervenors and CCC are not substantially affected by the outcome of this action as it pertains to only *ineligible* voters. The Intervenors and CCC speculate that eligible voters risk wrongful removal from voter rolls. Should that occur, Intervenors and CCC may bring a separate, private cause of action to vindicate these voters' rights.

(Order at 3:2-5, Dist. Ct. Dkt. No. 76.)

The possibility that Movants-Appellants could bring a separate action if their interests are adversely affected by the outcome of this case does not, as the district court believed, constitute grounds to deny intervention under Rule 24(a)(3). The district court cited no authority for that proposition. Indeed, if that result were compelled by 24(a)(3), it would function to eliminate the possibility of intervention as of right in many voting rights actions and other civil rights cases.

Instead, the Supreme Court has recognized that intervention as of right is appropriate in voting rights cases despite intervenors' having an alternative means of challenging the outcome in such cases. *See, e.g., Georgia v. Ashcroft,* 539 U.S. at 476 (upholding district court's grant of intervention of right in preclearance proceedings under the federal Voting Rights Act, which also provides a separate cause of action for challenging a redistricting plan that survives preclearance).

Indeed, intervenors with interests exactly like those of Movants-Appellants have been granted intervention and played a crucial role as intervenor-defendants in other cases where plaintiffs similar to Judicial Watch have sought to impose more aggressive purge practices. *See, e.g., Am. Civil Rights Union v. Snipes, supra,* No. 16-cv-61474, slip op. at 3 (noting, in order denying plaintiffs' challenge to Broward County Florida's list maintenance practices, that court had granted intervention to defendant-intervenor union whose members would be affected by the stricter purge requirements sought by plaintiffs).

Moreover, waiting to file a collateral attack on a judgment or settlement is impractical in terms of the timeline of upcoming elections. Los Angeles County alone has no fewer than 14 municipal elections scheduled between March 5 and June 4, 2019. (*See* County of Los Angeles 2019 Scheduled Elections at https://lavote.net/docs/rrcc/Election-Info/scheduled_elections_2019.pdf?v=3.) Accordingly, a separate action would have to be filed and completed on an

unrealistic timeline, likely requiring Movants-Appellants to seek injunctive relief, with all of the burdens and obstacles such relief imposes on the parties as well as the courts. This is yet another reason why the district court erred in concluding that a resolution of this action without Movants-Intervenors' participation will not impair their interests.

Finally, intervention of right is warranted in the interests of judicial efficiency. As this Court noted in *City of Los Angeles*:

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a *practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

288 F.3d at 397-98 (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir.1995) (quoting *Greene v. United States*, 996 F.2d 973, 980 (9th Cir.1993) (Reinhardt, J., dissenting))).

For these reasons, Movants-Appellants' interests would be impaired if they are denied intervention. The district court erred in ruling to the contrary.

D. The Defendants May Not Adequately Represent or Protect Movants-Appellants' More Narrow and Unique Interests In Ensuring Eligible Voters In Marginalized Communities Are Not Wrongfully and Inadvertently Purged From the Voter Rolls.

A proposed intervenor need not demonstrate with "absolute certainty" that its interests will not be adequately represented by the existing parties. *Citizens for*

Balanced Use, 647 F.3d at 900. Instead, this Court has held that "the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *Southwest Ctr.*, 268 F.3d at 822 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Indeed, and as other Circuits have recognized, Fed. R. Civ. P. 24 "underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention." *Nuesse v. Camp*, 385 F.2d 694, 702-04 (D.C. Cir. 1967).

In its assessment of whether a proposed intervenor has met its minimal burden, this Court considers "(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." *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

Where the proposed intervenor and an existing party have "identical interests" or where a party is charged by law with representing the proposed intervenor's interest, a presumption of adequacy of representation will be applied. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citing 7C Fed. Prac. &

Proc. Civ. § 1909 (3d ed.)). Prospective intervenors may rebut the presumption with a compelling showing to the contrary. *Id*.

The district court erred when it held that the government Defendants had the same interest as Movants-Appellants and thus presumed they would adequately represent their interests. ER3. Certainly, there may be some overlap between the interests of the Defendants and that of Movants-Appellants; but their interests are far from identical. For example, Movants-Appellants may share with Defendants an interest in promoting voter registration and protecting voters. But Movants-Appellants are not required to balance that interest against the challenges and costs of running elections or meeting the demands and needs of a range of voters and counties across the state. Thus, Defendants and Movants-Appellants have different, discrete, and even potentially conflicting areas of interest, making it far from "undoubted" that the governmental defendants would, or are "capable and willing" to, make all of Movants-Appellants' proposed arguments. *Citizens for Balanced Use*, 647 F.3d at 398.

As governmental officials with substantial public responsibilities and limited resources tied to the public treasury, Defendants may feel pressure to settle for a less than satisfactory resolution of the case to avoid the distraction and expense of litigation. Movants-Appellants noted this danger in their motion to intervene. Now, just a short time after the district court issued its order denying the motion to

intervene, the parties have filed a Notice of Settlement (ER6), and are engaged in ongoing negotiations to finalize an agreement without the involvement of the potentially impacted voters Movants-Appellants represent. While Movants-Appellants understand the value of settlement as a potential avenue for the resolution of the action, and have no intrinsic objection to the potential for settlement, the fact that both public officials may need to take into account their respective offices' institutional interests and staff capabilities, and are subject to political pressures that do not align perfectly given their different constituencies, cannot be ignored. The concern that Defendants could be forced to prioritize these interests over the interests of the voters Movants-Appellants represent is further heightened with the announcement of a quick settlement of the case that could be finalized imminently and without recourse to protect the interests of Movants-Appellants' constituencies before upcoming elections.

And the governmental defendants have quite different constituencies: Los Angeles County is but one county within the purview of Defendant Padilla as the California Secretary of State, who must balance the concerns and constraints of 58 counties of different size, different budgets, and different demographics. Because of those varying constituencies, neither governmental defendant could be expected to focus perfectly on the interests of the marginalized voters Movants-Appellants represent and engage.

To be sure, governmental officials should be responsive to their constituents, but Movants-Appellants will give primacy to the interests and voices of voters in a way that governmental officials simply cannot replicate. This is why courts often find that governmental entities may not be capable of adequately representing the interests of private, non-governmental intervenors. *See Georgia v. Ashcroft*, 539 at 476 (upholding district court's grant of intervention as of right for private parties to intervene as defendants alongside the U.S. Department of Justice); *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349, 353-54 (9th Cir. 1974) (holding that school district "charged with the representation of all parents within the district" could not adequately represent the interests of Chinese-American parent intervenors); *Meek v Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (finding county defendants could not adequately represent interests of intervenors because it "was required to balance a range of interests likely to diverge from those of the intervenors" including "the overall fairness of the election system to be employed in the future . . . and the social and political divisiveness of the election issue") *abrogated on other grounds, Dillard v. Chilton County Com'n*, 495 F.3d 1324 (11th Cir. 2007); *Am. Civil Rights Union v. Snipes*, *supra*, 16-cv-61474, slip op. at 52-54 (noting, in a case remarkably similar to the present case, that a great deal of the trial evidence the court relied on to reject the

plaintiffs' NVRA Section 8 claims was presented by the defendant-intervenor rather than the defendant election official).

Importantly, when determining whether the presumption of adequacy of government representation applies, this Court looks to whether the interests asserted by proposed intervenors are "more narrow, parochial interests" than those the government is charged with protecting. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995) (presumption of government's adequacy of representation did not apply where government was charged with representing a broader public interest, not just the concerns of one particular constituency), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Circ. 2011); *Southwest Ctr.*, 268 F.3d at 823 (inadequacy of representation found where defendant "City's range of considerations in development is broader than the profit-motives animating [intervenor] developers"); *see also Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (affirming district court's grant of intervention where "the employment interests of [intervenor's] members were potentially more narrow and parochial than the interests of the public at large"); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F. 2d 994, 1000-01 (8th Cir. 1993) (statewide defendant could not adequately represent the interests of landowners and counties whose interests were narrower than those

the state was charged with representing); *cf. Lulac v. Wilson*, 131 F. 3d 1297, 1305 (9th Cir. 1997) (intervention denied where proposed intervenor conceded its ultimate objective was identical to state defendants').

Here, Defendants must balance the pressures of running cost-effective elections and the broader interests of a wide range of voters and constituencies. In constrast, Movants-Appellants are focused on the interests of marginalized voters and their demonstrated vulnerability to aggressive purge practices. Indeed, the state Defendant specifically noted in his non-opposition to Movants-Appellants' motion to intervene that he did "not dispute Potential Intervenors' assertion that they would provide an important perspective on the issues in the case by focusing intensively on the interests of young, minority, and other voters who may be disproportionately harmed by the relief sought by Plaintiffs if it were to be granted." ER173.

This is why both Defendants' surprising opposition to Movants-Appellants' motion to expedite, made on the heels of their sudden announcement of an imminent settlement agreement, sounds an alarm that they may be concerned that Movants-Appellants narrower interests – interests Defendants did not previously oppose being independently represented in the case – are somehow in conflict with the compromises Defendants may be prepared to make with Plaintiffs-Appellees.

The district court ignored the long list of compelling reasons that Movants-Appellants provided for why the county and state Defendants may not be able to adequately represent their interests. Instead, the court summarily dismissed their arguments as merely suggesting Defendants "may approach litigation differently." ER3.

To the contrary, Movants-Appellants not only demonstrated that their interests are narrower and potentially in conflict with some of the interests that Defendants must balance, but they also demonstrated that state Defendant has disagreed with organizations similar to Movants-Appellants over interpretation and implementation of other provisions of the NVRA, state statutes that protect language minorities, and the due process implications of rejecting mail ballots without providing voters an opportunity to cure a signature mismatch.

For example, the League of Women Voters of California and other voter engagement groups that seek to protect communities of color and persons with low incomes last year sued the state Defendant and the California Secretary of Transportation over their misinterpretation and inadequate implementation of other provisions of the NVRA. *League of Women Voters of California v. Kelly,* No. 17-cv-02665-LB, 2017 WL 4354909 (N.D. Cal. Sept. 29, 2017) (order denying defendants' motion to dismiss plaintiffs' lawsuit challenging state's failure to comply with NVRA's requirement to incorporate voter registration into California

Department of Motor Vehicles license renewal forms). Still other voting rights organizations sued the state Defendant over his interpretation and inconsistent application of state statutes that require language assistance be provided to voters who speak English as a second language. ER137-38. And the state Defendant was sued last year for failing to ensure that voters whose signatures are deemed a mismatch on their mail ballot are given an opportunity to cure the mismatch. ER140-42. After losing that case in the Superior Court, the state Defendant appealed the ruling that held he was enforcing an unconstitutional state law. *Id.*

In all of those instances, the state Defendant presumably believed he was not acting to "jeopardize anyone's statutory or constitutional rights," just as he promised in briefing before the Court below. ER173, n 2. Yet as the cases demonstrate, Movants-Appellants and similarly situated organizations periodically disagree with state Defendants on what that means. The district court ignored this reality in its reliance on the state Defendant's general statement of intent to respect voting rights.

Thus, even if the district court correctly applied the presumption of adequacy of government representation in this case, Movants-Appellants have made a compelling showing that the government Defendants have potentially conflicting interests and demonstrated differences of opinion with organizations like Movants-Appellants over the interpretation of the NVRA and state voting

laws. These conflicting interests and approach to the NVRA may impair Defendants' ability to represent the unique and much narrower interests of Movants-Appellants. *See, e.g.*, *Kobach v. U.S. Election Assistance Commn.*, Case No. 13-CV-4095-EFM-DJW, 2013 WL 6511874 (D. Kan. Dec. 12, 2013)("the Court finds that the existing government Defendants have a duty to represent the public interest, which may diverge from the private interest of Applicants' [nonprofit voter engagement organizations] specific interests"). The fact that the case is on a fast track to a final settlement and Defendants, who did not oppose Movants-Appellants' motion to intervene below, now curiously oppose a swift resolution of this appeal, is further compelling evidence that Defendants may be inadequate representatives of Movants-Appellants' interests.

For all of these reasons, Movants-Appellants have demonstrated that Defendants will not "undoubtedly" make, or are necessarily willing and capable of making, all of Movants-Appellants arguments. Movants-Appellants intervention in the case is thus critical to ensuring their unique perspectives and defenses of marginalized voters are not "neglect[ed]" by the existing parties. *Citizens for Balanced Use*, 647 F.3d at 898 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). This Court should thereby grant Movants-Appellants intervention of right in order to ensure their interests are fully and adequately represented in this case.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED MOVANTS-APPELLANTS' ALTERNATIVE REQUEST FOR PERMISSIVE INTERVENTION.

In the event the Court finds the requirements for intervention of right have not been satisfied, the Court should reverse the district court's denial of permissive intervention pursuant to Federal Rule of Civil Procedure 24(b) as an abuse of discretion. Permissive intervention requires the proposed intervenor to share a common question of law or fact with the main action, file a timely motion, and have an independent basis for the court's jurisdiction over the proposed intervenor. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998); *see also City of Los Angeles*, 288 F.3d at 403. Courts also consider whether the intervention will "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

A. The Prerequisites For Permissive Intervention Were Satisfied.

Movants-Appellants satisfied the prerequisites for permissive intervention. The court has jurisdiction over Movants-Appellants, all of whom either register voters or have members who are voters in Los Angeles County. And as discussed in Section II.A., *supra*, the Motion to Intervene was timely. Plaintiffs-Appellees conceded the timeliness of the motion to intervene; Defendants did not oppose the motion or raise any concerns regarding timeliness below; and the district court

noted that Movants-Appellants "filed their motion before any hearings or rulings on any substantive matters," weighing in favor of intervention of right.

Judge Real's denial of permissive intervention thus focused only on the third prerequisite: whether Movants-Appellants shared a common question of law or fact with the underlying action. In concluding they did not, the district court operated under the same misconception and flawed reasoning that led to its erroneous conclusion that Movants-Appellants lacked a protectible interest in this case under Rule 24(a)(2):

> Intervenors and CCC do not meet the threshold requirements because they do not share a common question of law or fact with the underlying action. Here, Plaintiffs are suing Defendants to enforce the NVRA and remove ineligible voters from the voter rolls. By contrast, Intervenors and CCC are concerned with *eligible* voters being wrongfully removed from the list. There is no reason that eligible voters would be removed from voter rolls if Plaintiffs are successful. In fact, it is purely speculative that eligible voters would be injured by ordering compliance with the NVRA.

ER3.

Once again, the district court's reasoning incorrectly assumes that election officials have perfect information about which persons currently on the registration rolls have become ineligible since the time they registered, and thus can easily remove only the persons who have clearly become ineligible. As explained in Section II.B., *supra*, this assumption is deeply flawed. It actually can be quite

difficult for election administrators to determine which currently-registered voters have become ineligible, and which registered voters remain eligible, and different programs and methodologies for removing voters from the rolls carry differing degrees of risk of canceling the registrations of eligible persons. Accordingly, the district court's cursory rejection of the existence of a common question of law or fact was an abuse of discretion.

Movants-Appellants' defenses and the main action plainly share common questions of law and fact—whether Los Angeles County's list-maintenance activities satisfy the requirements of the National Voter Registration Act. *See, e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 (9th Cir. 2002) ("if there is a common question of law or fact, the requirement of the rule has been satisfied"), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011).

Movants-Appellants' also demonstrated that their defenses will rely upon many of the same facts presented by the existing parties, although they may supplement the record or inform settlement negotiations with facts related to their unique interests and positions as organizations that engage with or have as members the voters that would be impacted by any court-ordered list maintenance procedures. Movants-Appellants are in much the same position as the intervenors in *Am. Civil Rights Union v. Snipes*, *supra*. In that case, the American Civil Rights

Union, a collaborator with Judicial Watch in seeking more aggressive purge tactics around the country, and one of its members challenged Broward County, Florida's list maintenance practices and relied on the same statistical analysis put forward in the complaint in the instant case to allege that the county had more registered voters than eligible voting-age citizens. A union that engaged in voter registration activities was granted intervention as of right to defend against the claim. Defendant-intervenor put forward critical expert evidence on the deficiencies in plaintiffs' statistical analysis, and the court relied on that evidence in rejecting plaintiffs' claims, concluding that the analysis advanced by the plaintiffs was "misleading." Here as well, Movants-Appellants' would "assert[ ] defenses . . . directly responsive to" Plaintiffs' claims that Defendants' have failed to comply with the voter list maintenance requirements of Section 8 of the NVRA. *Kootenai Tribe*, 313 F.3d at 1110.

The district court's misunderstanding of the central claim being litigated in this case – what procedures should be used to determine whether someone has become an ineligible voter – and its failure to understand Movants-Appellants' significant interest in and expertise related to the resolution of this claim, resulted in the district court abusing its discretion when it denied Movants-Appellants' motion for permissive intervention.

B. Movants-Appellants Demonstrated That Intervention Would Not Cause Undue Delay or Unfair Prejudice.

Movants-Appellants demonstrated below that their intervention would not cause undue delay or unfair prejudice to the parties. Movants-Appellants filed their motion to intervene early in the proceedings, and made it clear in their moving papers that they did not seek to re-open discovery and would abide by the court's scheduling orders and the scheduling of depositions and all other matters. Notably, and as discussed in Section II.A., *supra*, Plaintiffs-Appellants conceded the timeliness of the motion, the Defendants did not object to the timeliness of the motion, and the district court specifically noted that the timeliness of the motion – filed "before any hearings or rulings on substantive matters" – favored intervention. ER2.

Given that Plaintiffs-Appellees had no objections to the timeliness of the motion to intervene as of right, which addresses similar questions of delay and prejudice, and the district court's own reasoning that the timeliness of the motion favored intervention as of right, there was simply no basis for the district court to find that permissive intervention would unduly delay the action or prejudice the parties.

The sole explanation the district court gave for its finding that Movants-Appellants' participation was "likely to delay the main action" was that "the case would expand to six defendants." *Id.* at 3. But the mere fact that the number of

parties would expand if permissive intervention were granted is plainly insufficient to establish that intervention would cause undue delay. If it were, no motion for permissive intervention would ever be granted, because intervention by definition brings additional affected parties into the case. In fact, courts routinely grant permissive intervention, finding no undue delay, even when it substantially increases the number of parties. *See*, *e.g.*, *Kobach*, 2013 WL 6511874, at *3 (granting four separate motions by multiple voter engagement organizations for permissive intervention and finding no undue delay in allowing 13 additional intervenor-defendants into the case); *Manier v. L'Oreal USA, Inc*, No. 2:16-CV-06886-ODW-KS, 2017 WL 59066, at *2 (C.D. Cal. Jan. 4, 2017) (granting permissive intervention and finding no undue delay in increasing the number of plaintiffs from two to five).

The district court's finding that increasing the number of parties to the action would unduly delay the action rings particularly hollow in this case, where none of the original parties objected to the timeliness of the motion to intervene, the court itself noted the timeliness of the motion in its intervention of right analysis, and Movants-Appellants made clear representations that they would work under the court's scheduling orders and the scheduling of other matters by the original parties. It was therefore an abuse of discretion for the district court to deny intervention on the basis of undue delay.

Moreover, Movants-Appellants have demonstrated that they can argue and offer additional evidence in accordance with their unique positions as representatives of the voters they register and engage marginalized communities. They thus offer a unique perspective that "will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977).

Movants-Appellants demonstrated they share a common question of law or fact with the underlying, and that permissive intervention would not cause undue delay or unfair prejudice. Because Movants-Appellants' experience and perspective will actually assist the resolution of this action in a way that protects the critical rights at stake and furthers the interests of judicial economy, the district court's denial of permissive intervention was an abuse of discretion.

CONCLUSION

For the foregoing reasons, Movants-Appellants respectfully request that this Court reverse the district court's order denying the motion to intervene and grant Movants-Appellants' intervention of right or, in the alternative, grant their request for permissive intervention.

STATEMENT OF RELATED CASE

The following appeal is related and arose from the same district court case:

Judicial Watch, Inc. et al, v. Logan, et al, v. California Common Cause (No. 18-56105), on appeal from the United States District Court for the Central District of California, No. 2:17-cv-08948-R-SK, and consolidated with this appeal on September 12, 2018, by order of this Court (Dkt. Entry No. 16).

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Pursuant to Circuit Rule 25-5(e), I attest that all other parties on whose behalf this filing is submitted concur in the filing's content.

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-56102

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Signature of Attorney or Unrepresented Litigant: /s/ Anna Do

Date: 9/17/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by email.

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