IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-56102, 18-56105

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,
Movant-Appellant.

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

On Appeal from the United States District Court
for the Central District of California
Civil No. 17-08948 SK-R

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Judicial Watch, Inc. is a nongovernmental corporate entity that has no parent company.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction in this case pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. The District Court denied motions to intervene filed by Movants-Appellants Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles, and by California Common Cause (collectively, "Movants-Appellants") on July 12, 2018. ER-1. Movants-Appellants filed their Notice of Appeal on August 10, 2018. ER-17.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. To intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2), Movants-Appellants had to show a significantly protectable interest, an impairment of their ability to protect their interests, and defeat the presumption that state and local government Defendants adequately represented their interests. Did the District Court correctly deny Movants-Appellants' motion to intervene as of right because Movants-Appellants failed to demonstrate these three elements of the test for intervention as of right?

2. Did the District Court abuse its discretion in denying Movants-Appellants' motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b) on the grounds that Movants-Appellants failed to demonstrate a claim or defense that

shares with the main action a common question of law or fact, and that Movant's-Appellants' intervention would delay the main action?

STATEMENT OF THE CASE

Plaintiffs-Appellees filed the complaint in this action on December 13, 2017, alleging 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. 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.

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. ER-175. Plaintiffs-Appellees opposed that motion by response dated May 14, 2018. ER-158. On May 14, 2018 Common Cause filed a motion to intervene. ER-159. Plaintiffs-Appellees opposed that motion by response dated May 29, 2018. ER-23.

The District Court denied both motions on July 12, 2018. ER-1. The District Court found that neither Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles nor Common Cause had a protectable interest warranting intervention as of right under Fed. R. Civ. P. 24(a). *Id*. at 2. Specifically, the District Court found that while Movants-Appellants had

> a legally protected interest to ensure that eligible voters maintain their right to vote and remain on the voter rolls . . . there is no relationship between this interest and the claims at issue. 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.

Id. In addition, the District Court found that the existing parties adequately represented Movants-Appellants' interests:

> Defendants are government officials charged with enforcing state election laws and promoting voter registration to eligible voters. They share the same interest as Intervenors . . . in protecting eligible voters' right to vote. Defendants have specifically stated that they intend to represent and defend the voting interest that Intervenors . . . claim in their motions. That the Intervenors . . . may approach litigation differently than Defendants does not justify intervention.

Id. at 3.

The District Court also found that Movants-Appellants failed to show a common question of law or fact with the underlying action warranting permissive intervention under Fed. R. Civ. P. 24(b). *Id*. at 4. Specifically, the District Court found that here,

> Plaintiffs are suing Defendants to enforce the NVRA and remove ineligible voters from the voter rolls. By contrast, [Movants] 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.

Id. The Court added that "it is purely speculative that eligible voters would be injured by ordering compliance with the NVRA." *Id*.

Movants-Appellants filed a notice of appeal of the District Court's order on August 10, 2018. ER-17.

On August 31, 2018, Plaintiffs-Appellees and state and local government Defendants filed a Joint Notice of Settlement, seeking 120 days in which to finalize the settlement, and requesting that the District Court retain jurisdiction to enforce the terms of the settlement agreement. ER-6. Although the settlement agreement was negotiated privately and currently is confidential, no part of the settlement agreement will take effect until it is made public. Declaration of Robert D. Popper, ¶ 6, Dkt. Entry 21-2.

Following the Joint Notice of Settlement, the District Court entered the following Order of Dismissal:

> THE COURT having been advised by the counsel for the parties that the above-entitled action has been settled;
>
> IT IS THEREFORE ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within 120 days, to reopen the action if the settlement is not consummated. IT IS FURTHER ORDERED that all dates set in this action are hereby vacated. The Court reserves its jurisdiction for the purpose of enforcing the settlement.

ER-5.

On September 10, 2018, Movants-Appellants then filed an emergency motion to expedite these appeals. Dkt. Entry 12-1. Plaintiffs-Appellees opposed that motion by response dated September 14, 2018. Dkt. Entry 21-1.

This Court denied Movants-Appellants' emergency motion on September 19, 2018. Dkt. Entry 26. Movants-Appellants' consolidated opening brief has been submitted. *Id*. Plaintiffs-Appellees now submit the instant answering brief.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's denial of Movants-Appellants' requested intervention. As discussed below, and as the District Court found, Movants-Appellants have no significantly protectable interest related to the subject of this action. They claim to represent eligible voters, while Plaintiffs-Appellees only seek to enforce federal law to remove ineligible voters from the voter rolls.

The interests Movants-Appellants do assert would not be impaired by the claims Plaintiffs-Appellees bring. Movants-Appellants are unable to explain clearly what they hope to achieve by intervention, although their opening brief shows that they would seek to reopen discovery to supplement the record, and even seek to reopen issues already resolved in these now-closed proceedings. They also appear to want to participate in a settlement now being finalized between Plaintiffs-Appellees and Defendants Logan and Padilla. But Movants-Appellants have no right to do so. The parties are entitled to keep their settlement agreement private until it is publicly released.

There is a strong presumption that can only be overcome by compelling evidence that the government Defendants will provide adequate representation in

defending against Plaintiffs-Appellees' claims. Movants-Appellants have not overcome this presumption. To the contrary, the record evidence shows that the existing Defendants are particularly concerned about the same issues Movants-Appellants raise.

As the District Court found, Movants-Appellants do not have a claim that shares a common question of law or fact with the underlying action. In addition, a new scheduling order likely will be needed to address all the interests and concerns of the new parties. The added time and expense are unnecessary because the government Defendants are providing vigorous representation, as they are presumed to do by the case authority of the Ninth Circuit.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the "[d]enial of a motion to intervene as of right . . . *de novo*, except for the timeliness prong which is reviewed for an abuse of discretion." *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (citation omitted). "Denial of a motion for permissive intervention is reviewed for an abuse of discretion." *Id*. (citation omitted). This Court may "affirm on any ground supported by the record even if the district court did not consider the issue." *Ming Dai v. Sessions*, 884 F.3d 858, 869 (9th Cir. 2018), quoting *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007).

II. THE DISTRICT COURT CORRECTLY DENIED MOVANTS-APPELLANTS' REQUEST FOR INTERVENTION AS OF RIGHT

Movants-Appellants first seek 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) Movants-Appellants must show "a significantly protectable interest" related to the "property or transaction that is the subject of the action;" (3) Movants-Appellants must demonstrate they are "situated such that the disposition of the action may impair or impede" their 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) (citations omitted).

Failing to demonstrate even one of these elements dooms a motion to intervene as of right under Rule 24(a)(2). *Id*. Here, Movants-Appellants have failed to establish three of the four.[1]

A. Movants-Appellants Have No "Significantly Protectable Interest" in the Subject Matter of this Case

To show a "significantly protectable interest," Movants-Appellants must (1) assert an interest protected by law, and (2) prove a "relationship" between the legally protected interest and Plaintiffs-Appellees' claims in this litigation.

[1] Plaintiffs-Appellees conceded the element of timeliness of Movants-Appellants' motion to intervene as of right under Fed. R. Civ. P. 24(a)(2). ER-150, 151.

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). Movants-Appellants will satisfy this "relationship" requirement "only if the resolution of the plaintiff's claims actually will affect" them. *Donnelly*, 159 F.3d at 410 (citations and quotation marks omitted).

Movants-Appellants cite *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) for the proposition that intervenors do not need to show full Article III standing for the purposes of intervention where there is ongoing litigation between other parties. Op. Br. 23 n. 6. In this case, however, litigation is *not* ongoing. Plaintiffs-Appellees and Defendants Logan and Padilla have settled the underlying dispute. The District Court has dismissed this action without prejudice, vacated all discovery dates set in this action, and reserved its jurisdiction only for the purpose of enforcing the settlement agreement. ER-5. Thus, for all practical purposes, this appeal is like a post-judgment intervention. In *Diamond v. Charles*, 476 U.S. 54, 68 (1986), the Supreme Court stated that in order to intervene post-judgment, an intervenor must "fulfill[] the [standing] requirements of Art[icle] III." Movants-Appellants should have to meet this standard.

In any event, Movants-Appellants cannot meet even the less demanding requirement that they show "an interest protected by law," because the necessary

connection between Movants-Appellants' legally protected interests and Plaintiffs-Appellees' claims is missing. Movants-Appellants claim that their objective is "to educate and engage *eligible* voters." ER-183, ¶ 4 (emphasis added); *see* ER-167, ¶ 3 (California Common Cause's membership includes "eligible and registered voters in Los Angeles County and elsewhere in California"); ER-154, ¶ 7 (claiming concern about harm to "legitimate voters"). To be sure, Movants-Appellants' members who are lawful voters have the same panoply of federal and state voting rights as any other citizen. But Plaintiffs-Appellees have alleged that Los Angeles County is not identifying and removing the registrations of *ineligible* voters. ER-192, ¶ 14; ER-194, ¶ 28; ER-213, Prayer for Relief, ¶ d (requesting an order that Defendants "implement a general program that makes a reasonable effort to remove from Los Angeles County's rolls the registrations of ineligible registrants"). Of particular concern are voters who have moved elsewhere but whose inactive registrations are never cancelled as the NVRA requires. ER-191-193, 198-200. 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. As

the District Court correctly observed, "it is purely speculative that eligible voters would be injured by ordering compliance with the NVRA." ER-4.[2]

To try to suggest a protectable interest, Movants-Appellants can only offer their own baseless speculations about the unreleased settlement agreement. In lieu of facts, the declarations submitted in support of the two sets of proposed intervenors rely on suggestive language, often attaching the same adjectives or adverbs to various forms of "purge" and "remove." Thus, they claim concern over purges and removals that are "indiscriminate" (ER-154, 180, 184), "wrongful" (ER-170, 180, 181, 184), and "improper" (ER-169, 181, 184), not to mention "sweeping," "wide-ranging," and "expansive." ER-169. They speak of the "the purges envisioned by Plaintiffs," without saying what Plaintiffs-Appellants supposedly "envision." ER-170. Two declarations express concern over "untested methods of list maintenance," which are not further described. ER-180, 184. One alleges that Plaintiffs-Appellees demand "unspecified steps" to remove voter from the rolls, which could lead, again, to "indiscriminate purging." ER-180.

The problem for Movants-Appellants is that *all* of their factual contentions are "unspecified." The declarants never identify the flawed list maintenance

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[2] While Movants-Appellants 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).

procedures that they fear the parties have incorporated into the settlement agreement. They cannot event attempt to do so because they do not know the terms of the settlement agreement.[3] Because they cannot show that "the resolution of the plaintiff's claims actually will affect" them, they cannot establish a protectable interest justifying intervention. *Donnelly*, 159 F.3d at 410; *see also Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 534 F. App'x 665, 667 (9th Cir. 2013) (intervention was properly denied where proposed intervenors' "alleged interests are too speculative to satisfy" the *Donnelly* requirement). The declarants' worst fears and speculations about defective list maintenance procedures that the parties *might* agree to without them is not enough to meet this standard. If it were, no proposed intervenor would ever be denied participation in a voting case.

As speculative as the declarations in support of intervention are, they are models of restraint and sobriety compared to Movants-Appellants' briefs. Unconstrained by the contents of their own declarations, by the record below, or by their lack of knowledge of the pending settlement, Movants-Appellants routinely make inflammatory allegations of harm, while questioning the motives of the

[3] Indeed, Movants-Appellants' declarations scarcely identify the *kinds* of procedures they fear. The only declarant who gives an example of an allegedly "problematic" list maintenance practice refers to the "use of postcard mailings to properly registered voters." ER-154, ¶ 8. Such mailings, however, are expressly authorized by both federal and California law. 52 U.S.C. § 20507(d)(2); CAL. ELEC. CODE §§ 2220(a), 2224(a), 2225(a).

parties and even, by implication, the District Court. For example, while Movants-Appellants concede, in their brief supporting their motion to expedite claims, that they "have no knowledge of the terms or status of the ongoing confidential settlement negotiations," they claim nonetheless that that agreement "presents a serious and urgent risk of irreparable harm to Movants-Appellants" (Dkt. Entry 12-1 at 2) and in particular to "the voting rights of millions of California voters, primarily low-income and minority California residents." *Id.* at 1. There is no basis in the record for these assertions.

Movants-Appellants repeatedly go outside the record to try associate Plaintiff-Appellee Judicial Watch with other parties in other cases and states as a way to impugn its intentions here. Thus, they contend that this is one of a number of lawsuits brought by "Judicial Watch, Inc, *and its allies*" seeking "to require election authorities . . . to take more aggressive action to purge potentially ineligible voters from the voting rolls based on nothing more than supposition and hysteria."[4] Op. Br. 2 (emphasis added); *see id.* at 31 (referring to the "track record of Judicial Watch and its partner organizations in pursuing aggressive purge practices"); *id.* at 33 (referring to "plaintiffs similar to Judicial Watch"); *id.* at 47

[4] The article cited to support this claim was written by Jonathan Brater, who is, incidentally, an attorney for proposed intervenor California Common Cause in this case. Op. Br. 2; *see id.* at 52. True to form, Movants-Appellants did not introduce this article below in the District Court but cite it for the first time on appeal.

(referring to "a collaborator with Judicial Watch"). They then cite to events in Florida in 2000 and 2012 and in Texas in 2012 to allege that faulty list maintenance procedures can "sweep up, remove, and disenfranchise eligible voters." Op. Br. 26-27. But Judicial Watch had nothing to do with any of those efforts in those states. Nor was it involved in the Broward County case cited by Movants-Appellants, *Bellitto v. Snipes*, Case No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617 (S.D. Fla. Mar. 30, 2018). Op. Br. 46-47.[5]

Movants-Appellants claim that their intervention would "protect the interests of marginalized, eligible voters . . . from the relief Plaintiffs-Appellees seek in this case." Op. Br. 2. The implication that Plaintiffs-Appellees desire any outcome that would injure "marginalized, eligible voters" is scurrilous and unsupported by record evidence. Note that the complaint in this action simply requests a declaration that Defendants are "in violation of Section 8(a)(4) of the NVRA," a permanent injunction against such violations, and an order that Defendants "develop and implement a general program that makes a reasonable effort to remove from Los Angeles County's rolls the registrations of ineligible registrants." ER-213 (Prayer for Relief, ¶¶ a, b, and d).

[5] The case is currently titled *Am. Civil Rights Union v. Snipes*, Case No. 16-cv-61474 (S.D. Fla.).

Movants-Appellants impugn Defendants' intentions as well, arguing that "both Defendants' surprising opposition" to the motion to expedite, "on the heels of their sudden announcement of an imminent settlement agreement, sounds an alarm" that "Movants-Appellants narrower interests" are "in conflict with the compromises Defendants may be prepared to make with Plaintiffs-Appellees." Op. Br. 40. The inference Movants-Appellants draw here is preposterous. It also ignores the facts. When the District Court was notified on August 31, 2018 that the parties had settled (ER-8), the case had been pending for over eight months, the parties were well into discovery and had exchanged tens of thousands of pages of documents, two discovery motions had been fully briefed and were awaiting resolution (D. Ct. Dkt. 82 and 83), and there was a little over two months remaining before the close of discovery. The settlement was not "sudden" to the parties.

Movants-Appellants disparage the parties *and* the District Court when they state that "disposition of Plaintiffs-Appellees' legal claims" threatens "eligible voters in marginalized communities," especially "if an aggressive purge of voter rolls"—by which Movants-Appellants invariably mean a flawed purge—"is ordered by the court or agreed to as part of a settlement." Op. Br. 31. There is simply no basis for thinking that the Plaintiffs-Appellants or either of the Defendants would seek a result that was careless with regard to the rights of

eligible voters in marginalized communities,[6] or that the District Court, which has retained jurisdiction to enforce the parties' agreement, would allow it.

In the end, Movants-Appellants have failed to prove that "the resolution of the plaintiff's claims actually will affect" them. *Donnelly*, 159 F.3d at 410. Movants-Appellants' adjectives and adverbs, their worst imaginings and fears, and facts outside the record developed below, are not evidence. Neither are any of the provocative statements in their briefs. *O'Bannon v. NCAA*, 802 F.3d 1049, 1067 n.11 (9th Cir. 2015) ("Statements in appellate briefs are not evidence."). Accordingly, Movants-Appellants have not shown a protectable interest warranting intervention.

The cases Movants-Appellants cite are all distinguishable. Op. Br. 22-23. In *Bellitto v. Snipes*, the plaintiffs proposed a specific list maintenance program that included a number of non-statutory techniques (such as utilizing information from jury rolls) to perform list maintenance. SER-16, ¶ 19; SER-18, ¶ 26. In those circumstances it was plausible for the court, in its decision granting intervention, to credit intervenors' argument that the "court-ordered 'voter list maintenance' sought by Plaintiffs in Count I 'could itself violate the NVRA.'" *Bellitto v. Snipes*, Case No. 16-cv-61474, 2016 U.S. Dist. LEXIS 193489 at *4

[6] Indeed, Secretary Padilla has publicly stated that he would never submit to an agreement that threatens the enfranchisement of eligible citizens. *See infra* at 27.

(S.D. Fla. Oct 4, 2016). That argument simply does not apply here, given that the Plaintiffs' complaint only cites existing state and federal statutes.

Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032 (9th Cir. 2015) also is inapposite. The claims there arose under Section 7 of the NVRA, which requires state public assistance offices to conduct certain voter registration activities. 52 U.S.C. § 20506(a). It was a straightforward matter for the plaintiffs, who sought to register voters, to claim an organizational injury when state agencies failed to conduct the voter registration activities required by law. *Nat'l Council of La Raza,* 800 F.3d at 1036-37. Movants-Appellants here, on the other hand, seem to be asserting an interest in having California *not* follow federal law.

The interest found in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) was far stronger than that alleged here. At issue in *Ashcroft* was whether Georgia's statewide senate redistricting plan was entitled to pre-clearance. *Id.* at 465. The United States had interposed an objection to the plan under Section 5 of the Voting Rights Act on the grounds that the redistricting would dilute black citizens' votes in state senate districts. *Id.* at 473-74. The district court granted intervention to four African-American registered voters who had alleged that "their right to vote will be impaired by the proposed redistricting plans." *Georgia v. Ashcroft*, Case No. 1:01-CV-2111-EGS-LFO, 2002 U.S. Dist.

LEXIS 13088, at *5 (D.D.C. Jan. 10, 2002), *vacated and remanded on other grounds*, 539 U.S. 461 (2003). The court noted that this was sufficient to confer standing, let alone a protectable interest. *Id.* In other words, the intervenors in *Ashcroft* had direct and personal Article III standing, grounded in the relative power of their own votes, to challenge Georgia's redistricting plan.

In contrast with the plaintiffs in *La Raza* and the intervenors in *Ashcroft*, Movants-Appellants, who claim to represent eligible voters, have no protectable interest relating to Plaintiffs-Appellees' claims that Defendants failed to remove ineligible voters as required by law; nor can they create such an interest by speculating about events that might occur—but that have not yet. *See Alisal Water Corp.*, 370 F.3d at 920 (interest as a potential future creditor was "several degrees removed" from the public health and environmental policies at issue in an enforcement action under the Safe Drinking Water Act) (citation omitted); *Donnelly*, 159 F.3d at 408, 410 (male workers claiming discrimination by Forest Service could not intervene in discrimination case brought by female workers).

B. Movants-Appellants Have No Interest that Will be Impaired in this Case without Their Participation

As set forth above, Movants-Appellants cannot show a legally protectable interest related to the subject matter of this action. They simply cannot explain how compliance with the NVRA would cause them harm. They can only speculate that their interests *may* be harmed *if* the parties agree to, and the District Court

grants, not the relief sought in the complaint, but what they call "unspecified steps" and "untested methods" that cause "indiscriminate purging" of lawful voters. Because they cannot show a protectable interest, they also cannot show an impairment of their ability to protect such an interest.

A second reason to conclude that intervention is not necessary to protect any of Movants-Appellants' interests is that they cannot offer a coherent explanation of what, precisely, they would do if they *were* allowed to intervene. In their opening brief Movants-Appellants say almost nothing that would answer this obvious question. They do suggest that they "may supplement the record or inform settlement negotiations with facts related to their unique interests and positions" as the supposed representatives of eligible voters "impacted by any court-ordered list maintenance procedures." Op. Br. 46. They compare their preferred role to that of the intervenors in *Snipes* in Broward County, Florida. *Id.* at 46-47. And they state that when they "filed their motion to intervene early in the proceedings," they "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." *Id.* at 48.

None of this makes sense given the current status of the case. The case is now closed. In its Order of Dismissal, the District Court ordered that "all dates set in this action are hereby vacated." ER-5. Movants-Appellants cannot supplement

the record at will. Because the current parties must have the opportunity to obtain discovery regarding any facts or evidence Movants-Appellants hope to offer, what they propose requires that discovery be reopened and that a new scheduling order fixing new dates and deadlines be issued.[7] More to the point, Movants-Appellants do not, and probably cannot, say what they would "supplement the record" with. They can make no representations about the settlement agreement because it has not been made public. The original Defendants in this case wish to settle, and pointedly do not desire the "assistance" of the proposed intervenors in mounting any defense. What, then, will Movants-Appellants be offering evidence about? Note that this case is completely different from *Bellitto*, where the intervenors and the defendants were agreed on defending the case and ultimately prevailed at trial. *Bellitto*, 2018 U.S. Dist. LEXIS 103617 at *93-94.

Movants-Appellants' suggestion that they would "inform settlement negotiations" also makes no sense. Plaintiffs-Appellees and Defendants Logan and Padilla are entitled to engage in settlement discussions. They are just as entitled to keep such negotiations private,[8] and to embargo the results of their negotiations

[7] As discussed *infra* at 39-40, Movants-Appellants' proposed answers in intervention confirm that they dispute facts that are not disputed by the parties.

[8] The fact that confidentiality helps litigants to settle is universally acknowledged, recognized by courts, and embodied in court rules. *See United States v. Glens Falls Newspapers*, 160 F.3d 853, 855-56 (2d Cir. 1998) (upholding district court's determination that "public access to settlement conferences, settlement

until a final settlement is concluded. All of this remains true whether or not Movants-Appellants are parties. Indeed, even if the District Court had granted Movants-Appellants' motion to intervene below, Plaintiffs-Appellees and Defendants Logan and Padilla could still have engaged in confidential settlement negotiations among themselves, to the exclusion of Movants-Appellants, and could still have made the agreement they did. Reversing the District Court's order will not make even the slightest difference in Movants-Appellants' ability to "inform" the existing parties' settlement negotiations or agreement.

A third reason to conclude that Movants-Appellants can show no interest that will be impaired without their participation is the fact that they always retain the option, in the event the any of the concerns they express actually materialize, to commence a lawsuit. As the District Court observed, the proposed intervenors "speculate that eligible voters risk wrongful removal from voter rolls. Should that

proposals, and settlement conference statements is very low or nonexistent under either constitutional or common law principles" and would "result in no settlement discussions and no settlements"); *Skydive Ariz., Inc. v. Quattrocchi*, Case No. CV 05-2656-PHX-MHM, 2009 U.S. Dist. LEXIS 128418 at 26 (D. Ariz. Feb. 2, 2009) (denying request to intervene to unseal a settlement agreement given "the federal policy of encouraging settlements by safeguarding the confidentiality of settlement agreements") (citation and internal quotations omitted); *see* Circuit Rule 33-1(c) ("To encourage efficient and frank settlement discussions, the Court establishes the following rules to achieve strict confidentiality of the mediation process."); Fed. R. Evid. 408 (restricting evidentiary use of offers to compromise).

occur," they "may bring a separate, private cause of action to vindicate these voters' rights." ER-3.

The existence of private remedies counsels 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.*; *see Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977) (impairment of interest not shown 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-05064-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). Here too, no eligible voter who is a member of the Movants-Appellants will be precluded from bringing a private right of action. Nothing in this litigation will preclude Movants-Appellants from working to achieve their legitimate voter registration goals. Indeed, if Movants-Appellants want to challenge Congress' authority to require list maintenance programs related to federal elections, they are certainly free to file their own complaint to litigate the propriety and necessity of list maintenance mandated by the NVRA.

Movants-Appellants argue that filing a separate action would be "impractical," "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." Op. Br. 33-34. But such inconvenience does not show impairment of interests. In *Blake v. Pallan*, 554 F.2d 947, 951 (9th Cir. 1977), the Court held that, because an intervenor was free to bring a separate lawsuit to protect a legal interest, he could not "as a practical matter" claim that his interest would be impaired without intervention. "Mere inconvenience" caused by "requiring him to litigate separately is not the sort of adverse practical effect contemplated by Rule 24(a)." *Id.* at 954.

C. Movants-Appellants Have 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. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (citation omitted).

This low standard gives way to a presumption of adequacy of representation, however, in a number of different circumstances. "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Arakaki*, 324 F.3d at 1086 (citation omitted). This presumption is heightened "[i]f the applicant's interest is identical to that of one of the present parties," in which case "a compelling showing should be required to demonstrate inadequate representation." *Id.* (citation omitted). Note that "[w]here parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id*. (citation omitted).

There is also a presumption of adequacy of representation "when the government is acting on behalf of a constituency that it represents." *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (citation omitted). This presumption is enhanced when the government shares an interest with a proposed intervenor:

"In 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).

Summing up, *Arakaki* really sets forth four different circumstances in which a presumption of adequacy of representation arises: (1) an ordinary presumption 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." *See Arakaki,* 324 F3d at 1086 (citations omitted).

Movants-Appellants mistakenly argue as if only the second and perhaps the third of these standards applies, stating that a presumption of adequacy arises "[w]here 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." Op. Br. 35. They then narrow their analysis even further, considering only the second of these standards when they argue that while "there

may be some overlap between the interests of the Defendants and that of Movants-Appellants," their "interests are far from identical." Op. Br. 36.

But this is the wrong standard from *Arakaki*. The appropriate presumption is described by the fourth standard. Because the current Defendants are state representatives who share an interest with Movants-Appellants, "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed" the Defendants "adequately represent[]" their interests. 324 F.3d at 1086. This was the standard adopted by the District Court. ER-3 ("Because Intervenors . . . have not made a compelling showing to the contrary, the presumption that Defendants will adequately represent the citizens of California applies.").

Defendant Padilla is the California Secretary of State and Defendant Logan is the Registrar-Recorder/County Clerk of Los Angeles County, and they are sued in their official capacities. ER-191. 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 fact that Movants-Appellants share the same interests in this litigation as these government Defendants is established, among other things, by the relief

Movants-Appellants requested in the proposed answers they submitted along with their motions to intervene. Proposed intervenors Mi Familia Vota Educational Fund, Rock the Vote, and League of Women Voters of Los Angeles asked that the District Court "[d]ismiss the Complaint with prejudice and enter judgment *in favor of Defendants and Defendant-Intervenors*" and "[d]eny all relief requested by Plaintiffs." SER-134 (emphasis added). Similarly, proposed intervenor California Common Cause asked that "the Complaint be dismissed in its entirety," that "the relief sought in the Complaint be denied," and that "judgment be awarded *in favor of Intervenor-Defendant and Defendants* and against Plaintiffs on each and every claim set forth in the Complaint." SER-105 (emphasis added). These answers by their own terms expressly align Movants-Appellants interests with those of the existing Defendants. They also mirror the relief requested in Defendant Padilla's original answer, which asks that "Plaintiffs take nothing by reason of the Complaint," and "Judgment be entered in favor of Defendant." SER-163.

Defendants also share Movants-Appellants' particular interest in eligible and marginalized voters. As a matter of state law, the Secretary of State must "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 registration agencies). The Secretary of State is also

charged with promoting the voter registration interests of marginalized communities: "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). As the District Court concluded,

> Defendants are government officials charged with enforcing state election laws and promoting voter registration to eligible voters. They share the same interest as Intervenors . . . in protecting eligible voters' right to vote. Defendants have specifically stated that they intend to represent and defend the voting interest that Intervenors . . . claim in their motions.

ER-3.

Secretary Padilla, moreover, has publicly pledged to defend the voting interests Movants-Appellants claim to be concerned about, elaborating on this point in online tweets.[9] For example, in January 2018, he said:

> 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.

SER-7 ¶ 3 (emphasis added); *see 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.").

[9] *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).

For their part, Movants-Appellants have publicly recognized Secretary Padilla for his voting rights advocacy. In December 2017, Movants-Appellants California Common Cause honored Secretary Padilla with its "Champion of Democracy" award. California Common Cause's executive director, who submitted a declaration in support of Movants-Appellants below, 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." SER-9, ¶ 12. Thus, only a few *days* before Plaintiffs filed this action, Movants-Appellants publicly praised Secretary Padilla for protecting the very interests about which they claim to be concerned now. One can reasonably expect that the public official they lionize as a "Champion of Democracy" will protect Movants-Appellants' voting-related interests in this action.

Movants-Appellants also have an existing relationship with Defendant Logan on voting-related matters. His website 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." SER-8, ¶ 11. One of the organizations in the list of groups that Defendant Logan's office "frequently works with" is Movant-Appellant California Common Cause. *Id.*

Movants-Appellants Rock the Vote and League of Women Voters also appear on that list. *Id.*

In sum, the adequacy of Defendants' representation of Movants-Appellants interests in this action is presumed, as a matter of law, in the absence of compelling evidence to the contrary. *Arakaki*, 324 F.3d at 1086. The adequacy of this representation is also supported by concrete evidence of Defendants' and Movants-Appellants' mutual agreement when it comes to issues of voting law.

In response, Movants-Appellants offer only theories about how government interests might diverge from their own. Such speculation "falls far short of a 'very compelling showing.'" *Dep't of Fair Emp't & Hous. v. Lucent Techs., 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) (a movant's "assertion that its interest might . . . at some other unspecified time in the future, diverge from the interest of the governor and attorney general is purely speculative, and does not justify intervention as a full-fledged party"), citing *Moosehead San. Dist. v. S.G. Phillips Corp*., 610 F.2d 49, 54 (1st Cir. 1979) (holding that "a petitioner must produce something more than speculation as to the purported inadequacy" to intervene as of right).

Movants-Appellants argue that 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." Op. Br. 36. As a factual matter, this argument fails. The California Department of Justice had a $894-million-dollar budget for 2017-2018. SER-8, ¶ 10. It does not need to rely on intervenors to cover expenses related to defending itself against alleged violations of federal law. Yet even if these concerns had a grounding in reality, 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 Movants-Appellants would defend "more vigorously than existing parties also does not amount to a showing of inadequate representation." *Tahoe Reg'l Planning Agency*, 792 F.2d at 779. Speculation that they might stress different facts and make different arguments is likewise not enough. *See Daggett v. Comm'n on Governmental 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 Movants-Appellants' interests might otherwise diverge from those of government defendants, or may involve different motivations, are speculative and do not justify intervention. *Wilson*, 131 F.3d at 1307 (citation omitted); *United States v. California*, 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); *SEC v. Private Equity Mgmt. Grp., Inc.*, Case No. 09-C2901-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). The fact that "Movants-Appellants and similarly situated organizations periodically disagree with state Defendants" (Op. Br. 42) does not amount to a compelling showing that Movants-Appellants are not adequately represented in this case.

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.

The other cases Movants-Appellants cite do not support their contention that they are not adequately represented here. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 895 (9th Cir. 2011), cited throughout their brief, concerned an interim order restricting "motorized and mechanized vehicle use in a section of the Gallatin National Forest." As the Court noted, the movants wished "to defend the Interim Order as containing the kind of restrictions that are statutorily mandated" by federal law, while "the Forest Service may assert only that the Interim Order was compelled by the prior district court decision, which the Forest Service is also seeking to overturn." *Id.* at 899. Further, the movants sought "the broadest possible restrictions on recreational uses" while "the Forest Service has made clear its position that . . . much narrower restrictions would suffice." *Id.* Thus, the intervenors and the defendants had crucially different approaches to the law, and to that order. In *Ashcroft,* 539 U.S. at 472-73, the U.S. Justice Department refused to preclear three districts in Georgia's 2001 state senate plan under Section 5 of the Voting Rights Act. The intervenors there sought to join the case specifically to establish that two other, additional senate districts were also objectionable. *Id.* at 474. Their interest in doing so clearly diverged from the interests of the Justice Department. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) is distinguishable because the City of San Diego had bluntly "acknowledge[d] that it 'will not

represent proposed intervenors' interests in this action.'" *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. In *Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349, 353-54 (9th Cir. 1974), a school desegregation case, the Ninth Circuit found the local school district could not adequately represent the interests of Chinese-American parents, in part because the district "authored the very plan which appellants claim impairs their interest[s]." In contrast, Movants here seek to *defend* Defendants' maintenance of Los Angeles County's voter rolls and maintain that it is the relief *Plaintiffs* seek that threatens to impair their interests. And in *Forest Conservation Council v. U.S. Forest Serv.,* 66 F.3d 1489, 1491 (9th Cir.1995), the State of Arizona and Apache County sought to intervene in an action by environmental organizations alleging that the Forest Service was violating the National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA). In allowing them to intervene, the Court noted how their interests "lie not in the procedural requirements of NEPA and NFMA with which the Forest Service must comply,"

but rather "in the question of whether all forest management activities in Arizona's national forests and other Northern Goshawk habitat should be enjoined pending the Forest Service's compliance." *Id.* at 1499.

Movants-Appellants' citations to other circuits not governed by this Court's *Arakaki* ruling are of little value. For example, they rely on *Meek v. Metropolitan Dade Cnty., Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993), and *Bellitto, supra*, from the Eleventh Circuit. But the Eleventh Circuit has not consistently applied the presumptions of adequacy that the Ninth Circuit has clearly endorsed. *See Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 (11th Cir. 2007) (characterizing the presumption raised by common objectives as a "weak" one). *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993) was also decided under a different legal standard. Even though the defendant in that case was the State of Minnesota with responsibilities related to the subject matter of the suit, the Court held that "proposed intervenors need only carry a minimal burden of showing inadequate representation." *Id.* at 1001. The facts were also completely different. That case concerned the State's attempt to regulate hunting and fishing rights the plaintiff tribe believed to have been ceded by treaty. *Id.* at 996. The Court noted that the proposed intervenor "counties and [] landowners seek to protect local and individual interests not shared by the general citizenry of Minnesota":

> Any recognition of treaty rights would allow Band members to hunt and fish on public county land. The counties assert that such recognition would also affect the value of the property that they own and their ability to manage profitably and to derive revenue from tax-forfeited land. . . . [T]he landowners' property values may be affected by the depletion of fish and game stocks. Again, these interests are narrower and more parochial interests than the sovereign interest the state asserts in protecting fish and game.

Id. at 1001.

III. THE DISTRICT COURT CORRECTLY DENIED MOVANTS-APPELLANTS' 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).[10]

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[10] 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.

The permissive intervention Movants-Appellants seek 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 raised also 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'y. 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).

Movants-Appellants do not identify an "asserted claim or defense" that they hope to litigate. As discussed above in part II.A, they claim concern about eligible registrants—not the ineligible registrations that are the subject of this action. The District Court explained that

> 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.

ER-4.

Further, to the extent that their claimed interest is to defend the list maintenance procedures of current Defendants, such defenses are not the Movants-Appellants' 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 Movants-Appellants for failing to maintain reasonable list maintenance procedures, nor could they, here or anywhere else. Movants-Appellants are not the ones 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. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992). Other federal cases addressing the meaning of "claim or defense" within the 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 Movants-Appellants' 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 the intervenors' interests are adequately represented by other parties." *Perry*, 587 F.3d at 955 (citation omitted).

For the reasons discussed in part II.B, the purpose of Movants-Appellants' intervention at this point in the litigation is utterly unclear. They do indicate that they may try to "supplement the record or inform settlement negotiations with facts related to their unique interests and positions." Op. Br. 46. But the District Court vacated all existing dates in its Order of Dismissal. ER-5. What Movants propose, therefore, requires issuing a new scheduling order with new dates and deadlines so the parties can conduct appropriate discovery regarding Movants-Appellants new facts.

Movants-Appellants' answers, moreover, show that they will seek to revisit matters the existing parties did not dispute. Defendants Logan and Secretary Padilla have jointly admitted, in whole or in part, several 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. SER-136, ¶¶ 5-8; SER-139, ¶ 35; SER-142, ¶ 69; SER-143, ¶ 74; SER-151, ¶¶ 5-8; SER-155, ¶ 35; SER-158, ¶¶ 69, 74. These admitted facts are conclusively established for purposes of this litigation. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). But each of Movants-Appellants' answers denied, on insufficient information, all of these allegations. SER-94, ¶¶ 5-8; SER-97, ¶ 35; SER-100, ¶¶ 69, 74; SER-116, ¶ 5; SER-117, ¶¶

6-8; SER-121, ¶ 35; SER-126, ¶ 69; SER-127, ¶ 74. Because these allegations would now be in dispute if Movants-Appellants were allowed to intervene, reversing the District Court's order 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.").

Granting Movants-Appellants' request to intervene will lead to the reopening of discovery in a case the original parties had settled, and possibly revisiting and contesting issues the original parties never disputed. The prospect of these developments is more or less the definition of an intervention that "will unduly delay the main action" and "will unfairly prejudice the existing parties." *Donnelly*, 159 F.3d at 412 (citations omitted).

Finally, note that "[d]enial of a motion for permissive intervention is reviewed for an abuse of discretion." *Allen*, 787 F.3d at 1222. Even if Movants-Appellants in reply make new representations about how much or how little they plan to do if allowed to intervene, or about any of the other matters discussed herein, they would not have shown that the District Court abused its discretion in denying their request for permissive intervention.

For all of the reasons set forth above, permissive intervention is unwarranted and unnecessary.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court affirm the District Court's order denying Movants-Appellants' motion to intervene.

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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 16).

Dated: December 13, 2018

/s/ Robert D. Popper
Robert D. Popper

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 31-1

I certify that this response complies with the length limits permitted by Ninth Circuit Rule 32-1. This brief is 9,385 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Date: December 13, 2018

/s/ Robert D. Popper
Robert D. Popper

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: December 13, 2018

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